STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

IMAGINE SCHOOLS AT IMPERIAL VALLEY, Employer, and GROUP OF EMPLOYEES, Petitioner, and IMAGINE SCHOOLS TEACHERS ASSOCIATION, Exclusive Representative.	Case Nos. LA-DP-406-E LA-CE-6062-E Administrative Appeal PERB Order No. Ad-431 January 13, 2016

Appearances: California Teachers Association, by Jean Shinn, Attorney for Imagine Schools Teachers Association; Fisher & Phillips, LLP, by L. Brent Garrett, Attorney for Imagine Schools at Imperial Valley.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by Imagine Schools at Imperial Valley (Imagine Schools) from an administrative determination (Determination) (attached) pursuant to the Educational Employment Relations Act (EERA) and PERB Regulation 32752.[1] The Determination grants the request of Imagine Schools Teachers Association (Association) for a stay of further processing of a petition (Petition) filed by Group of Employees (Petitioner) seeking to decertify the Association as exclusive representative of a unit of certificated employees of

[1] The EERA is codified at Government Code section 3540 et seq. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. and may be found on the internet at www.perb.ca.gov.

Imagine Schools. The Association filed its stay request in conjunction with an unfair practice charge which alleged that Imagine Schools engaged in unlawful anti-union campaigning in connection with the Petition, viz., showing and commenting on an anti-union film during a mandatory meeting with unit employees and, shortly thereafter, disseminating to unit employees a letter which undermined the Association's authority and contained false information. Following an investigation of the unfair practice charge, PERB's Office of the General Counsel (OGC) issued an unfair practice complaint, determining the respondent's conduct as alleged in the charge to be unlawful. The OGC also determined that the unlawful anti-union campaigning, as alleged in the complaint, if proven by the Association, would so affect the election process as to prevent employee free choice. On that basis, on October 7, 2015, the OGC issued an administrative determination granting the Association's stay request.[2]

We have reviewed the entire record, and deny the appeal. We conclude that the OGC conducted an adequate investigation and adduced facts that reasonably support the Determination. The Determination is based on factual determinations of which the parties were aware and to which they had full opportunity to respond. Accordingly, we adopt the OGC's administrative determination as the decision of the Board itself, as supplemented by our discussion below of the issues raised by the appeal.

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[2] PERB takes administrative notice of its own records. (*County of Riverside* (2012) PERB Decision No. 2280-M; *Regents of the University of California* (1999) PERB Decision No. 1359-H; *San Ysidro School District* (1997) PERB Decision No. 1198; *El Monte Union High School District* (1980) PERB Decision No. 142.) The unfair practice complaint was issued on October 9, 2015, two days after issuance of the Determination. Given the close proximity in time between the issuance of the Determination and complaint, and the absence of any other charge processing and investigation activity during that time, we assume that charge processing and investigation had been completed and a decision to issue a complaint had been made at the time the Determination issued. (See *Pleasant Valley Elementary School District* (1984) PERB Decision No. 380, p. 5, fn. 6 (*Pleasant Valley*) ["The reference to investigating the effect of the alleged unlawful conduct on the election assumes that the charge has already been investigated and a complaint issued pursuant to Regulation 32640"].)

PROCEDURAL HISTORY

On July 1, 2015, Petitioner filed the Petition seeking to decertify the Association. The following day, the OGC contacted Petitioner's representative to obtain clarification of certain matters and informed Petitioner that a proof of service of the Petition was necessary.

On July 6, 2015, Petitioner filed an amended Petition with a proof of service. The amended Petition averred that Imagine Schools recognized the Association in March 2014 and that the bargaining unit in question was comprised of 33 employees.

On July 7, 2015, the OGC requested that the Association and Imagine Schools confirm or refute the size of the bargaining unit, the Association's recognition date, and whether a collective bargaining agreement existed between the Association and Imagine Schools. Additionally, the OGC requested that Imagine Schools: (1) post the "Notice of Decertification Petition" (Notice) in a conspicuous location where it would be seen by unit members; and (2) provide to PERB a copy of the Notice and a list of all employees in the bargaining unit.

On July 13, 2015, the Association confirmed that it had been recognized in March 2014 and that it had not entered into a collective bargaining agreement with Imagine Schools. In addition, it stated that the bargaining unit was comprised of 35 employees.

On August 4, 2015, Imagine Schools provided PERB a copy of the posted Notice and confirmed that posting had occurred on July 24, 2015. In addition, Imagine Schools filed with PERB a list of employees in the bargaining unit.

On August 6, 2015, in a telephonic conversation with the OGC, Petitioner's representative stated that unit employees would commence work on August 13, 2015 and that the academic year would commence on August 24, 2015.

On August 25, 2015, pursuant to PERB Regulation 32752 which governs requests for stay, the Association filed a request to stay the scheduling of an election among unit employees together with an unfair practice charge (PERB Case No. LA-CE-6062-E) alleging unlawful conduct by Imagine Schools.

On September 2, 2015, the OGC informed the parties by telephone that the Association had filed a request to stay further processing of the Petition, and that Petitioner and Imagine Schools would have until September 14, 2015, to respond to the Association's stay request.

On September 10, 2015, Imagine Schools filed its response opposing the stay request. On September 14, 2015, Petitioner filed a response opposing the stay request. Also on September 14, 2015, the Association filed written legal argument supporting its stay request.

On October 2, 2015, Imagine Schools filed its position statement in opposition to the Association's unfair practice charge.

On October 9, 2015, the OGC issued a complaint on the Association's unfair practice charge, alleging that Imagine Schools interfered with employee rights in violation of Government Code section 3543.5(a) and denied the Association its right to represent employees in violation of Government Code section 3543.5(b).

FACTS ALLEGED IN THE COMPLAINT

The complaint in PERB Case No. LA-CE-6062-E (Complaint) was based on the following allegations:

1. On August 13, 2015, Imagine Schools held a mandatory certificated staff meeting. During the mandatory meeting, bargaining unit employees were shown a documentary titled "Waiting for Superman," which contained anti-union commentary. Respondent's agent Grace

Jiminez (Jiminez), principal and California regional director of Imagine Schools, spoke about the documentary before and after it was shown.

2. On August 18, 2015, Jiminez distributed to bargaining unit members a letter (Jiminez letter), either by personal service or placing the letter in school mailboxes. The letter made unsupported anti-union commentary and misrepresented the amount of annual union dues paid to the California Teachers Association (CTA). Paragraph 4 of PERB's complaint states:

> The letter reads in pertinent part:
>
> **Our Position – Our School is Better Off Without a Union**
>
> - We are committed to paying competitive teacher salaries within the guidelines of our funding and our budget.
> - We do not want our certificated staff to incur costly annual union dues. The CTA union dues are over $1200.00 per year.
> - We need to work cooperatively to promote education and support our community.
> - Our certificated staff have a tremendous voice through Imagine School Task Forces.
> - We already contribute to the CalSTRS Retirement Fund and provide a benefit package.
> - We believe that union representation is not the right choice for our certificated staff.
> - We believe unions create a divisive atmosphere between teachers and administration.

