STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SWEETWATER UNION HIGH SCHOOL DISTRICT, Charging Party, v. SWEETWATER EDUCATION ASSOCIATION, CTN/NEA, Respondent.	Case No. LA-CO-1612-E PERB Order No. IR-58 August 20, 2014

Appearances: Dannis, Woliver & Kelley by Jonathan A. Pearl, Attorney, for Sweetwater Union High School District; California Teachers Association by Brenda Sutton-Wills, Attorney, for Sweetwater Education Association, CTA/NEA.

Before Martinez, Chair; Huguenin, Winslow and Banks Members.

DECISION

WINSLOW, Member: This case came before the Public Employment Relations Board (PERB or Board) on a request for injunctive relief filed by the Sweetwater Union High School District (District) on March 17, 2014. On the same day, the District filed an unfair practice charge against the Sweetwater Education Association, CTN/NEA (Association) alleging that it violated the Educational Employment Relations Act (EERA)[1] by threatening to strike and engaging in preparations for a strike prior to the exhaustion of statutory impasse procedures.

On March 26, 2014, the Board through the Office of the General Counsel denied the District's request for injunctive relief. We explain our reasons for that denial in this decision.

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

FACTS

As an initial matter, we note that there has been no evidentiary hearing in this case. The facts on which we rely are those alleged by the District and contained in sworn declarations submitted by the District, the exhibits attached thereto, and other facts obtained by the Office of the General Counsel during its investigation of the District's request. As with all allegations contained in an unfair practice charge, at this stage of case processing, we presume the allegations in the charge to be true. (*San Juan Unified School District* (1977) EERB Decision No. 12.)[2] Should this matter go to a hearing, these alleged facts will be subject to verification or contradiction.

The parties have been negotiating for a successor collective bargaining agreement (CBA) since May 2013. In July 2013, the District made a proposal to cap its contribution to employee health benefits at 68 percent of the cost of those benefits, effective January 1, 2014. The Association understood this proposal to mean that the 68 percent would be pegged to the cost of the then-existing basic family plan available through the California Schools Voluntary Employees Benefits Association (VEBA). [3]

In November 2013, the Association directed its members to "work to rule." Members were engaged in that activity at the time the District filed its request for injunctive relief.

The Association filed a request for impasse determination with PERB on December 9, 2013. PERB determined the parties were at impasse on December 23, 2013, and appointed a mediator.

---

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

[3] VEBA is a non-profit entity that administers healthcare benefits for District employees.

On January 1, 2014, the District allegedly unilaterally implemented a proposal that it had made in October 2013, which capped its contributions to employee healthcare to "68% of the cost of the Kaiser 10/10 [composite], Safeguard, Vision and Life." As a result of this implementation, the employer contribution for employee health benefits decreased by approximately $300 per month per employee. The Association filed an unfair practice charge on January 28, 2014 (Case No. LA-CE-5893-E) alleging that this implementation of the new contribution rate violated the duty to bargain in good faith.[4]

Meanwhile, the parties engaged in mediation. Sessions with the mediator were held on February 12 and 25, March 6 and 11, and April 5, 2014. The District asserts that it participated in these sessions in good faith and that progress was made during mediation in narrowing the differences between the parties. As of the time the District filed its request for injunctive relief and unfair practice charge against the Association, the parties had not reached agreement on a CBA and continued to participate in mediation. The District does not assert that the Association failed to participate in good faith in mediation by engaging in any conduct, other than the strike preparation described below.

Strike Preparation

On March 17, 2014, the District filed unfair practice charge, Case No. LA-CO-1612-E, alleging that the Association has been preparing for a "pre-impasse" strike by, among other things, having its representative council vote on February 25, 2014, to seek a vote by members to authorize an unfair practice strike authorization vote, urging members to picket and participate in a rally on February 28, 2014, distributing publications informing members that the

[4] The District disputes that the new contribution rate represents a unilateral change, asserting that the rate implemented in January 2014, was in existence for many years and that the District's 2012 and 2013 contributions were based on this rate. This is a dispute we cannot resolve at this stage of the proceedings.

representative council approved the strike authorization vote and reminding Association representatives to organize their sites in preparation for the vote.

The Association established a picket line outside the District's offices on February 28, 2014, and unit members displayed signs with messages such as, "Sweetwater School District breaks teachers' contract," and "I don't want to strike . . . but I will."[5] The Association also posted on its social media sites discussions of the rationale supporting an unfair practice strike and the need to have an authorization vote prior to striking. Another document on the Association's web page in a question-and-answer format asserted, "We have already established that negotiations are meaningless if we allow the SUHSD [the District] to disregard our current contract . . ." and "If we wait, the District violates our contract, damaging 100% of our members, with no consequence. If we wait, the District retains a position of power. If we act, SEA [the Association] takes control."

