

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES  
ASSOCIATION & ITS CAPISTRANO  
CHAPTER 224,

Charging Party,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-5621-E

PERB Decision No. 2440

June 30, 2015

Appearances: Nathan Banditelli, Labor Relations Representative, for California School Employees Association & its Capistrano Chapter 224; Atkinson, Adelson, Loya, Ruud & Romo by Anthony P. De Marco and Amy W. Estrada, Attorneys, for Capistrano Unified School District.

Before Huguenin, Winslow, and Banks, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the Capistrano Unified School District (District) to the proposed decision (attached) of an administrative law judge (ALJ). The ALJ ruled that the District interfered with the right of Teresa Hause (Hause) to be represented by the California School Employees Association & its Capistrano Chapter 224 (collectively, CSEA) and with CSEA's right to represent Hause during a June 2, 2011 meeting with her supervisor, in violation of Educational Employment Relations Act (EERA) section 3543.5, subdivisions (a) and (b).<sup>1</sup> As a remedy, the ALJ ordered that the District's written reprimand be rescinded and expunged from Hause's personnel file in accordance with *Lake Elsinore Unified School District* (2004)

<sup>1</sup> EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein shall be to the Government Code.

PERB Decision No. 1648 (*Lake Elsinore*) and *Redwoods Community College District* (1983) PERB Decision No. 293 (*Redwoods*). Although the ALJ acknowledged that the reprimand referenced some conduct that was unrelated to the June 2, 2011 meeting, he concluded that it was nonetheless appropriate to rescind and expunge the entire document, because it was based, at least in part, on an investigatory interview at which Hause was denied the right to representation.

The District denies any wrongdoing and asserts various grounds for reversing the proposed decision. It also excepts to the remedy as improper and excessive. CSEA contends that each of the District's arguments is without merit and urges the Board to affirm the proposed decision.

We have reviewed the entire record in this matter, including the charge, the complaint, the District's answer, the transcript of the hearing before the ALJ and exhibits thereto, the ALJ's proposed decision, the District's exceptions to the proposed decision, and CSEA's response to the District's exceptions. Based on this review, we conclude that the ALJ's findings of fact are supported by the record, and we adopt them as the findings of the Board itself, as supplemented below. The ALJ's legal conclusions are generally well-reasoned and in accordance with applicable law and, except as noted below, and we affirm the proposed decision, subject to the following discussion of the District's exceptions.

#### PROCEDURAL HISTORY

On November 7, 2011, CSEA filed an unfair practice charge alleging that the District violated EERA section 3543.5, subdivisions (a) and (b), by interfering with Hause's right to union representation, retaliating against Hause for engaging in protected activities, and denying CSEA its right to represent Hause in employment related matters. On January 20, 2012, PERB's Office of the General Counsel issued a complaint alleging that the District interfered

with Hause's right to representation and with CSEA's right to represent Hause, in violation of EERA section 3543.5, subdivisions (a) and (b). On the same day, CSEA withdrew all other allegations from its charge.

On February 16, 2012, the District answered the complaint by denying any wrongdoing and asserting various affirmative defenses.

After an informal settlement conference on March 14, 2012, failed to resolve the dispute, a formal hearing was held on June 13 and 14, 2012 before a PERB ALJ. On August 24, 2012, the parties filed closing briefs and the matter was fully submitted.

On October 10, 2012, the ALJ issued his proposed decision, which concluded that the District had violated EERA section 3543.5, subdivisions (a) and (b).

On November 5, 2012, the District filed a statement of exceptions and brief in support thereof. After being granted an extension of time in which to respond, on December 17, 2012, CSEA filed its response to the District's exceptions.

#### FINDINGS OF FACT

CSEA is the exclusive representative of the District's classified employees, including its food service staff. CSEA's chief steward is Ken Jensen (Jensen), whose duties include representing the District's food service workers in investigatory and other meetings with management. Jensen testified that CSEA has a good working relationship with the District and that, other than the present dispute, he knew of no instance in which the District had denied a food service worker's request for representation at an investigative meeting with District management.

The District's Food and Nutrition Director is Dawn Davey (Davey). Davey testified, in general agreement with Jensen, that the District has "a good relationship with the Union," and

that it has generally permitted a CSEA representative to attend meetings with management, including non-disciplinary meetings, “[i]f it’s convenient and it works out for everyone.”