(Complaint, p. 2, emphasis in original.) The complaint goes on to state: "Bargaining unit members . . . stated they found this letter to be informational and helpful in making an educated decision concerning their representational [rights]." (*Ibid.*)

ADMINISTRATIVE DETERMINATION

In the Determination, the OGC reviewed: (1) PERB's standard applicable when assessing a request for stay of an election; (2) PERB's application of this standard in prior stay request cases; (3) PERB's application of a related standard, viz., that for setting aside results of an election, based on employer anti-union speech; and (4) the potential impact of the employer's unlawful conduct on the election process. The OGC concluded that PERB had not yet applied its standard for staying an election to conduct involving solely employer speech, but that PERB had applied a related standard, viz., that for setting aside an election in such a circumstance.[3] Relying on this PERB precedent, the OGC reasoned that PERB's decisions in election objection cases which apply a totality test to employer speech should inform PERB's application in this case of its stay request standard. On this basis, the OGC assessed Imagine Schools' alleged unlawful conduct, and concluded that if proven by the Association, the alleged conduct would so affect the election process as to prevent employee free choice.

DISCUSSION

Introduction

We turn now to the merits of the appeal taken by Imagine Schools from the OGC's determination to grant the stay. We first revisit our standard of review of an OGC's determination, then discuss our regulations and precedents governing stay requests, and finally take up Imagine Schools' contentions on appeal.

Standard of Review

When reviewing an OGC's determination to stay a decertification election, the inquiry on appeal is whether the OGC abused his or her discretion. *(Jefferson School District* (1980)

[3] *Office of the Kern County Superintendent of Schools* (1985) PERB Decision No. 533 (*Kern County Superintendent*).

PERB Order No. Ad-82, pp. 8-10 *(Jefferson)* [If the OGC conducts "a satisfactory investigation and adduces facts that reasonably support her or his decision, the Board will not overturn the [OGC's] decision. This is true whether or not we would have made the same [decision] ourselves."]; *(Pleasant Valley, supra,* PERB Decision No. 380 [The Board will generally defer to the conclusions reached by its agent if it finds the conclusions supported by facts developed during the course of a properly conducted investigation].) An OGC's stay determination should be the result of sufficient investigation and analysis of the allegations and the potential impact on the employees in the bargaining unit. *(Regents of the University of California* (1984) PERB Decision No. 381-H (*Regents*); *Grenada Elementary School District* (1984) PERB Decision No. 387 (*Grenada*).) The role of the Board itself on appeal is not to reweigh facts, but to ensure that they support the administrative determination. (*Jefferson, supra,* PERB Order No. Ad-82, p. 12.) If the OGC conducts an adequate investigation and reaches a conclusion consistent with the facts developed during the investigation, deference is due and no abuse of discretion will be found. (*Ibid.*)

Stay Requests

The EERA's legislative policy design set forth in section 3540 is as follows:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy.

(EERA, § 3540.) In furtherance of this policy, the Legislature provided in EERA section 3543, subdivision (a) that "public school employees shall have 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" and in EERA section 3543.5, subdivisions (a) and (b), that a public school employer may neither "impose 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 this chapter" nor "deny to employee organizations rights guaranteed to them by this chapter."

To effectuate this legislative policy and the statutory rights accorded employees and their organizations in furtherance thereof, PERB conducts elections, including decertification elections, to facilitate employees' free choice on questions concerning representation.[4] (*International Union of Operating Engineers, State of California Locals 3, 12, 39 and 501, AFL-CIO (California State Employees' Association, SEIU, AFL-CIO)* (1984) PERB Decision No. 390-S.)

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[4] PERB Regulation 32720 provides:

> An election shall be conducted when the Board issues a decision directing an election or approves an agreement for a consent election, . . . [¶] The Board shall determine the date, time, place and manner of the election absent an approved agreement of the parties.

PERB Regulation 33490 provides:

> All elections shall be conducted by the Board in accordance with election procedures described in . . . these Regulations.

PERB Regulation 32752[5] authorizes the Board to stay a representation election pending the resolution of an unfair practice charge alleging unlawful conduct which could prevent the employees from exercising free choice. PERB may delay decertification elections "in circumstances in which the employees' dissatisfaction with their representative is in all likelihood attributable to the employer's unfair practices rather than to the exclusive representative's failure to respond to and serve the needs of the employees it represents." (*Jefferson School District* (1979) PERB Order No. Ad-66.) This determination is to be based on "the judgment and discretion of the [OGC] as applied to the facts ascertained in the investigation." (*Jefferson, supra,* PERB Order No. Ad-82, p. 6.)

The stay procedure "serves to insulate an election from unfair practices that may influence its outcome." (*Jefferson*, *supra*, PERB Decision No. Ad-82.) "In considering the stay of an election, the [OGC's] obligation is to determine whether the facts alleged in the unfair practice complaint, if true, would be likely to affect the vote of the employees and, thus, the outcome of the election." (*Pleasant Valley, supra,* PERB Decision No. 380, p. 5.); see also *Grenada, supra,* PERB Decision No. 387, p. 14 [for purposes of evaluating whether an election should be blocked, the OGC must presume that the allegations in the complaint are true].)

"It is neither the [OGC's] obligation nor function to resolve disputed facts

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[5] PERB Regulation 32752 provides:

> The Board may stay an election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice. Any determination to stay an election made by the Board pursuant to this section may be appealed to the Board itself in accordance with the provisions of Chapter 1, Subchapter 4, Article 3 of these regulations.

or venture into a pre-judgment of the merits of the unfair practice complaint." (*Pleasant Valley, supra*, PERB Decision No. 380, p. 7.) In *Statewide University Police Association* (1984) PERB Decision No. 381-H, p. 6, the Board noted that the regional director "did not purport to prejudge the merits of the charge . . . . Rather, she correctly analyzed whether such conduct is of such character and seriousness that, if it were proven to have occurred, it would be reasonable to infer that it would contribute to employee dissatisfaction and hence prevent a fair election."

The motivation of the individual petitioners in seeking a decertification election is not determinative. The inquiry is "properly limited to the potential impact of the alleged conduct on all of the employees in the unit, rather than the actual motivation of those filing the petition for decertification." (*Statewide University Police Association, supra*, PERB Decision No. 381-H, p. 6.) "The proper focus of the [OGC's] inquiry is an objective evaluation of the probable effect of the conduct alleged and the possibility of a free election." (*Grenada, supra,* PERB Decision No. 387, p. 11.)