On March 7, 2014, the Association held a general membership meeting to discuss the strike vote. The following day, the Association posted on its social media sites the dates for the strike vote—March 13 and 14, 2014. Another question-and-answer posting described what the District had to do to avoid a strike: "immediately agree to contribute $12,068 (68% of the Kaiser 10/10/Safeguard family plan) retroactive to 1/1/14 to all employees' health-care premiums." The same posting informed members that the Association was only obligated to give 24-48 hours "lead time" before a strike begins.

Association President Roberto Rodriguez (Rodriguez) further explained to Association members via social media on March 11, 2014, that the Association was asking them to vote on two strike options. The first option was the "Unfair Labor Practice (ULP) strike" over the

[5] We presume this was an informational picket, as the District did not allege and presented no facts showing that the individuals on the picket line urged anyone to refrain from crossing the line or otherwise cease conducting business with the District.

"contract violation of the District's imposed healthcare contribution. This type of strike would address that specific issue." (District Petition for Injunctive Relief, p. 8.) The second option on the ballot was a post-factfinding strike. Rodriguez explained that a "Yes" vote on the latter issue would allow the Association's board of directors to call a strike if the District imposes its "last, best, and final offer," and would "address all issues (including healthcare) currently being negotiated." (Op Cit., p. 8.) The Association urged a "Yes" vote on both options.

The strike vote was taken and, according to press reports, 1,443 of the Association's 1,800 members voted, with over 90 percent voting to authorize the Association to call a strike.[6]

Three days later, the District filed this request for injunctive relief and accompanying unfair practice charge.

POSITIONS OF THE PARTIES

Position of the District

The District alleges that the Association violated EERA section 3543.6(c) and (d) by preparing for and threatening to strike prior to the exhaustion of impasse procedures. It cites to the well-settled law that presumes that economic strikes undertaken before the exhaustion of EERA's impasse procedures presumptively violate the Association's duty to negotiate in good faith and/or to participate in the impasse procedures in good faith. (*San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 8 (*San Diego*); *Santa Maria Joint Union High School District* (1989) PERB Order No. IR-53 (*Santa Maria*); *Sacramento City Unified School District* (1987) PERB Order No. IR-49 (*Sacramento*).)

[6] PERB's investigation does not reveal the tally of votes on each of the two questions presented, i.e., whether to engage in an unfair practice strike or to authorize the board of directors to call a post-factfinding strike if the District imposed its last, best and final offer (LBFO).

The District also relies on S*outh Bay Unified School District* (1990) PERB Decision No. 815 (S*outh Bay*), which held that a strike threat and strike preparation activities undertaken before impasse resolution procedures were exhausted could constitute sufficient facts to state a prima facie violation of EERA section 3543.6(d).[7] The District also argues that *Regents of the University of California* (2010) PERB Decision No. 2094-H (*Regents*) establishes that a union commits an unfair practice by preparing for and threatening a pre-impasse strike that was not provoked by any employer unfair practices. (*Regents,* pp. 33-34.)

According to the District, PERB is still investigating the Association's unfair practice charge that the Association claims has provoked its call for a strike, and has thus not determined whether a prima facie case has been stated by the Association's charge. Because the Association cannot prove that the District has committed an unfair practice, its current strike threats and preparations are in furtherance of an unlawful strike, according to the District.

The District also argues that the Association cannot demonstrate that its strike threat was provoked by the District's alleged unfair practice and that the strike threat is a last resort, because the parties continued to engage in mediation. Threatening to and preparing for a strike while the parties are in mediation constitute unlawful pressure tactics to obtain District concessions at the bargaining table and therefore violate the duty to bargain in good faith, according to the District.

Injunctive relief is just and proper according to the District, because PERB is without authority to order the payment of damages should the Association's conduct ultimately be found to have violated EERA. Absent injunctive relief, the Association will "likely have accomplished its unlawful objective-to place pressure on the District during the negotiation

[7] EERA section 3543.6(d) prohibits an employee organization from refusing to participate in good faith in impasse procedures.

process to concede to SEA's bargaining demands." (District's Petition for Injunctive Relief, p. 21.)

Finally, the District claims that students will suffer "considerable harm" if the Association is not enjoined from striking before the completion of impasse procedures because key student examinations are scheduled to be administered starting on March 17, 2014, and continuing through the end of the school year. These exams include the High School Exit exam (CAHSEE), the Smarter Balanced Assessment Consortium (SBAC) exam, Advanced Placement (AP) exams, several other state standardized tests, and final exams, the interference with which would affect students' final grades. The District alleges that any strike by teachers before the end of the school year would be "exceptionally upsetting and unjust to students." (Petition for Injunctive Relief, p. 11.)