At all times relevant, Hause has worked as a Food Service Lead II at the District’s Niguel Hills Middle School (Niguel Hills). Her duties include ordering and preparing food, directing other food service workers, and serving food to students, either from one of six food service terminals or “windows,” which connect the kitchen to the school’s courtyard, or from a separate cart located outside the kitchen. Pursuant to her job description, Hause is also responsible for analyzing operations and making recommendations to her supervisors on ways to cut costs and improve service.

Hause’s immediate supervisor is Food and Nutrition Supervisor IV John Chamberlin (Chamberlin) who, in turn, reports to Davey. Chamberlin oversees approximately 55 food and nutrition department employees at twelve middle school sites, one of which is Niguel Hills. Chamberlin is in regular telephone and email contact with the lead food service workers under his supervision. Although he visits the school sites “on a daily basis” to check operations and to ensure compliance with procedures, because of the District’s size, he considers himself “lucky” if he can visit two or three schools per day. The record does not indicate whether Chamberlin’s visits follow a regular schedule or whether he typically advises food service leads in advance of his plans to visit a particular site.

By all accounts, Hause and Chamberlin have a “strained” working relationship. In or about March 2011, Chamberlin counseled Hause regarding her failure to follow a department policy of providing student helpers with only one meal and one snack per shift. In an April 21, 2011 email message, Hause advised Chamberlin that she disagreed with this policy and was not following it. It is undisputed that Chamberlin did not counsel Hause or otherwise inform

her that he regarded her email message as insubordinate. It is also undisputed that the District took no disciplinary action against Hause regarding this message until September 1, 2011.

The present dispute is not the first instance in which Hause has requested CSEA's assistance at a meeting with Chamberlin or other District managers. There was undisputed evidence that, at CSEA's request, in March of 2009, the District's Deputy Superintendent of Personnel Services, Suzette Lovely, agreed to "[p]rovide at least 24 hours['] notice to Ms. Hause and CSEA before a meeting, memo, evaluation or conversation occurs that could lead to discipline." Jensen also testified that, at Hause's request and with Davey's approval, he had attended a meeting on or about November 8, 2010, at which Chamberlin and Davey had instructed Hause on "the day-to-day workings of food service."

In or about April 2011, the District began converting the food services department's accounting software program, known as "Lunch Box," to a new program known as "Meals Plus." The new program is designed to track inventory, compliance with federal regulations and overall transaction activity at the various sites throughout the District. The change in software also entailed certain operational changes. Under the previous system, each employee was responsible for sales at only one window at a time. The enhanced Meals Plus software, however, would allow each employee to work two "points-of-sale" or "windows" simultaneously. Additionally, only snacks and other non-meal items, referred to as *a la carte* items, would be sold from the outside carts following the change to Meals Plus, because the carts were not compatible with the program's meal tracking software.

The Meals Plus program was implemented in phases throughout the District. Its implementation at Niguel Hills was scheduled for May 26, 2011. During a May 20, 2011 telephone conversation with Hause on an unrelated matter, Chamberlin raised the topic of Meals Plus. According to Chamberlin, Hause became "argumentative" and "belligerent." She

criticized Meals Plus as unworkable and a misguided attempt to replace employees with computers. Chamberlin testified that Hause's position was, "essentially, that she was not going to do this" and that he regarded Hause's comments as an "attack" on the integrity of management. However, before Chamberlin could defend himself or expound on the benefits of Meals Plus at other sites where it had already been implemented, Hause hung up.

Chamberlin immediately tried to call Hause back, but another employee informed him that Hause was in the front office. Chamberlin left a message that it was "important" that Hause call him back the same day. At the hearing, he explained that he wanted to "finish summarizing the points to make clear what the plan was and to not have this attack on me." There was no testimony regarding whether Hause received Chamberlin's message. However, she did not return Chamberlin's call. Chamberlin tried calling Hause again later the same day but did not reach her. The record does not indicate whether Chamberlin left a voicemail message, or, if so, whether Hause received any such message.