PERB's investigation is "a limited one which involves primarily an investigation and analysis of the charges filed." (*Grenada, supra*, PERB Decision No. 387, p. 15.) It is therefore improper "to reach beyond the subject matter of the complaint in making its decision whether or not to block." (*Id.* at pp. 15-16 [responding to union's argument that events outside the six-month statute of limitations should be considered].)

We turn now to Imagine Schools' appeal.

Imagine Schools' Appeal

Imagine Schools makes the following three principal contentions on appeal: (1) the OGC applied the wrong standard, using the standard for setting aside election results, not the

standard for stays of election; (2) assuming arguendo the proper standard was applied, the alleged conduct is not of the character or severity sufficient to stay the election, and in any event it is mere speech containing no threat or promise; and (3) the Association failed to tender to PERB a supporting "offer of proof" that the blocking charge raises a real dispute and is not merely a delaying tactic. We examine each contention.

1. The OGC applied the wrong standard and thus abused her discretion.

Imagine Schools contends that the OGC mistakenly relied upon the standard for assessing election objections rather than the standard for assessing stay requests. Imagine Schools urges that by relying on *Kern County Superintendent*, *supra*, PERB Decision No. 533, an objections case, the OGC erred and thereby abused her discretion. The fault and the prejudice to itself, contends Imagine Schools, lies in reliance of the OGC on Board decisions in which unlawful conduct, not merely speech, had been alleged and/or proved. We consider this claim.

PERB Regulation 32572 establishes the stay standard applicable here. It requires allegations of unlawful conduct which "would so affect the election process as to prevent the employees from exercising free choice." By contrast, PERB Regulation 32738, subdivisions (a)(c)(1) and (a)(c)(2) establishes the standard in cases of election objections, to wit, that the conduct "interfered with the employees' right to freely choose a representative," or constituted "serious irregularity in the conduct of the election." The two standards are quite similar. Both examine the alleged conduct and the likely impact of alleged conduct on the ability of employees to exercise free choice in voting.

Here, the OGC properly assumed the truth of alleged speech of Imagine Schools' agents, including Jiminez. The OGC surveyed prior stay decisions and concluded there were

none in which a stay was granted or denied solely because of an employer's anti-union speech. She then looked for guidance to PERB decisions setting aside election results based on employer speech. Many of those cases involved employer speech and other conduct. However, the OGC identified one decision in which employer speech was deemed sufficient to have impacted employee free choice. (*Kern County Superintendent, supra*, PERB Decision No. 533.) She relied on that decision and authorities cited therein, along with other Board decisions in election stay cases, to "inform" her application of the standard applicable under PERB Regulation 32752 to a request for stay of election. We conclude that in so doing the OGC did not abuse her discretion.

2. The OGC misapplied the standard and thus abused her discretion.

Imagine Schools contends that its conduct alleged here is merely speech and is unaccompanied by other allegedly unlawful conduct, and that the OGC erred in concluding Imagine Schools' conduct would likely "affect the vote of the employees, and, thus, the outcome of the election." We examine the OGC's determination.

We first note that the OGC conducted a thorough investigation. She sought the positions of all parties. (Determination, p. 4.) She received responses to that invitation from all parties. (*Ibid.*) She prepared a thorough analysis from which she concluded that the alleged conduct of Imagine Schools, if true, would prevent the exercise of employee free choice.

a. Showing the film "Waiting for Superman."

Imagine Schools urges that it had a legitimate business justification for showing this film at a mandatory all-employee meeting on the first day of school. Nonetheless, the OGC reasonably concluded that in the context of a recently filed decertification petition, an employer's mandatory showing of a film critical of teachers' unions would logically tend to

have a coercive effect on employees. Imagine Schools urges that its affirmative defense of business justification outweighs the interference, if any, arising from the anti-union aspects of the film, and thus excuses whatever coercive impact the film might have on the outcome of the election. We are not persuaded.

When investigating a stay request, the OGC presumes the truth of complaint allegations and does not consider possible affirmative defenses.[6] Appeals from stay orders are not the appropriate platform for debating the lawfulness of the employer's conduct. The proper arena for litigating the merits is the formal hearing on the unfair practice charge. At that time, the employer may present its affirmative defense. At this stage, the only relevant issue is whether the employer's conduct, as alleged in the complaint, will so taint the election process as to interfere with employee free choice. We find reasonable the OGC's conclusion that the anti-union aspects of the film, considered in context (a mandatory meeting on the first working day of the school year and commentary by Jiminez during the meeting before and after the film was screened), would likely affect the vote of the employee and thus the outcome of the election. (*Jefferson School District*, *supra*, PERB Order No. Ad-66; *Pleasant Valley*, *supra*, PERB Decision No. 380.) The conclusion is well within the OGC's discretion and not an abuse thereof.

b. Distributing to employees the Jiminez letter.

Imagine Schools urges that its distribution to employees of a letter from Jiminez was lawful, arguing that the letter amounted to the legitimate exercise of employer speech setting forth statements of fact. We are not persuaded.

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[6] *Grenada*, *supra*, PERB Decision no. 387, citing to *Pleasant Valley*, *supra*, PERB Decision No. 380.

In our view the OGC reasonably concluded that given the filing of the recent decertification petition, the letter undermined the Association. Among the contents of the letter reasonably relied upon by the OGC for this conclusion are the following expressions of opposition to the Association and support for decertification, viz., "Our School Is Better Off Without a Union," "unions create a divisive atmosphere between teachers and administration," and "union representation is not the right choice for our certificated staff." In so concluding, the OGC reasonably exercised, and did not abuse, its discretion.

Imagine Schools further urges that the OGC erred in concluding that the letter from Jiminez overstated significantly (by approximately 50 percent) the amount of Association's annual dues, and that this deceptive statement about Association dues would tend to interfere with employee free choice. Imagine Schools argues on appeal that the Association had rebuttal time in which to correct the misstatement, and that the OGC failed to consider in her analysis that perhaps the Imagine Schools statement about the Association's dues was justified as "to the best of [its] knowledge." We find both assertions unpersuasive.

In its position statement filed in response to the Association's charge on October 2, 2105, Imagine Schools acknowledged that it based its statements about the amount of Association dues on its beliefs about dues paid by employees in other school districts and on Jiminez's recollections about what was paid twenty years earlier at a different employer. We regard such sources as inherently unreliable and insufficient to demonstrate a good faith basis for Imagine Schools' claims in the Jiminez letter about the amount of Association dues. As to Imagine Schools' claim on appeal that the Association had ample opportunity to rebut or correct inaccurate statements about the amount of the Association's dues, an opportunity for rebuttal cannot be counted on to undo the taint on the election process where bargaining unit

members considered the letter "informational" and "helpful" in making an "educated" decision concerning their representational status.

We conclude that the OGC reasonably viewed as a misrepresentation the Imagine Schools' claim in the Jiminez letter that the Association's annual dues were significantly higher than claimed by the Association. We conclude further that this accusation that the Association was being untruthful about the amount of its dues had the probable effect of undermining the Association and tended to impede employee free choice. Again, we find that the OGC did not abuse her discretion.