Position of the Association

The Association claims there is no reasonable cause to believe its conduct amounts to an unfair practice because it has not prepared for or threatened to conduct a pre-impasse strike and never contemplated conducting a pre-impasse economic strike. It characterizes its communications to its members as mere polling of its members to ascertain support for a possible strike, and denies that it has threatened the District with a strike.

DISCUSSION

On March 26, 2014, the Board denied the District's request for injunctive relief. We take this opportunity to review our previous cases that dealt with threats or preparations for a presumed pre-impasse strike, in particular *South Bay, supra,* PERB Decision No. 815 and *Regents, supra,* PERB Decision No. 2094-H.

In order to seek injunctive relief from the courts, PERB must be satisfied that two criteria are met: (1) there is "reasonable cause" to believe an unfair practice has been

committed; and (2) injunctive relief must be "just and proper." (*Public Employment Relations Board v. Modesto City Schools District* (1982) 136 Cal.App.3d 881, 895-896 (*Modesto*).) "Reasonable cause" is a higher standard than merely stating a prima facie violation, but PERB does not have to establish that its theory will ultimately prevail, only that its theory is not "insubstantial or frivolous." (*Modesto*, p. 897.) As the Board noted in *Fremont Unified School District* (1990) PERB Order No. IR-54, p. 8 (*Fremont*): "In order to meet the reasonable cause standard, the Board must determine that it is probable that a violation of the Act has been committed." (Emphasis in original.)

With that standard in mind, we turn to the issue presented by this request for injunctive relief: whether the Association's strike preparation activities, including taking a strike authorization vote of its membership, constitute reasonable cause to believe the Association violated its duty to participate in EERA's impasse procedures in good faith.

The District alleges and the Office of the General Counsel's investigation established that the Association was engaged in activities that could reasonably be construed as preparing for a strike. These preparations were undertaken before the exhaustion of impasse procedures. The parties dispute whether the potential pre-impasse strike would be in protest of the District's unfair practices or would be an economic strike. The District denies that it has committed any unfair practices, and therefore disputes that the Association could be legitimately preparing to strike in response to any unfair practices.

For purposes of this decision, we need not resolve whether a strike prior to the exhaustion of impasse procedures by the Association, if it occurs, would be lawful. That question will likely be resolved in the Association's favor if the Association strikes before the completion of impasse procedures and it is determined by this agency after an evidentiary hearing that the District did in fact commit unfair practices and that such unfair practices

provoked the strike. Of course, any pre-impasse strike is undertaken at the union's peril. If PERB ultimately determines that such a strike was not in response to an unfair practice, the Association will likely be deemed to have violated EERA. (*Regents, supra,* PERB Decision No. 2094-H.)

The question placed before us by this request for injunctive relief is whether the Association's conduct as alleged and described by the District as strike preparations undertaken before impasse procedures have been exhausted constitutes "reasonable cause" to believe that an unfair practice has been committed. As we explain below, the Association's conduct does not constitute reasonable cause to believe it has violated EERA by bargaining in bad faith or by failing to participate in impasse procedures in good faith.

In *San Diego, supra,* 24 Cal.3d 1, the Court noted that EERA's impasse procedures were intended to head off strikes. The Court stated: "Since they assume deferment of a strike at least until their completion, strikes before then can properly be found to be a refusal to participate in the impasse procedures in good faith and thus [cit. omitted] an unfair practice under section 3543.6, subdivision (d)." (*San Diego,* p. 8.) In cases decided by PERB subsequent to *San Diego,* the Board has consistently held that there is a rebuttable presumption that strikes conducted before the completion of impasse procedures are unfair practices. The presumption can be rebutted by a showing that the strike was provoked by the employer's unfair practice, which is a mixed question of law and fact. (*Sacramento, supra,* PERB Order No. IR-49; *Modesto City Schools/Modesto City Schools, et al.* (1980) PERB Order No. IR-12; *Santa Maria, supra,* PERB Order No. IR-53).

Construed together, these cases establish that pre-impasse strikes presumptively violate EERA. It is not the speech attendant to informing unit members and the public of the bargaining dispute, urging unit members to show solidarity and support for the union's

demands, informing unit members of the progress (or lack thereof) at the bargaining table, publicizing the employer's alleged unfair practices, taking strike votes, or engaging in what the District characterizes as strike preparation that is presumptively unlawful conduct. Rather, it is the pre-impasse work stoppage that is presumptively unlawful. Except under the unique circumstances in *Regents, supra,* PERB Decision No. 2094-H discussed below, PERB has not sought to enjoin a threatened work stoppage on the basis that the strike preparations or threats to strike have occurred before the exhaustion of impasse procedures.[8]