On May 23, 2011, Chamberlin expressed concern to Davey about Hause and suggested that, if she was unable or unwilling to implement Meals Plus, she be temporarily transferred to another school where Meals Plus was already operational. On the same day, Chamberlin met with Hause to discuss the possibility of transferring her to another school site. According to Chamberlin, the proposed transfer arose out of his conversation with Davey and his concern that the Meals Plus roll-out would "be too much" for Hause because she was "under a lot of stress." According to Hause, Chamberlin "threatened" to transfer her involuntarily, if he suspected that she was "sabotaging" the Meals Plus program.

On May 26, 2011, the first day of the Meals Plus program at Niguel Hills, Hause did not comply with Chamberlin's directives. Contrary to his instructions that Hause work inside and

oversee operations, she instead worked outside at the food cart. While at the cart, Hause served both meals and *a la carte* items, which was also contrary to Chamberlain's instructions.

On June 1, 2011, Chamberlin telephoned Hause to discuss the proper protocol for Meals Plus. Chamberlin again directed Hause to work "inside," at the food service windows, rather than at the cart. He also instructed her that only *a la carte* items should be sold from the cart. After some discussion, in which Hause again questioned the wisdom and practicality of the program, she ended the conversation by hanging up the telephone on Chamberlin.

On June 2, the last day of the school year before the summer break, Chamberlin paid an unannounced visit to Niguel Hills to discuss the Meals Plus roll-out with Hause and to determine whether Hause understood and intended to comply with his directives. Chamberlin testified that he did not intend to discipline Hause, even if he learned that she had deliberately sabotaged implementation of the Meals Plus plan at Niguel Hills. When asked whether Hause's apparent defiance was a cause for concern, Chamberlin testified that his focus was on getting Meals Plus operational, and that he could deal with "other things" later.

Shortly before 9:00 am, Chamberlin entered the kitchen area, which was unoccupied, except for Hause, who was busy setting up for breakfast. Chamberlin greeted Hause, who did not acknowledge Chamberlin's greeting.<sup>2</sup> Chamberlin again greeted Hause and stated that he was there to talk with her about his directives regarding Meals Plus. According to Chamberlin, Hause "yelled at" him to "get out of [her] kitchen" and to stop harassing her and the other food service workers at Niguel Hills. Chamberlin responded in what he described as his own "elevated voice," by informing Hause that, as her supervisor, he had every right to be there,

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<sup>2</sup> Chamberlin testified that, because of fans placed over the ovens, "[i]t's loud [in the kitchen] so that you [must] elevate your voice . . . to be heard." It is thus unclear from the record whether Hause heard Chamberlin's initial greeting.

and that he intended to have a conversation with her about whether she understood and was following his directives. Chamberlin testified that Hause walked away from him and into her office, and that, after he stood there for a moment, he followed her into the office and sat down. However, he also admitted that it was "possible," that he had directed her to go into the office but did not remember doing so.

Once in the office, Chamberlin repeated the purpose of his visit. Hause responded by saying that, if this meeting was going to be disciplinary, then she wanted to have a union representative present. Chamberlin stated that he "came here with no intention" of the meeting resulting in disciplinary action, but that he had no objection to the presence of a representative, even if he did not personally see the need for it. Chamberlin also testified that he would have "welcomed" the presence of a CSEA representative at the June 2, 2011 meeting.

After Hause stated that she wanted representation, if the meeting was going to be disciplinary, Chamberlin did not expressly grant her request or permit her to contact Jensen or another CSEA representative. Nor did Chamberlin end the meeting or advise Hause that she could continue the meeting without representation or skip the meeting altogether. Instead, Chamberlin asked Hause, once again, to repeat his directives from the previous day and to indicate whether she understood, and was following those directives. Hause initially refused to answer, but after being asked "possibly three times," she accurately restated Chamberlin's directives and confirmed that she was following them.

Hause then stood up and paced the room while stating her view that the Meals Plus plan "sucks," is unworkable and "ridiculous." In particular, she criticized the program as potentially destructive of food service jobs with no corresponding improvement in service. According to Chamberlin, she asserted that her "ladies" were not going to work that hard. ~~Hause then attempted unsuccessfully to contact Jensen on her cellular telephone. After leaving~~

a message for Jensen that Chamberlin was harassing her and would not leave her office, Hause again yelled that she wanted Chamberlin out of her kitchen immediately.