Finally, Imagine Schools avers that the OGC should have, but did not, afford the same weight to statements made in opposition to the stay request as it did to allegations in the Association's unfair practice charge, and that this discrepancy evidences OGC bias. We are not persuaded.

When evaluating a request for stay, the OGC's task is to determine whether the facts alleged in the complaint, if true, would likely affect the vote of employees, and, thus, the outcome of the election. *(Pleasant Valley, supra,* PERB Decision No. 380, p. 5.) The OGC examines the conduct alleged in the complaint, and determines whether it is "of such character and seriousness that, if it were proven to have occurred, it would be reasonable to infer that it would contribute to employee dissatisfaction and hence prevent a fair election." *(Regents, supra,* PERB Decision No. 381-H, p. 6.) In making that assessment, the OGC does not resolve factual disputes or venture into a pre-judgment of the merits of the complaint. The OGC was correct to accept the Association's allegations as fact for purposes of the investigation. We defer to the OGC's judgment and discretion in determining the proper weight and

consideration to be given each of the parties' submissions, guided by the fundamental tenet that the allegations in the complaint are presumed true.

3. The OGC did not require an "offer of proof" from the Association.

Imagine Schools contends that like the National Labor Relations Board (NLRB), PERB should have required, and the OGC abused her discretion by not requiring, that the Association submit in support of its stay request an "offer of proof" to establish that the stay request was made for legitimate reasons and not for delay. We are not persuaded.

PERB has not adopted the "offer of proof" procedure recently established by the NLRB to discourage parties from filing frivolous or meritless stay requests.[7] PERB regulations contain no similar provision, and PERB may not modify its regulations by its decisional law. (*State of California (Department of Corrections and Rehabilitation*) (2009) PERB Order No. Ad-382-S, pp. 4-5.) The OGC therefore did not abuse her discretion in failing to require the Association to submit an "offer of proof."

Conclusion

In determining to stay further processing of the Petition, the OGC conducted a thorough investigation, correctly stated the law, cited to appropriate PERB precedent, and properly applied the law. Her conclusions are supported by the record. We conclude that she acted well within her discretion. We decline to set aside the OGC's determination and, instead, adopt it as the decision of the Board itself, as supplemented by our discussion herein.

[7] NLRB Casehandling Manual, Part Two: Representation Proceedings (2014) section 11730.

ORDER

Based on the foregoing, the OGC's administrative determination in Case No. LA-DP-406-E is hereby AFFIRMED.

Chair Martinez and Member Winslow joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

IMAGINE SCHOOLS AT IMPERIAL VALLEY, Employer, and GROUP OF EMPLOYEES, Petitioner, and IMAGINE EDUCATORS ASSOCIATION, CTA/NEA Exclusive Representative.	REPRESENTATION CASE NO. LA-DP-406-E ADMINISTRATIVE DETERMINATION (October 7, 2015)

Appearances: Gonzalo Estrada, Representative for Group of Employees, California Teachers' Association, by Jean Shin, Attorney for Imagine Schools Teachers Association; Fisher & Phillips, LLP, by L. Brent Garrett, Attorney for Imagine Schools at Imperial Valley.

Before Mirna Solís, Regional Attorney.

INTRODUCTION

On July 1, 2015, a group of employees (Petitioners) filed a decertification petition (Petition) to decertify the Imagine Educators' Association (Association) the exclusive representative of the certificated bargaining unit at the Imagine Schools at Imperial Valley (Imagine Schools). Thereafter, the Association filed an unfair practice charge (blocking charge), Case No. LA-CE-6062-E, asserting that Imagine Schools engaged in unlawful anti-union campaigning in connection with the Petition. Concurrently filed with the blocking charge, is a request to stay further processing of the Petition until the unfair practice charge has been resolved. The Association asserts Imagine Schools showed an anti-union film during a mandatory meeting with employees and shortly thereafter, disseminated a letter which undermined the Association's authority and contained false information.

It is concluded, pursuant to the discussion below, that the allegations contained in the blocking charge, if proven by the Association, would so affect the election process as to prevent employee free choice. Therefore, a stay of the Petition is warranted.

PROCEDURAL HISTORY

On July 1, 2015, Petitioners filed the Petition seeking to decertify the Association. The Petition did not contain a "Notice of Decertification Petition" form[1] nor was a proof of service attached. The Petition stated that the Association had been recognized in March 2015.

On July 2, 2015, the undersigned Board agent contacted Petitioners's representative, Gonzalo Estrada (Estrada), by telephone to confirm whether the Association was recognized in March 2015. Estrada stated that the March 2015 date was a typographic error. The absence of a proof of service form from the Petition was also discussed. The undersigned Board agent suggested that Estrada amend the Petition to correct these deficiencies.

On July 3, 2015, Petitioners attempted to correct the deficiencies by filing a short statement confirming that they had served the Regional Director of Imagine Schools and that the Association was recognized as the exclusive representative in March 2014.

On July 6, 2015, Petitioners filed an amended Petition correcting the date of recognition and attached a "Notice of Decertification Petition" and a revised proof of service form confirming service on the Executive Vice President of Imagine Schools. The Petition stated that the Association was recognized in March 2014 and the bargaining unit was comprised of 33 employees.

On July 7, 2015, PERB asked the Association and Imagine Schools to confirm or refute the size of the bargaining unit, the Association's recognition date, and whether a collective

[1] The "Notice of Decertification Petition" form is page two of the Decertification Petition and is located on PERB's website www.perb.ca.gov.

bargaining agreement (CBA) existed between the Association and Imagine Schools. The July 7, 2015, correspondence also asked that Imagine Schools post the "Notice of Decertification Petition" (Notice) where it could be conspicuously seen by the Association's members. Imagine Schools was also instructed to provide PERB with a copy of the Notice and a list of all employees in the bargaining unit.[2]

On July 13, 2015, the Association confirmed that it had not entered into a CBA with Imagine Schools, that the Association had been recognized in March 2014, and stated that the bargaining unit was comprised of 35 employees, not 33 as indicated in the Petition.

On July 27, 2015, the Association and Imagine Schools filed their respective "Notice of Appearance" forms.

On August 4, 2015, in accordance with PERB's instructions, Imagine Schools provided PERB with a copy of the posted Notice and confirmed that it had been posted on July 24, 2015. Additionally, Imagine Schools filed with PERB a list of employees in the bargaining unit.

On August 6, 2015, in a telephone conversation with Estrada, the undersigned Board agent confirmed that while the academic school year would begin on August 24, 2015, employees in the bargaining unit would begin work on August 13, 2015.