In contrast, PERB has directed the Office of the General Counsel to seek an injunction against pre-impasse strikes when it was shown that a work stoppage was in progress and that the work stoppage had not been provoked by an employer's unfair practice. (*Las Virgenes Unified School District* (1979) PERB Order No. IR-8 (*Las Virgenes*); *Val Verde School District* (1979) PERB Order No. IR-9 (*Val Verde*); *San Francisco Unified School District* (1979) PERB Order No. IR-10 (*San Francisco*); *San Mateo City Schools* (1985) PERB Order No. IR-48; *Sacramento, supra,* PERB Order No. IR-49.)[9]

Unlike an actual work stoppage, preparing for a strike is more akin to speech protected by EERA. PERB has long held that speech in the workplace that is related to the legitimate

---

[8] PERB has sought to enjoin certain individuals from engaging in strikes before those strikes occur upon a showing that those "necessary" employees' absence from the job would create an imminent threat to health and safety. (*County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564 (*County Sanitation District*).) However, the District makes no such claim in this case.

[9] In its unfair practice charge, the District cites *Santa Maria, supra,* PERB Order No. IR-53 and *Sacramento, supra,* PERB Order No. IR-49, for the proposition that PERB has held that strikes "including engaging in strike preparations, before the completion of statutory impasse resolution" creates a rebuttable presumption that the union bargained in bad faith. However, these decisions do not mention strike preparations. *Santa Maria* involved a one-day strike that occurred before the district sought injunctive relief. *Sacramento* involved a work stoppage in progress when the petition for injunctive relief was filed. There was no discussion in either of these cases of any claimed unlawfulness of strike preparations.

concerns of employees is protected activity within the meaning of EERA section 3543. (*Richmond Unified School District/Simi Valley Unified School District* (1979) PERB Decision No. 99 (*Richmond/Simi*); *Konocti Unified School District* (1982) PERB Decision No. 217 (*Konocti*); *Rancho Santiago Community College District* (1986) PERB Decision No. 602 (*Rancho Santiago*); *Mt. San Antonio Community College District* (1982) PERB Decision No. 224 (*Mt. San Antonio*); *East Whittier School District* (2004) PERB Decision No. 1727 (*East Whittier*).) As the Board explained in *Richmond/Simi Valley,* p. 15:

> [E]ffective and non-disruptive organizational communications are an important aspect of employee rights to "form, join, and participate" in employee groups (section 3543), by serving as necessary links between employees and their representatives. Without adequate communications, these employee rights at the workplace would be largely empty or subject to employer whim and domination.

While *Richmond/Simi Valley* did not involve a threatened strike, the principle establishing the protected nature of "non-disruptive organizational communications" is a useful starting point for any analysis of a union's communications to bargaining unit members and to the employer regarding matters relating to employer-employee relations, including preparing for a strike.

In rejecting the employer's claim that the union's strike threats were coercive in *Konocti, supra,* PERB Decision No. 217, PERB observed, "Strike votes – like strike talk – are commonplace in labor relations, particularly in the face of approaching deadlines. They cannot be viewed as per se violations of the good-faith obligation." (*Konocti,* p. 12; emphasis in original.) *Konocti* also noted that the mere fact that an employer claims to have been coerced by the union's conduct is insufficient to support such a finding. (*Id.*)

East Whittier, supra, PERB Decision No. 1727 offers particular insight into the importance of employee and union speech when the parties are engaged in contract negotiations:

> It is important to assure that employees can freely voice their perspectives so that the parties can construct an agreement everyone may support. It is also important to assure that employers can ascertain the relative importance of their employees' concerns at the workplace, so that they can properly develop and weigh bargaining proposals during the process of negotiations.

(*East Whittier,* pp. 10-11.)

Although *East Whittier, supra,* PERB Decision No. 1727 concerned the right of certificated employees to wear union buttons in the classroom, the observation quoted above applies equally to communications by an employee organization in the heat of negotiations. First, it is a fundamental right of the employee organization to communicate to its members about the progress of negotiations and to urge members to support positions it takes at the table. This is the essence of organizing. It is what unions do to exercise their power in the collective bargaining arena. That an employer may claim that "strike talk" or a strike vote is coercive ignores *Konocti, supra,* PERB Decision No. 217, and what *East Whittier* correctly suggests is valuable information to the employer, information that can be obtained without illegal polling of employees. How credible is the strike threat? Are the rank-and-file employees truly agitated about the alleged unilateral change in the health benefits formula, or is the union raising a chimera of outrage? It is in both parties' interest to know the outcome of any union-sponsored strike vote.