Once Hause had repeated his directives and confirmed her compliance, Chamberlin said, “great, that’s all I needed to know,” and “[t]hat’s all I came here to find out.” However, Chamberlin remained seated for some time, even after Hause had repeated his directives, because, “as her supervisor,” he did not appreciate being told by a subordinate to leave “her” office. Chamberlin also testified that, after ensuring that his directives were being followed, if “there was some discussion [of those directives],” then he “would listen to her.” At no point during the June 2, 2011 conversation did Chamberlin advise Hause that the meeting was “over” or that she should return to her duties in the kitchen.

After finishing her denunciation of the Meals Plus program, Hause left the food service area and told Niguel Hills Vice Principal Al Rios (Rios) that she was being “harassed” and felt ill. Rios then went to the kitchen, where he informed Chamberlin that Hause was leaving work. Chamberlin contacted Davey to report what had just happened with Hause. After the brief telephone conversation, Chamberlin pulled himself together and took over Hause’s serving duties for the remainder of her shift.

Later that day, Jensen returned Hause’s voice mail message and obtained Hause’s account of the meeting. Jensen then sent an email message to Chamberlin, Davey, and the local president of CSEA, in which he requested, among other things, that when employees request union representation, District managers consider such requests, if they later plan to bring forward issues that allegedly took place during the conversation.

Davey replied to Jensen’s message the same day. Her response did not specifically address Jensen’s request regarding future meetings. It did, however, assert Davey’s view that,

“anytime an employee has requested CSEA representation[,] we have welcomed you to be a part of that process.”

When Hause returned to work on September 7, 2011, the District issued a written reprimand for failure to follow directives, unprofessionalism, and insubordination. The reprimand states that the purpose of the June 2, 2011 meeting was to “monitor the implementation of the directives given the day before.” Among the instances of “unprofessional, disrespectful, insubordinate and willfully disobedient” behavior for which Hause was reprimanded were Hause’s assertion that “this is my operation,” and her “yelling” at Chamberlin to “get out of my kitchen,” after she had expressed her desire for representation and attempted to contact Jensen.

The written reprimand also references several prior events, some of which were not discussed at the June 2, 2011 meeting. Among these prior instances of unacceptable conduct referenced in the written reprimand was the April 21, 2011 email message from Hause referred to above, in which she stated her disagreement with, and refusal to follow, the policy of providing only one meal and one snack to student helpers.

On September 21, 2011, Hause submitted a written response to the reprimand in which she disputed some of the document’s contents. In or about October 2011, Hause also filed a hostile work environment complaint against Chamberlin and Davey.

#### DISCUSSION

Before considering the District’s exceptions, we review the statutory and decisional law governing the representational rights of employees and employee organizations. The representational rights of employees and employee organizations in meetings with management derive from EERA section 3543’s guarantee of employee rights to “participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of

employer-employee relations,” and from section 3543.1’s guarantee of the exclusive representative’s right to represent unit employees in their relations with the public school employer. (EERA §§ 3543, subd. (a), 3543.1, subd. (a);<sup>3</sup> *Sonoma County Superior Court* (2015) PERB Decision No. 2409-C (*Sonoma*), p. 14.<sup>4</sup>) PERB has held that an investigatory or disciplinary interview with the employer falls within the broad definition of “all matters of employer-employee relations,” and that EERA section 3543, subdivision (a), therefore guarantees public school employees representational rights that are at least as broad as those afforded private-sector employees under *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251 (*Weingarten*) and other federal authorities interpreting section 7 of the National Labor Relations Act (NLRA).<sup>5</sup> (*Marin Community College District* (1980) PERB Decision No. 145 (*Marin*), pp. 13-14.)<sup>6</sup>

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<sup>3</sup> See also EERA section 3540, which states that EERA’s purposes include “providing a uniform basis for recognizing the right of public school employees . . . to be represented by [employee] organizations in their professional and employment relationships with public school employers.” As discussed in *Trustees of the California State University* (2014) PERB Decision No. 2384-H, pages 24-25, California courts have repeatedly held that EERA section 3540 is not merely hortatory, but a source of enforceable rights.

<sup>4</sup> Although *Sonoma* is currently under superior court review pursuant to a Petition for Writ of Mandate under California Code of Civil Procedure, section 1085, the Board is unaware of any authority prohibiting it from citing to a Board decision pending review by a superior court.

<sup>5</sup> The NLRA is codified at 29 U.S.C., § 151 et seq.