On August 25, 2015, pursuant to PERB Regulation 32752,[3] the Association filed a request to stay the scheduling of an election in this matter based on alleged misconduct by

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[2] The July 7, 2015, correspondence was erroneously mailed to an incorrect address for the Executive Vice President of Imagine Schools. This service error was corrected on July 24, 2015, when PERB re-sent the July 7, 2015, correspondence to all the parties including Imagine Schools at its correct mailing address, which is 1843 W. 16th Avenue, Apache Junction, Arizona 85220.

[3] The Educational Employment Relations Act (EERA) is codified at Government Code section 3540 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

Imagine Schools. Concurrent with its request to stay, the Association filed its blocking charge against Imagine Schools.

On September 2, 2015, the undersigned Board agent informed the parties by telephone that a request to stay any further processing of the Petition had been filed. Each party was afforded an opportunity to file a response to the Association's request by September 14, 2015.

On September 10, 2015, Imagine Schools filed its response (Response). On September 14, 2015, the Petitioners filed their response (Petitioners's Response) and the Association filed a Memorandum of Points and Authorities in support of its stay request.

FACTS AS ALLEGED IN BLOCKING CHARGE

On August 13, 2015, Imagine Schools required employees to attend a mandatory staff development and training meeting. During the mandatory meeting, employees watched a film titled "Waiting for Superman." (Blocking Charge, ¶ 4.) The Association asserts that the film is commonly used as anti-union propaganda and cites to commentary by academic, Rick Ayers, who states the film is used to "break the teacher's unions." (*Ibid.*)[4]

On August 18, 2015, Grace Jiminez (Jiminez), the Principal and California Regional Director of Imagine Schools, distributed a letter (Jiminez Letter) to employees, either by personal service or by placing it in the employees' school mailboxes. (Blocking Charge, ¶ 5.) The Jiminez Letter reads in pertinent part as follows:

Our Position – Our School is Better Off Without A Union

- We are committed to paying competitive teacher salaries within the guidelines of our funding and our budget.

[4] On October 2, 2015, Imagine Schools filed a position statement to the blocking charge which clarifies that the film is a documentary. Imagine Schools also asserts that the documentary "critiques issues in the public school system, including issues pertaining to school bureaucracy, teacher tenure, and teachers' unions. The documentary also discusses the role and history of charter schools in improving public education."

- We do not want our certificated staff to incur costly annual union dues. The CTA union dues are over $1200.00 per year.
- We need to work cooperatively to promote education and support our community.
- Our certificated staff have a tremendous voice through Imagine School Task Forces.
- We already contribute to the CalSTRS Retirement Fund and provide a benefit package.
- We believe that union representation is not the right choice for our certificated staff.
- We believe unions create a divisive atmosphere between teachers and administration.

(Blocking Charge, Exhibit A [emphasis in original].)

The Association asserts that Jiminez coerced, intimidated and, more significantly, misled employees by doubling the amount that bargaining unit employees actually pay in annual dues to CTA. (Blocking Charge, ¶ 7.) Although the Jiminez Letter states that CTA annual dues are $1,200.00, the Association asserts the accurate amount is $644.00. (*Ibid.*) The total amount of annual union dues, including dues to CTA, is $844.50. (*Ibid.*)

ISSUE

Whether Imagine Schools's screening of the film titled, "Waiting for Superman," during a mandatory meeting with employees and dissemination of the Jiminez Letter would so affect the decertification election process as to prevent employees from exercising free choice?

POSITION OF THE PARTIES

Imagine Schools appears to argue the merits of the Association's interference allegations. (Response, pp. 2-3.) In particular, Imagine Schools argues that neither the screening of the film nor the issuance of the Jiminez Letter, as alleged, constituted "unlawful conduct." (*Id.* at p. 2.) Imagine Schools also appears to argue that the Association failed, in its blocking charge, to state a prima facie case of interference. (Response, p. 2 [arguing that the

Association had "not alleged sufficient facts to show that the content [of the film] could unlawfully interfere with the election"].)

Imagine Schools also argues that, as an employer, it was free to "address the issues raised by a pending election" and "express antipathy toward an employee organization" as long as it did not make "promises of benefits, threats of retaliation or otherwise coercive statements." (Response, p. 2, citing *Santa Monica Unified School District* (1978) PERB Decision No. 52.) Additionally, Imagine Schools argues that when assessing misrepresentation allegations, PERB must determine whether the statement was made in a fraudulent manner. (Response, pp. 3-4.) It further argues that the Association has not demonstrated how the alleged misrepresentation concerning union dues was made in a fraudulent manner.

The Petitioners argue that the showing of "Waiting for Superman" was consistent with past superhero themes in trainings and meetings. (Petitioners's Response, ¶ 1.)[5] For the August 13, 2015, meeting, teachers were asked to dress up as their favorite superhero.

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[5] It should be noted that Petitioners's Response uses terminology not typically used by employees. For instance, the Petitioners's Response reads in pertinent part:

> . . . we, the certificated staff read the informational memo and actually saw this is as an opportunity to educate our staff as many of our teachers are new to the profession . . .
>
> In regard to the video, our school is following a super hero theme based on various trainings we have attended. Last school year our theme was super stars so we followed a movie and Hollywood theme. This year we are following the super hero theme, based on the belief that teachers are student's super heroes. Our staff development agendas, welcome back letter and other information is based on "What are your super hero powers?" "What kind of super hero do you want to be?" All teachers received an invitation for staff development based on this theme and invited staff to dress up as their super hero. This prompted discussion of what are teacher's skills that make a difference for students. During our staff development we focused on our mission and vision and history on how charter schools

Petitioners also confirm that before and after the screening of the film, Jiminez provided commentary, presumably concerning the film.

With respect to the Jiminez Letter, Petitioners state that employees did not feel intimidated or coerced, rather they saw the Jiminez Letter as providing "information so that certificated [staff] make[] educated decisions about the school." (*Id.*, ¶ 2.)

CONCLUSIONS OF LAW

A. Applicable Standard

EERA section 3540 contains the following express purpose:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy.

EERA further provides that "[p]ublic school employees shall have 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(a).) In fulfilling these express objectives, PERB Regulations 32720 and 33490[6] authorize PERB to

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> make a difference for those students and families that are looking for the super hero teacher and school.

The above appears to be written from a viewpoint other than an employee's perspective, as evidenced by references to teachers in the third person, as opposed to the first person, discussion of mission and vision, and references to "our staff" and "our teachers."

[6] PERB Regulation 32720 provides:

conduct elections, including decertification elections, in order to effectuate employee free choice. Where a question concerning representation is raised during the course of an election, PERB's statutory obligation is to expeditiously resolve such issues. (*International Union of Operating Engineers, State of California Locals 3, 12, 39 and 501, AFL-CIO (California State Employees' Association, SEIU, AFL-CIO)* (1984) PERB Decision No. 390-S.)