More critically, the Association's strike preparations, e.g., conducting membership meetings to urge a strike authorization vote, taking that vote, conducting informational picket lines, explaining to members why they need to show the District that they support the Association's bargaining demands, and publicizing the dispute to the public, are all protected by EERA's guarantee of employees' right to participate in the activities of their employee organization for the purpose of representation in employer-employee relations. (EERA, § 3543;

Rancho Santiago, supra, PERB Decision No. 602; *Mt. San Antonio, supra,* PERB Decision No. 224.) The same conduct falls within EERA's protection of employee organizations' right to represent their members in employment relations. (EERA, § 3543.1(a).) Such activity does not lose its protection simply because it becomes effective, that is, when the employer claims to be coerced or pressured into making concessions. Nor would we presume that an employer's pre-impasse preparation for an expected strike, such as advertising for replacements, offering bonus pay for substitute teachers, or contracting with temporary employment agencies, etc., would by itself constitute an unfair practice simply because a union asserts that it was pressured into making concessions when faced with the prospect of the employer's success in blunting the effects of a strike. (*Rio Hondo Community College District* (1983) PERB Decision No. 292, p. 10.)

In sum, we are unwilling to seek injunctive relief against conduct that is clearly protected by EERA where there has been no work stoppage and where there is no evidence that the Association lacked the genuine intent to reach agreement on the CBA. Here, as the District admits, the parties continued to meet in mediation and make progress while the Association was engaged in its organizing activities.

The precedents relied on by the District, *South Bay, supra,* PERB Decision No. 815 and *Regents, supra,* PERB Decision No. 2094-H, provide at best ambiguous guidance. In *South Bay,* the district alleged that the union took a strike vote while mediation was in progress and before impasse procedures had been exhausted, and engaged in various other organizing activities designed to publicize the parties' bargaining dispute both to unit members and to parents. The union announced that the strike vote would take place, contingent on the parties not reaching an agreement by a certain date. A few days before the vote was to take place, the union delivered to the district's governing board a memorandum stating that the bargaining

team was prepared to meet with the district's team, "with or without a mediator, in an attempt to resolve the impasse and avoid a strike." (*South Bay*, p. 4.) The day before the scheduled strike authorization vote, the union announced that it had opened a strike headquarters. Fliers were distributed to unit members urging a "Yes" vote, stating, "[t]he only way that this message could be effective is if it was obvious to the school board that teachers are truly prepared to strike." (*Id.* at p. 5.) The union also distributed packets to unit members delineating "'last day of school', procedures" which advised teachers to lock their desks, take their lesson plans, grade books and keys and urged them to tell prospective substitute teachers that they were participating in strike-breaking activities.

The strike authorization vote in *South Bay, supra,* PERB Decision No. 815 was postponed, and when it ultimately was taken, the employees voted by one vote not to strike. Before the union announced the results of this vote, a tentative agreement had been reached with the district. Nevertheless, the district alleged in its unfair practice charge that the strike preparation activities were aimed at pressuring the district into making concessions at the bargaining table and in fact, had coerced the district into making concessions.[10] There was no claim by the union in *South Bay* that its strike preparation activities were undertaken in response to any employer unfair practices. The charge was dismissed by the Office of the General Counsel and the district appealed that decision to the Board itself.

The Board held in *South Bay, supra,* PERB Decision No. 815 that under the totality of circumstances test, the union's strike threat and strike preparation activities stated a prima facie violation of EERA section 3543.6(d). Although the decision noted that the allegations of the

[10] Our review of PERB's case file in *South Bay, supra,* PERB Decision No. 815 reveals that the Office of the General Counsel issued a complaint after the Board's decision and the matter was set for a formal hearing. The case settled on the eve of that hearing, so there is no record available to ascertain whether the union also made concessions after the strike vote failed. PERB may take administrative notice of its own files. (*San Ysidro School District* (1997) PERB Decision No. 1198, p. 3.)

coercive effect of union's conduct were minimal, the Board majority, with very little analysis, concluded that those allegations were sufficient to warrant the issuance of a complaint. The underlying assumption in *South Bay* was that preparing for a strike and directly or indirectly threatening to strike during impasse procedures could, under a totality of circumstances standard, constitute a prima facie violation of section 3543.5(d), where the employer alleges that the threat of a strike caused it to make concessions. Member Craib dissented, criticizing the majority for holding that surface bargaining can be evidenced by conduct which is aimed at coercing the other party to make concessions. (*South Bay,* p. 15.) In his view, "[c]onduct which is aimed at seeking agreement, regardless of its coercive nature, is quite different from surface bargaining," which is aimed at avoiding agreement. Member Craib would have allowed a complaint to issue under the facts alleged in *South Bay* only if the threat of strike was used as a method of delaying or avoiding agreement, and in his view, the district had not alleged facts showing that the strike preparations interfered with bargaining or good faith participation in the impasse procedures.