<sup>6</sup> In *Weingarten*, the Supreme Court affirmed a decision by the National Labor Relations Board (NLRB) that an employer’s failure to grant an employee’s request to have a union representative at an investigative interview unlawfully interfered with the employee’s section 7 right to engage in concerted activities for mutual aid or protection. (*Weingarten, supra*, at p. 256.) Section 7 of the NLRA provides, in pertinent part, that employees “shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” (29 U.S.C., § 157.)

Under *Weingarten*, the employee has a right to the advice and active assistance of the union representative in investigative or disciplinary meetings. (*Id.* at p. 263; *Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d 552, 567-568.) The employer must inform the employee of the nature of any charge of impropriety before the meeting and, if the employee has no opportunity to confer with the representative on the employee's own time before the interview, allow the employee and the representative an opportunity to confer privately about the subject of the impending interview, so that the representative can provide meaningful representation. (*Jurupa Unified School District* (2012) PERB Decision No. 2283 (*Jurupa*), p. 30; *United States Postal Serv.* (2005) 345 NLRB 426, 436-437; *Barnard College* (2003) 340 NLRB 934, 935; *United States Nuclear Regulatory Commission* (2010) 65 FLRA 79, 84-85.) Once an employee has requested representation, it makes no difference whether the request for prior consultation comes from the employee or the representative. (*United States Postal Serv.* (1991) 303 NLRB 463, 467, enforced (D.C. Cir. 1992) 969 F.2d 1064; see also *Fremont Union High School District* (1983) PERB Decision No. 301 (*Fremont*), pp. 7-10.)

While the representative cannot turn the interview into an adversarial proceeding (*State of California (Department of Corrections)* (1998) PERB Decision No. 1297-S, adopting proposed dec. at pp. 16-18), neither may the employer insist that the representative remain silent or take no active role in the meeting. (*Id.* at p. 12; *Southwestern Bell Telephone Co.* (1980) 251 NLRB 612, enforcement den. (5th Cir. 1982) 667 F.2d 470; *United States Postal Serv.* (2007) 351 NLRB 1226, 1226-1227; *Redwoods, supra*, PERB Decision No. 293, p. 9, *affd.* *Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617 (*Redwoods v. PERB.*)) Employees may refuse to attend investigatory or disciplinary interviews where their representational rights are denied without fear of discipline or reprisal from the employer. (*International Ladies' Garment Workers' Union, Upper South*

*Department, AFL-CIO v. Quality Manufacturing Co.* (1975) 420 U.S. 276, 279-281 (*Quality Manufacturing*); *Marin, supra*, PERB Decision No. 145, p. 13; see also *Social Workers' Union, Local 535 v. Alameda County Welfare Department* (1974) 11 Cal.3d 382 (*Social Workers' Union*).

In addition to these so-called *Weingarten* rights, PERB and California courts have recognized that, in at least two respects, the language of EERA is “considerably broader” than the federal law on which *Weingarten* rests. (*Redwoods v. PERB, supra*, 159 Cal.App.3d 617, 623; *Placer Hills, supra*, PERB Decision No. 377, p. 40.) Because EERA guarantees employees a right to representation “in *all* matters of employee-employer relations,” not all meetings with management must conform to the requirements of *Weingarten* before the right to representation attaches. (*Sonoma, supra*, PERB Decision No. 2409-C, p. 8.) California law extends the right of representation to employer-initiated meetings held under “highly unusual circumstances,” *i.e.*, meetings that are not “investigative” or “disciplinary” *per se*. (*Redwoods v. PERB, supra*, 159 Cal.App.3d 617; *Placer Hills, supra*, at pp. 39-40; *Regents of the University of California* (1984) PERB Decision No. 403-H (*Regents*), pp. 9-10; *Regents of the University of California* (1984) PERB Decision No. 449-H, adopting proposed dec. at pp. 133-134; *San Diego Unified School District* (1991) PERB Decision No. 885 (*San Diego*), pp. 66-67.)