The object of this administrative determination is to apply PERB Regulation 32752, PERB's "blocking charge rule," to the alleged facts of this case to determine whether a stay of the election process is warranted. PERB Regulation 32752 provides:

> The Board may stay an election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice . . . .

The Board interpreted the above language in *Pleasant Valley Elementary School District* (1984) PERB Decision No. 380 (*Pleasant Valley*) as obligating the Board agent "to determine whether the facts alleged in the unfair practice complaint, *if true*, would be likely to affect the vote of the employees, and, thus, the outcome of the election." (*Id.* at p. 5, emphasis added.)

PERB does not apply the "blocking charge rule" mechanically, but rather determines on a case-by-case basis whether a stay will serve the purposes of the statutes enforced by PERB. (*Pleasant Valley*, *supra*, PERB Decision No. 380.) Even before the adoption of PERB Regulation 32752, the Board held that each stay request is to be investigated and evaluated on

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An election shall be conducted when the Board issues a decision directing an election or approves an agreement for a consent election . . . [¶] The Board shall determine the date, time, place and manner of the election absent an approved agreement of the parties.

PERB Regulation 33490 provides:

All elections shall be conducted by the Board in accordance with election procedures described in . . . these Regulations.

its merits rather than being disposed of by rote application of a blocking charge rule. (*Jefferson School District* (1979) PERB Order No. Ad-66.)

A determination to stay an election is not intended to involve adjudication of the unfair practice charge itself. (*Children of Promise Preparatory Academy* (2015) PERB Order No. Ad-428.) In *Regents of the University of California* (1984) PERB Decision No. 381-H, the Board held that the Board agent correctly analyzed "whether [the conduct alleged] is of such character and seriousness that, *if it were proven to have occurred*, it would be reasonable to infer that it would contribute to employee dissatisfaction and hence prevent a fair election." (*Id.* at p. 6, emphasis added.) And, although the truth of all relevant allegations contained in the charges must be assumed (*Golden Plains Unified School District* (2002) PERB Decision No. 1489), allegations are not evaluated separately and without regard to the factual contexts in which they arose. (*Grenada Elementary School District (Dealey)* (1984) PERB Decision No. 387 (*Grenada*); *Antelope Valley Community College District* (1979) PERB Decision No. 97.) The circumstances in which they arise may be considered. (*Ibid.*; *Service Employees International Union #790 (Azda)* (2004) PERB Decision No. 1632-M [nothing in PERB case law requires the Board agent to ignore facts provided by the respondent or other parties and consider only the facts provided by the charging party].)

In *Grenada*, the Board held that it was inappropriate for a Board agent assessing a stay request to consider affirmative defenses raised by the respondent. (*Grenada, supra,* PERB Decision No. 387, citing to *Pleasant Valley*, *supra*, PERB Decision No. 380.) In *Grenada*, the employer argued that it had no duty to negotiate with the union because it had a reasonable good faith doubt as to the union's majority status. (*Id.* at pp. 13-14.) After noting that the employer's argument "essentially state[d] its defense to the merits" of the charge, the Board held that the employer's defense was a "matter to be addressed in the unfair practice hearing," and not in

determining whether a stay is warranted. (*Id.* at p. 13 ["it is neither the Board agent's obligation nor function to resolve disputed facts or *venture into a pre-judgment of the merits* of the unfair practice complaint" when staying a representation election] (emphasis added).)

Contrary to the applicable standards set forth above, Imagine Schools appears to argue the merits of the unfair practice charge allegations and its right to free speech. Since an employer's alleged right to free speech is an affirmative defense, Imagine School's free speech arguments are not dispositive of the Association's request to stay further processing of the Petition.[7] Rather, the standard under PERB Regulation 32752, which governs stay requests, mandates that the Board agent investigate to determinate whether the alleged conduct "*would so affect the election process as to prevent the employees from exercising free choice.*"

1. PERB's Application of the Stay Doctrine

The Association asserts that the election should be stayed pending the resolution of the blocking charge, because Imagine Schools's anti-union statements and the showing of an anti-union film would so affect the election process so as to prevent employee free choice.

PERB has found in various cases that a stay of a representation election was warranted when a charging party raised allegations that the respondent: discriminated against decertifying employees, unilaterally changed working conditions within scope, and engaged in bad-faith surface bargaining (*Regents of the University of California, supra*, PERB Decision No. 381-H); reneged on its contractual obligation to terminate employees who failed to pay their service fees which was required as a condition of continued employment (*Pleasant Valley, supra*,

[7] In *Hartnell Community College District (Moberg)* (2015) PERB Decision No. 2452, the Board held that employer free speech was an affirmative defense. The Board also held that the affirmative defense of employer free speech should also not be considered by a Board agent processing an unfair practice charge unless it can be established as a matter of law. (*Id.* at p. 53 ["generally it is not appropriate to dismiss without a hearing interference allegations on the basis of an affirmative defense, such as an employer's right to free speech, unless the defense can be established as a matter of law based on undisputed facts"].)

PERB Decision No. 380); and refused to provide necessary and relevant information thereby impeding the exclusive representative's ability to negotiate effectively. (*Children of Promise Preparatory Academy*, *supra*, PERB Order No. Ad-428.) The rationale in granting stays in the above cases was that such alleged misconduct, if proven to be true, would have given employees the impression that the exclusive representative was weak and ineffective. (*Regents of the University of California*, *supra*, PERB Decision No. 381-H, p. 5; *Pleasant Valley*, *supra*, PERB Decision No. 380, pp. 6-7, 13; *Children of Promise Preparatory Academy*, *supra*, PERB Order No. Ad-428, pp. 9, 29.)

PERB has also stayed a decertification election, even though the petition was filed *after* the filing of an unfair practice charge, which asserted that the employer refused to negotiate with the exclusive representative regarding 27 items. (*Jefferson School District* (1977) EERB[8] Order No. Ad-22; see also *Jefferson School District* (1980) PERB Order No. Ad-82.) PERB stated the decertification election should be stayed because the "resolution of the unfair practice charges . . . may significantly influence the outcome of the election." (*Jefferson School District*, *supra*, EERB Order No. Ad-22, p. 3.)