We agree with Member Craib on this point: "Conduct which is aimed at seeking agreement, regardless of its coercive nature, is quite different from surface bargaining. . . . [I]t is true that, in some circumstances, a threat to strike prior to the exhaustion of statutory impasse procedures could be evidence of bad faith. . . . [but] only where the threat was used as a method of delaying or avoiding agreement, or otherwise interfering with the negotiations process." (*South Bay, supra,* PERB Decision No. 815 dissenting opinion, pp. 15-16.) In *South Bay*, as in this case, there were no allegations that the union delivered an ultimatum to the employer that unless the employer met the union's demands, the union would strike on a certain date.

Therefore, to the extent that *South Bay, supra,* PERB Decision No. 815 stands for the proposition that a union's strike preparations undertaken prior to the completion of impasse

procedures in anticipation of a lawful post-impasse economic strike demonstrate surface bargaining, we disavow it. Provided the union continues to engage in good faith bargaining or participates in impasse procedures in good faith, its simultaneous preparation for the contingency of not reaching agreement does not violate EERA. Strike preparations do not, per se, constitute illegal coercion. It is the nature of collective bargaining that each side carries in its tool box elements that have varying degrees of persuasiveness. These tools include logical argument and reasoned discourse, publicizing the dispute with the intent of persuading third parties to put pressure on one side or the other, organizing members of the employee organization to picket, demonstrate or otherwise attempt to persuade the public employer or the union to alter their bargaining positions, etc. Ultimately, each side has its own weapon of last resort. Unions may strike, and the public employers may impose their LBFO, or less commonly in the public sector, lock employees out of the workplace. We fail to see how talk of or preparations for these potential courses of action constitutes unlawful coercive conduct.[11] The fact that these tools of persuasion may convince one side or the other to make concessions does not render their use unlawful under our statutes.

The facts in this case demonstrate the problem created by a rule that prohibits strike preparation activity. The District's request for injunctive relief was premised on its assumption that the Association would strike before impasse procedures were exhausted, and it pointed to the Association's talk of an unfair practice strike to support this assumption. Yet the

[11] Threats to engage in a strike that has an unlawful objective or uses an illegal tactic, such as a sit-down strike, or a partial strike where employees seek to work and strike at the same time, may be considered to be an illegal pressure tactic unprotected by EERA. (*San Ramon Valley Unified School District* (1984) PERB Order No. IR-46 (*San Ramon*); *Fremont, supra,* PERB Order No. IR-54; *El Dorado Union High School District* (1985) PERB Decision No. 537.) As we held in *Regents, supra,* PERB Decision No. 2094-H, p. 31, the strike threat and preparations must be: "in furtherance of an unlawful strike; and . . . sufficiently substantial to create a reasonable belief in the employer that the strike will occur."

investigation of this case revealed no indication that the Association intended to strike prior to the exhaustion of impasse procedures. The Association's response to the District's request for injunctive relief contains a sworn statement made under penalty of perjury by Lian Shoemake, an employee of the California Teachers Association (CTA) whose responsibilities include assisting CTA chapters in "issues covered under EERA." He declared that "a pre-impasse strike is not contemplated" by the Sweetwater Education Association. While PERB is not bound by a party's disclaimers in every case, the Board has declined to seek a strike injunction when the union has stated under penalty of perjury that it had "no plan, intention or desire to strike again." (*Santa Maria, supra,* PERB Order No. IR-53, p. 6.) In the absence of facts clearly demonstrating such an intent to strike prior to the exhaustion of impasse procedures and in light of the Association's express disavowal of any plan to engage in a pre-impasse strike, we decline to seek injunctive relief against otherwise legitimate organizing activity.

The Association's disavowal of an intent to engage in a pre-impasse strike makes this case very different from *Regents, supra,* PERB Decision No. 2094-H. *Regents* came before the Board on appeal from a proposed decision by a PERB administrative law judge after a full evidentiary hearing. At issue in that case was whether pre-impasse strike preparation and strike threats allegedly in response to the employer's unfair practices violated the duty to participate in impasse procedures in good faith under Higher Education Employer-Employee Relations Act (HEERA) section 3571.1(c).[12] The Board announced a test in *Regents*: to constitute an unfair practice, pre-impasse strike threats and preparation must be:

> (1) in furtherance of an unlawful strike; and
>
> (2) sufficiently substantial to create a reasonable belief in the employer that the strike will occur.

(*Regents,* p. 31.)

[12] HEERA is codified at Government Code section 3560.