Also unlike the federal law on which *Weingarten* is based, EERA provides an *independent* right to *employee organizations* “to represent their members in their employment relations with public school employers.” (EERA, § 3543.1, subd. (b); *Rio Hondo Community College District* (1982) PERB Decision No. 260 (*Rio Hondo*), pp. 3-4.) Once an employee organization has been recognized or certified as the exclusive representative of a bargaining unit, EERA further provides that “only that employee organization may represent that unit [of employees] in their employment relations with the public school employer.” (EERA, § 3543.1,

subd. (b); *Mount Diablo Unified School District, et al.* (1977) EERB<sup>7</sup> Decision No. 44 (*Mount Diablo*), pp. 8-9.)

Thus, unlike the *Weingarten* doctrine, which derives solely from *employees'* section 7 rights to engage in concerted activities “for mutual aid or protection,” under California law, employee organizations possess a *separate*, statutorily-guaranteed right to represent employees in their employment relations. (*Rio Hondo, supra* PERB Decision No. 260, pp. 16-19; *Rio Hondo Community College District* (1982) PERB Decision No. 272, pp. 6-11.)<sup>8</sup> The representational rights of employees *and* employee organizations under EERA are “distinct and separate,” *i.e.*, concurrent, rather than derivative. (*State of California (Department of Corrections)* (1995) PERB Decision No. 1104-S, adopting proposed dec. at p. 12, disapproved on other grounds, as recognized in *Claremont Unified School District* (2014) PERB Decision No. 2357, p. 17, fn. 14; *Redwoods v. PERB, supra*, 159 Cal.App.3d 617, 622.) They exist independently of one another, even when analyzed under the same test or are alleged to have been violated by the same conduct. (*State of California (Department of Parks and Recreation)* (1990) PERB Decision No. 810-S, pp. 6-7; see also *County of Riverside* (2010) PERB Decision No. 2119-M, p. 19; *Newark Unified School District* (1991) PERB Decision No. 864, p. 18; *Clovis Unified School District* (1978) PERB Decision No. 61, p. 3.)

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<sup>7</sup> Before January 1978, PERB was known as the Educational Employment Relations Board or EERB.

<sup>8</sup> Unlike EERA section 3543’s guarantee of employee rights to representation in “all” matters of employer-employee relations, EERA section 3543.1 does not use the word “all” when referring to the rights of employee organizations to represent employees. Nevertheless, we assign no significance to this distinction, as it would seem to contradict the declared purpose of the statute, as set forth in section 3540, and would lead to the anomalous conclusion that exclusively-represented employees have a right to representation in contexts where their designated representative has no parallel right to represent them. (See *State of California (Department of Consumer Affairs)* (2005) PERB Decision No. 1762-S, p. 9.)

When interpreting the California labor relations statutes, PERB may take guidance, as appropriate, from administrative and judicial authorities interpreting analogous provisions of federal labor law. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617 (*City of Vallejo*)). However, to the extent PERB follows *Weingarten* and other non-California authorities, it must harmonize them with the language and purposes of the PERB-administered statutes. Indeed, where the California statutes were clearly intended to serve a similar *purpose* as their federal counterparts, we may follow federal precedent, even in the absence of directly analogous language. (*Ibid.*)<sup>9</sup>

However, where the statutory language is dissimilar, or where the California and federal statutes serve dissimilar purposes, PERB is not constrained by federal precedent. (*Mt. Diablo, supra*, EERB Decision No. 44, pp. 8-9.) Just as PERB is not authorized to re-write statutory language to include rights deliberately omitted by the Legislature (*Regents v. PERB, supra*, 168 Cal.App.3d 937, 944-945), neither may we adopt a statutory construction that disregards express statutory rights as mere surplusage and thereby “ascribes to the Legislature . . . the

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<sup>9</sup> See also *Redlands Teachers Association (Faeth & McCarty)* (1978) PERB Decision No. 72, adopting proposed dec. at p. 4 (federal duty of fair representation (DFR) cases persuasive, despite absence in federal statute of EERA’s express DFR language); *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 311 (*McPherson*) (absent justification, PERB must follow reasoned private-sector authorities defining scope of protected employee conduct); *City of Oakland (Lewis)* (2014) PERB Decision No. 2387-M, pp. 25-26 (absence of NLRA’s employer “free speech” provision in MMBA does not preclude interpretation of MMBA to include such right); *Rio Hondo Community College District* (1980) PERB Decision No. 128, pp. 18-20 (recognizing same employer “free speech” rights under EERA, despite absence of statutory language); *Modesto City Schools* (1983) PERB Decision No. 291, pp. 60-61 (absence of NLRA language regarding employees’ “right to engage in concerted activities” does not preclude interpretation that strikes and strike-related conduct are statutorily-protected by EERA); but cf. *Regents of University of California v. Public Employment Relations Bd.* (1985) 168 Cal.App.3d 937, 944-945 (*Regents v. PERB*) (absence in HEERA of right to represent employees not due to legislative oversight). (The Meyers-Milias-Brown Act (MMBA) and the Higher Education Employer-Employee Relations Act (HEERA) are codified at §§ 3500 and 3560, respectively.)