In contrast, PERB has refused to stay a decertification election based on allegations that the employer caused confusion in the minds of employees by posting memoranda, in which the rival employee organization was described in terms normally used in conjunction with the exclusive representative. (*State of California (Department of Personnel Administration)* (1985) PERB Order No. Ad-151-S.) Additionally, the exclusive representative alleged that such memoranda/documents were management documents, which were posted on bulletin boards not normally used for the posting of management memoranda. On these facts, PERB refused to stay the election because the documents were neutral on their face, had only been

[8] Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

posted in four of 11 facilities, and were only posted for a brief period. (*Id.*, at p. 11.) Under such circumstances, the alleged conduct was found to be "peripheral" to the bargaining relationship and not the type of alleged misconduct which would so affect the election process as to prevent the employees from exercising free choice. (*Ibid.*)

A stay was also denied in *Jefferson School District*, *supra*, PERB Order No. Ad-82. PERB held that continuing to stay a decertification election was no longer warranted because the alleged unfair practices, which concerned bad faith bargaining, occurred three years before the Board's decision, the parties reached an agreement, and bargaining unit members had expressed a desire to move forward with the election. (*Jefferson School District*, *supra*, PERB Order No. Ad-82, pp. 17-18.) In weighing these facts, the Board determined that a continued stay would no longer promote PERB's policy of protecting employee free choice. (*Ibid.*)

B. Employer Speech As Alleged Misconduct For Setting Aside Election Results

While many PERB cases discuss employer speech in the context of unfair labor practices, there appears to be no PERB case law in which the Board has expressly stayed a representation election or denied a request to stay solely because of an employer's anti-union speech. Notwithstanding, guidance is gleaned from PERB cases, which discuss setting aside election results because of an employer's disparaging and anti-union comments.[9]

In *Manton Joint Union Elementary School District* (1992) PERB Decision No. 960 (*Manton*), employees filed a decertification petition. During the electioneering period, the

[9] It should be noted that the standard for setting aside an election and staying an election are different. When determining whether to set aside an election, PERB will assess whether the conduct had the natural and probable impact on employee choice. (See *Pleasant Valley Elementary School District* (2004) PERB Order No. Ad-333 (*Pleasant Valley ESD*); *Jefferson Elementary School District*, *supra*, PERB Decision No. 164.) The determination of probable effect is based on consideration of the facts submitted by the objecting party, which may include, the number, nature and timing of the improper acts, the number of employees affected by or aware of the acts. (*Pleasant Valley ESD*, *supra*, PERB Decision No. Ad-333.)

union filed a blocking charge alleging misconduct by the school district. Specifically, the misconduct stemmed from the superintendent's letter to employees, which stated:

> Personally, I can never express to the individuals responsible for this decertification, my admiration of their courage, commitment to the school, the community, and the certificated staff, for the position they have taken. A position that demonstrates an attitude that puts the children first, one that truly [sic] desires harmony, rather [th]an and [sic] adversarial [sic] relationship; An attitude that fosters team work and the betterment of the school is to be applauded.
>
> Thank you all for your concerns for the children, staff and community. It is an honor to work with people that use their position for the betterment of children and the school rather than for self fulfilling motives.

(*Manton, supra*, PERB Decision No. 960, proposed decision, p. 5.)

The contents of the above-quoted letter, in conjunction with allegations that the school district bypassed the exclusive representative, were sufficient for PERB to order the impounding of sealed ballots from the election. While neither the Board's decision nor the proposed decision state whether the election process was "stayed," it is apparent that PERB's order to impound the sealed ballots had the effect of a stay because further processing of the decertification petition ceased and there was no tally or certification of the results.[10]

The effect of an employer's disparaging and anti-union comments during the election process was also discussed in *Chula Vista Elementary School District* (2004) PERB Decision No. 1647 (*Chula Vista*). In *Chula Vista*, a school principal made his opposition to unionization widely known with statements such as "[teachers] didn't need a union because of the fact that

[10] Ultimately, the Board upheld the Administrative Law Judge's (ALJ) determination that the superintendent's letter, as well as the bypassing of the exclusive representative, warranted that the election be set aside and ballots be destroyed because such misconduct had a probable impact on employee free choice. However, the Board rejected the union's argument that a second election be delayed a year to remove any "taint" from the misconduct. (*Manton, supra*, PERB Decision No. 960, pp. 6-7.)

the union would stop [the school] from being a charter school and doing what [the school] needed to do to be a charter school"; "[a] union isn't necessary. You're paying dues into this union"; and "as a charter school, it was incumbent upon [the school] to be able to operate without the encumbrance of the union or the district . . . ." (*Chula Vista*, *supra*, PERB Decision No. 1647, proposed decision, p. 7.) The Board agreed with the ALJ's findings that these statements, along with allegations that the principal polled employees, threatened transfers and harassed bargaining unit members, were "extraordinary in their gravity" and had a "probable impact on the employees' vote[.]" (*Chula Vista*, *supra*, PERB Decision No. 1647, p. 13.) The Board ordered that the election results be set aside. (*Ibid.*)

Similarly, the Board decided to set aside an election because during a *mandatory* meeting a superintendent praised a rival employee organization as having done "a really good job" and credited them with negotiating an important term and condition of employment. (*Clovis Unified School District* (1984) PERB Decision No. 389 (*Clovis*).) Such allegations were "overt expressions of favoritism for one employee organization over another [which] clearly excee[ed] an employer's free speech right . . . ." (*Clovis*, *supra*, PERB Decision 389, p. 10.) Additionally, one principal held a mandatory meeting within 24 hours of the election and reiterated his anti-unionization position by stating that he had done his dissertation on collective bargaining and educational improvements should not be made through bargaining, but should be left to the Legislature. (*Clovis*, *supra*, PERB Decision 389, proposed decision, pp. 38-39.) The principal in *Clovis* also discussed agency shop and the payment of dues. He said that a vote for no representation was a vote for the school and that it was very important for employees to vote for no representation. (*Ibid.*) Taken collectively, these statements as well as other misconduct, such as threatening retaliation and bypassing the union, were found to have had "probable impact

on the employees' vote," thus warranting that the election be set aside. (*Clovis*, *supra*, PERB Decision 389, p. 20.)

C. Alleged Anti-Union Speech by Imagine Schools

In all of the above cases, the employer's speech, in conjunction with other unlawful acts, was found to have had a natural and probable impact on employee free choice such that setting aside the election results was warranted. In the instant matter, the blocking charge only alleges misconduct stemming from anti-union speech, i.e., the film and the Jiminez Letter. Notwithstanding, the Board indicated in *Office of Kern County Superintendent of Schools* (1985) PERB Decision No. 533 (*Office of Kern*), that unlawful speech could be the sole basis for setting aside an election. The proposed decision in *Office of Kern*, which was ultimately adopted by the Board, acknowledged that although many of PERB's earlier cases discussed an employer's anti-union speech in conjunction with other misconduct, it was still appropriate to apply the "totality of the circumstances" and the "cumulative effect" standard when the only alleged misconduct is an employer's speech. (*Office of Kern*, *supra*, PERB Decision No. 533, proposed decision p. 49.)