On the facts in *Regents, supra,* PERB Decision No. 2094-H, the Board held that the union's conduct violated HEERA, because the union was not able to prove that the employer had engaged in any unfair practices. Thus, the union "failed to rebut the presumption that its threatened pre-impasse strike was an unfair practice because it did not prove that UC engaged in any unfair practices that could have provoked CNA's strike." (*Regents,* pp. 33-34.) If the threatened strike were not in response to the employer's unfair practices, it was therefore undertaken for the purpose of "placing pressure on UC to reach agreement at the bargaining table prior to the exhaustion of statutory impasse procedures." (*Id.* at p. 34.) The union's strike threat and preparation was deemed to constitute an unfair practice. In a footnote, the Board reserved for another day the question of whether preparations for a lawful strike undertaken before the exhaustion of impasse procedures would constitute an unfair practice. (*Id.* at p. 34, fn. 14.)[13] We hold today that it would not.

Regents, supra, PERB Decision No. 2094-H is distinguishable from the facts alleged here. First, the decision in *Regents* did not arise out of an injunctive relief request, but came to the Board after a full evidentiary record was established, including facts that addressed whether the employer had committed unfair practices that provoked the threatened strike. As noted earlier, we cannot determine at this stage the ultimate legality of a hypothetical unfair practice strike because we do not have the factual record to determine whether the District actually committed unfair practices, and if it did, whether those unfair practices provoked a strike.

Second, the strike threat in *Regents, supra,* PERB Decision No. 2094-H was much more concrete than the organizing activity allegedly engaged in by the Association in this case. As

[13] Nor did PERB address the question of whether CNA's strike would have been unlawful under *County Sanitation District, supra,* 38 Cal.3d 564, as an imminent threat to public health and safety. (*Regents, supra,* PERB Decision No. 2094-H, p. 34, fn. 13.)

the Board noted: "[i]t is undisputed that the strike noticed by CNA would have occurred as scheduled . . . , had the superior court not enjoined it." (*Regents,* p. 31.) The California Nurses Association (CNA) had notified the employer, the University of California (UC), of the exact date, time, and duration of the pre-impasse strike; it had established an "emergency task force" in order to provide emergency nursing services during the strike. These facts, among others, led the Board to conclude that CNA's strike threat and preparations were "sufficiently substantial to support a reasonable belief by UC that the strike would occur." (*Regents,* p. 34.) Since the Board previously concluded that the threatened strike was not in response to any UC unfair practice, the Board concluded that CNA violated HEERA section 3571.1(c) by credibly threatening to engage in and preparing for a pre-impasse economic strike, i.e., an unlawful strike.

By contrast, here, the District has failed to show that the Association intended to strike prior to the completion of impasse procedures. The Association never announced a date on which it would strike, nor did it state that it would strike before the completion of impasse procedures. The ballot for the strike vote posed the choice of engaging in an unfair practice strike at some unspecified time, or authorizing the Association's board of directors to call a strike if the District imposed its LBFO after impasse procedures were exhausted. Most importantly, the Association stated under penalty of perjury that it did not intend to engage in a pre-impasse strike.

We, therefore, need not ascertain whether the District's alleged unfair practices provoked the Association's strike preparations, since there is no substantial evidence supporting a reasonable belief that a strike would occur before impasse procedures were exhausted. We leave to the administrative hearing process the question of whether the District's conduct

violated EERA.[14] For all these reasons, we cannot accept the District's assertion that the Association's conduct was therefore in furtherance of an unlawful strike.

Injunctive Relief Would Not Be Just and Proper

Having determined that there is no reasonable cause to believe the Association is engaged in conduct that violates EERA, we need not reach the "just and proper" prong of the *Modesto* test.[15] However, the District advances two arguments that warrant discussion in support of its claim that an injunction would be just and proper.

First, the District asserts that because EERA section 3541.3(i) deprives PERB of authority to award damages caused by illegal strike activity or preparation for such a strike, there is no effective remedy except injunctive relief. According to the District, any final order after an unfair practice hearing would be meaningless and that final order would be "so devoid of force that the remedial purposes of EERA will be frustrated." (Petition for Injunctive Relief, p. 17.)

This argument presumes that an award of damages is the only remedy that will deter unlawful conduct by the Association and ignores the District's right to return to PERB with a subsequent request for injunctive relief under circumstances demonstrating an actual work stoppage has commenced. While each injunctive relief request must be decided on a case-by-case basis, in the past PERB has granted employers' requests to seek injunctive relief against

---

[14] We take notice of PERB's case files in Unfair Practice Case No. LA-CE-5893-E. The Office of the General Counsel issued a complaint on this charge in May 2014. Subsequently, the charge was withdrawn.