commission of a meaningless act.” (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 16, citing *Peralta Community College District* (1978) PERB Decision No. 77, p. 8.) Although PERB has followed *Weingarten* and other federal authorities regarding the right of representation (*Redwoods v. PERB, supra*, 159 Cal.App.3d 617, 622), where the California statutes provide for broader or additional rights not found in the federal private-sector law, PERB must follow the intent of the Legislature to effectuate the purpose of the statute.

Having reviewed the relevant statutory and decisional law, we turn to the test for proving a violation of the right to representation in an investigatory or disciplinary meeting and to the issues raised by the District’s exceptions.

#### Legal Standard and the District’s Exceptions

To establish a violation of the right to representation in an investigatory or disciplinary interview, the charging party must demonstrate: (1) the employee or the representative invoked the right to representation on behalf of the employee; (2) for an investigatory meeting; (3) which the employee reasonably believed might result in disciplinary action; and (4) the employer denied that request. (*Lake Elsinore, supra*, PERB Decision No. 1648, p. 5; *Social Workers’ Union, supra*, 11 Cal.3d 382, 386-388.)

#### 1. Whether Hause Effectively Requested Representation.

The District first excepts to the ALJ’s finding that, when Chamberlin arrived at Hause’s worksite on June 2, 2011, Hause “immediately expressed fear of being disciplined and requested CSEA representation.” It is undisputed that, shortly after Chamberlin arrived, Hause said words to the effect of “if this is going to be disciplinary,” that she wished to have representation. The District contends that, because Hause’s statement’s was prefaced by words “If this is going to be disciplinary,” that it was “equivocal and conditional” and therefore insufficient to invoke the right to representation. We disagree.

Following federal precedent, PERB has held that, while an affirmative request for representation must be made (*Elk Grove Unified School District* (1997) PERB Decision No. 1190), it need not be made directly to the employer or phrased in any particular grammatical form. No magic words or specific conduct is required, so long as the employer has reasonable notice under the circumstances of the employee's desire for representation. (*United States Postal Serv.* (2010) 355 NLRB 368, 405, fn. 13; *Climax Molybdenum, supra*, 227 NLRB 1189, enforcement den. (10th Cir.1978) 584 F.2d 360.) There is authority that an employee need not even mention the union and that a request to "have someone there that could explain to me what was happening" may be sufficient to place the employer on notice of the employee's desire for representation. (*Southwestern Bell Tel. Co.* (1977) 227 NLRB 1223; *New Jersey Bell Tel. Co.* (1990) 300 NLRB 42, 49, enforced (3d Cir. 1991) 936 F.2d 144, and cases cited therein.)

*Mammoth Unified School District* (1983) PERB Decision No. 371 (*Mammoth*) is directly on point. There, an employee made a similarly conditional statement that, "if the meeting related to [a] coaching assignment" (which the employee had recently refused to carry out), *then* the employee wished to have a union representative at the meeting. The Board considered this grammatically conditional statement an effective request for representation. (*Id.*, adopting proposed dec. at p. 6, emphasis added.)

The reasons for regarding such grammatically "conditional" or even "interrogative" statements as sufficiently "affirmative" requests for representation should be readily apparent under the circumstances. When an employer convenes an investigatory interview or other meeting occurring under highly unusual circumstances, the employer, rather than the employee, is typically in a better position to know the purpose of the meeting. To insist that employees, with incomplete information about the purpose of a meeting, refrain from using a

grammatically conditional form when communicating their desire for representation seems unnecessarily formalistic and ultimately contrary to the statute's purpose. (*Lake Elsinore, supra*, PERB Decision No. 1648, pp. 8-9.) Even where an employee has sole possession of the sought-after information, such as knowledge of his or her wrongdoing, we fail to see how prefacing a request for representation with the words "if this is going to be disciplinary" would confuse the employer as to the employee's intentions, or otherwise render the request for representation ineffective.