In *Office of Kern*, the superintendent's statements, viewed in their totality, were found to have been delivered not in the form of opinion, but as incorrect and unsupported "statements of fact." (*Id.* at p. 53.) Specifically, the superintendent stated that unionization would destroy flexibility and undermine the relationship between management and employees because he would be forced to bring in outsiders to act as negotiators. Such statements "implied that the mere exercise of statutory rights guaranteed to employees and to the [union] would negatively impact [] employees." (*Id.* at p. 18.) The proposed decision in *Office of Kern* cited to *NLRB v. Lenkurt Electric Co.* (9th Cir. 1971) 438 F.2d 1102, in which the court of appeal clarified that:

> . . . an employer may not, in the absence of a factual basis therefor, predict adverse consequences arising from sources outside this

> volition and control. This would not be a retaliatory threat, but would be an improper restraint nevertheless . . . . Thus, an employer may not impliedly threaten retaliatory consequences within his control, nor may he, in an excess of imagination and under the guise of prediction, fabricate hobgoblin consequences outside his control which have no basis in objective fact. (citations omitted).

(*NLRB v. Lenkurt Electric Co.* (9th Cir. 1971) 438 F.2d 1102, 1106.)

While the Association does not allege unlawful acts other than the anti-union speech by Imagine Schools, pursuant to *Office of Kern,* when an employer's anti-union speech is the sole basis of alleged misconduct, election results may be set aside, depending on the nature and seriousness of the speech. Therefore, if the employer's speech in *Office of Kern* warranted setting aside an election because the speech had a "natural and probable impact" on employee free choice, then logically the employer's speech would also warrant a less severe order to simply stay an election.

In applying the above precedent, the totality of Imagine Schools's anti-union campaigning warrants that further processing of the Petition be stayed pending resolution of the blocking charge. As was the case in *Manton* and *Office of Kern*, Imagine Schools *forcibly* subjected employees to anti-union speech. (Blocking Charge, ¶ 4.) On the first day back from summer break, employees were required to attend a *mandatory* meeting during which an allegedly anti-union film was shown.[11] This conduct, if proven by the Association, would tend to affect employee free choice because the meeting was not voluntary nor was it on the bargaining unit members' own time. Rather, Jiminez, the Principal and Regional Director, a person of significant authority, appeared to endorse the film by making statements before and after the film. Since Jiminez, who has authority over bargaining unit members' employment

[11] In an August 6, 2015, telephone conversation with Estrada, the undersigned Board agent confirmed that the first workday for the 2015-2016 academic year was August 13, 2015.

tenure and working conditions, promoted this film during a *mandatory* meeting, the contents of the film could have a coercive effect on employees. Under NLRB precedent,[12] an employer may not use its "superior economic power" to compel employees to listen to pre-election speech. (*Clark Bros. Co.* (1946) 70 NLRB 802, 805, affd. *N.L.R.B. v. Clark Bros. Co.* (2d Cir. 1947) 163 F.2d 373; see also *Beverly Enterprises-Hawaii, Inc.* (1998) 326 NLRB 335.) The *Clark Bros.* decision also stated that "[t]o force employees to receive such aid, advice, and information impairs that freedom; it is calculated to, and does, interfere with the selection of a representative of the *employees'* choice [emphasis in original]." (*Clark Bros. Co.* (1946) 70 NLRB 802, 805.)

Days after employees were required to listen to and watch the allegedly anti-union film, the Jiminez Letter was sent to employees, which further undermined the Association and made statements that were not based on objective fact. (Blocking Charge, ¶¶ 5-10.) The Jiminez Letter stated that the "school is better off without a union," followed by "we are committed to paying competitive teacher salaries within the guidelines of our funding and our budget" and "we already contribute to the CalSTRS Retirement Fund and provide a benefit package." (Blocking Charge, Exhibit A.) These statements must be viewed in the context of the following significant facts—there is no CBA between the Association and Imagine Schools which provided for these benefits and the Association had been certified or recognized as the exclusive representative only one year and five months prior to the distribution of the Jiminez Letter. (See Amended Petition.) Imagine Schools's statements imply that it is solely responsible for employees' retirement and benefits package, thereby giving the impression that retaining the Association as the exclusive representative was unnecessary. Under similar facts,

[12] While PERB is not bound by decisions of the National Labor Relations Board (NLRB), the Board will take cognizance of them where appropriate. (*Carlsbad Unified School District* (1979) PERB Decision No. 89; *Los Angeles Unified School District* (1976) EERB Decision No. 5.)

the Board in *Manton* halted the election process by impounding ballots, because the Manton School District characterized the union as adversarial, and bypassed the union by agreeing to terms proposed by the decertifying employees. This conduct gave the impression that the union was not needed and was ineffective.

Also, as was the case in *Manton*, Imagine Schools's letter emphasized "team work" and implied that the Association's presence did not promote "cooperation" between employees and management. Such statements would also tend to derogate the authority of the Association by implying the union was an obstacle. (Blocking Charge, Exhibit A.)

Additionally, the Jiminez Letter misrepresents that "CTA union dues are over $1200.00." (*Ibid.*) This statement is refuted by the Association, which asserts that total annual union dues are only $884.50 and of that amount only $664.00 is paid to CTA. (Blocking Charge, ¶ 7.) While the Petitioners state that the Jiminez Letter was not "intimating [sic] or coercing [sic]," an employee's declaration as to the impact of alleged employer misconduct is not required. (See *State of California (Department of Personnel Administration)*, *supra*, PERB Order No. Ad-151-S.) Notwithstanding that the Association is not required to demonstrate any actual impact on employee free choice, the Petitioners have indeed conceded that they ". . . saw this [letter] as an opportunity to educate our staff" and as providing "information so that certificated [staff] make[] educated decisions about the school." (Petitioners's Response, ¶ 2.) It appears that some employees have indeed relied on the information provided by Jiminez, a person of authority at Imagine Schools, as accurate and educational "statements of fact," even though CTA's dues are not as high as Jiminez represented. If employees believe Jimenez's statements to be accurate and have already relied on this information to make an "educated decision," such misinformation would prevent employee free choice.

DETERMINATION

Based on the facts, conclusions of law and the entire record herein, the Association's request to stay the election process in the instant matter is **GRANTED**. It is hereby **ORDERED** that Case No. LA-DP-406-M be placed in abeyance pending the resolution of *Imagine Educators Association v. Imagine Schools at Imperial Valley*, unfair practice charge Case No. LA-CE-6062-E.

Right to Appeal

Pursuant to PERB Regulations, an aggrieved party may file an appeal directly with the Board itself and can request an expedited review of this administrative determination. (Cal. Code Regs., tit. 8, §§ 32147, subd. (a), 32350, 32360, 32802, 61060.) An appeal must be filed with the Board itself within 10 days following the date of service of this determination. (Cal. Code Regs., tit. 8, § 32360, subd. (b).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board. (*Ibid.*)

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 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 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If an aggrieved party appeals this determination, any other party may file with the Board an original and five copies of a statement in opposition within 10 calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the Sacramento regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see Cal. Code Regs., tit. 8, § 32140 for the required contents). The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time in which to file an appeal or opposition to an appeal with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (Cal. Code Regs., tit. 8, § 32132)