[15] *Modesto, supra,* 136 Cal.App.3d 881, described the "just and proper" standard: "[Where] there exists a probability that the purposes of the Act will be frustrated unless temporary relief is granted . . . [or] the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless, [the just and proper standard is met]." (*Modesto,* p. 902, quoting *Agricultural Labor Relations Bd. v. Ruline Nursery Co.* (1981) 115 Cal.App.3d 1005.)

actual strikes that were taking place prior to the exhaustion of impasse procedures (*Las Virgenes, supra,* PERB Order No. IR-8; *Val Verde, supra,* PERB Order No. IR-9; *San Francisco, supra,* PERB Order No. IR-10; *San Mateo City School District* (1985) PERB Order No. IR-48; *Sacramento, supra,* PERB Order No. IR-49.) The Board also has sought injunctive relief against a work stoppage that caused the complete breakdown of education (*Compton Unified School District* (1987) PERB Order No. IR-50 (*Compton*)), and where the means of the work stoppage amounted to an unlawful pressure tactic. (*San Ramon, supra,* PERB Order No. I.R.-46 [series of unannounced surprise strikes undertaken over the course of two months deemed an unlawful pressure tactic; injunction required adequate pre-strike notice to the employer]; *Fremont, supra,* PERB Order No. IR-54 [intermittent strikes].)[16] In sum, we have concluded that the District has not yet shown reasonable cause to believe the Association has committed an unfair practice based on the factual allegations of this charge. This conclusion does not preclude the District from returning with a new charge and request for injunctive relief if circumstances change. The constraint on PERB's remedial authority in EERA section 3541.3(i) does not mean the Board is powerless to seek injunctive relief against an actual work stoppage when both prongs of the *Modesto* test are met.

Second, the District claims that students will suffer "considerable harm" if the Association is not enjoined from engaging in a pre-impasse strike because they must take

[16] The Board declined to seek injunctive relief in *Fremont, supra,* PERB Order No. IR-54, in part, because the petitioning employer failed to demonstrate that the work stoppage caused a complete breakdown of education. The lead opinion concluded that the intermittent strike tactic was unlawful under EERA and there was therefore reasonable cause to believe the union's conduct violated EERA. Concurring opinions disagreed that the intermittent strike was illegal under EERA, or that the conduct met the reasonable cause prong.

important examinations between March and the end of the school year.[17] The Office of the General Counsel's investigation determined as a general matter that none of the examinations required certificated bargaining unit members to administer the exams, or that a missed exam would result in any student failing to graduate or matriculate to the next grade.

The Office of the General Counsel determined that high schools are required to administer the CAHSEE (the high school exit exam) to every tenth grade student. Those who fail in the tenth grade, have ample opportunity to take the test again at least twice in each academic year until graduating. Moreover, the CAHSEE scheduled for March 18-19, 2014 was only for tenth graders. The test was also scheduled for May 13 and 14, 2014, so any seniors who had not passed the exam by then could take the exam in May. With respect to the CAHSEE, the District does not contend that a strike during the administration of this test would prevent graduation, but only that a strike would "limit students' opportunity to take the exam and they will have less opportunity to determine which areas they need to focus on in order to pass the exam." Additionally, the District was unable to demonstrate any credible threat by the Association that it intended to strike in May, 2014.

The SBAC exam is being offered for the first time this school year. According to information obtained by of Office of the General Counsel's investigation and available from the State Board of Education, the SBAC is being administered only for field testing purposes at this time. The SBAC can be administered at any time within a window between April 7 and May 16, 2014, so the District has flexibility in re-scheduling any part of the SBAC were the Association to conduct a work stoppage on days during which the SBAC is currently scheduled.

[17] The District did not argue that students would suffer irreparable harm and did not contend that a strike during any examination period would cause a total breakdown of education, as occurred in *Compton, supra,* PERB Order No. IR-50.

With respect to AP (Advanced Placement) exams, the District has not shown that these exams must be proctored by certificated unit members. The same is true for final course work exams. In sum, the District has failed to demonstrate that the adjustments made to testing schedules or protocols that would be necessary if the Association were to conduct a strike during testing periods would cause a total breakdown of education. (*Compton, supra,* PERB Order No. IR-50.) Injunctive relief under these circumstances would therefore not be just and proper.

CONCLUSION

We deny the District's request for injunctive relief because it has failed to show reasonable cause to believe that the Association's strike preparations violated the duty to bargain in good faith or to participate in impasse procedures in good faith under the first prong of *Modesto, supra,* 136 Cal.App.3d 881. Under the second prong of *Modesto,* there is no showing injunctive relief would be just and proper. The Association's activity, described by the District as strike preparations, is presumptively protected under EERA. We are unwilling to seek to enjoin such activity where there has been no showing that an unlawful strike is imminent.

ORDER

The Sweetwater Union High School District's request for injunctive relief in Case No. LA-CO-1612-E is DENIED.

Chair Martinez and Members Huguenin and Banks joined in this Decision.