We therefore reject the District's contention that the grammatically "conditional" nature of Hause's statement rendered her request for representation ineffective. So long as the employer is reasonably placed on notice of the employee's desire for representation, grammatical hair-splitting over the "conditional" nature of the request, may not be used to frustrate the purpose of the statutory right to representation.

2. Whether the June 2, 2011 Meeting was "Disciplinary" or "Investigatory."

The District next excepts to the ALJ's finding that the June 2, 2011 meeting was an "investigatory interview" within the meaning of *Weingarten* and applicable California law. It contends that no right to representation arose at the June 2, 2011 meeting, because its purpose was to review operational procedures, and not to investigate wrongdoing or justify possible disciplinary action. It notes that, after Hause raised the topic of representation, Chamberlin expressly assured her that no discipline was contemplated. According to the District, the meeting thus constitutes the kind of "run-of-the-mill shop-floor conversation," involving "the

giving of instructions or training or needed corrections of work techniques,” for which the *Weingarten* doctrine is inapplicable. We disagree with each of these contentions.<sup>10</sup>

2.a. Whether the Employer’s Stated Purpose Determines the Nature of the Meeting.

The District accurately states the federal rule, which has been endorsed by PERB, that the right to representation does not usually apply for “the giving of instructions or training or needed corrections of work techniques.” (*Quality Mfg. Co.* (1972) 195 NLRB 197, 199; *Weingarten, supra*, 420 U.S. 251, 257-258; *Redwoods, supra*, PERB Decision No. 293.) Nor do representational rights attach to meetings where the employee is simply presented with “routine” or “perfunctory documents.” (*Placer Hills, supra*, PERB Decision No. 377.) Even though such meetings may involve some amount of “questioning” in the course of providing instructions or guidance to an employee, such interactions typically do not give rise to a right to representation, because, under such circumstances, “there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview...” and, consequently, there exists “no reasonable basis for [seeking] the assistance of [a] representative.” (*Quality Mfg. Co., supra*, at p. 199; see also *Los Angeles County Office of Education* (1999) PERB

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<sup>10</sup> The ALJ considered Hause’s right to representation solely as a function of whether the June 2, 2011 meeting was “investigatory” or “disciplinary,” within the meaning of *Weingarten* and similar PERB authority. The parties did not raise and the proposed decision did not consider whether, in the absence of a reasonable threat of discipline, the June 2, 2011 meeting might constitute “highly unusual circumstances” within the meaning of *Redwoods v. PERB, supra*, 159 Cal.App.3d 617. Because we agree with the ALJ that the June 2, 2011 meeting was “investigatory,” we need not and do not decide whether the agreement between CSEA and the District regarding Hause’s and CSEA’s rights to notice and representation in meetings with management constituted “highly unusual circumstances.” And, while the right of the exclusive representative to represent unit members in grievances or other meetings initiated by the representative or the employee is well-settled (*Sonoma, supra*, PERB Decision No. 2409-C, pp. 14, 15, 16), neither do we decide here whether PERB has jurisdiction to enforce a collective bargaining agreement purporting to clarify, expand, modify or waive the statutory rights to representation in *employer-initiated* investigations guaranteed by EERA sections 3540, 3543 and 3543.1.

Decision No. 1360; *State of California (Board of Equalization)* (2012) PERB Decision No. 2237-S (*Board of Equalization*).

However, like the federal authorities, PERB and California's courts have also recognized that not every meeting serves a single, uniform purpose. What may begin as a "routine" interaction can transform into an "investigatory" or "disciplinary" interview, *even where no such purpose was intended by the employer*. In such circumstances, the meeting need not be exclusively "investigative" in nature, nor designated as such, so long as it "concerns a subject matter related to disciplinary offenses" (*Quality Mfg. Co., supra*, 195 NLRB 197, 199) and is not "held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision." (*Baton Rouge Water Works Co. (1979)* 246 NLRB 995, 997, cited with approval by PERB in *Rio Hondo, supra*, PERB Decision No. 260, pp. 17-19; see also *Regents of the University of California (Los Alamos National Laboratory)* (2003) PERB Decision No. 1519-H, adopting warning letter at p. 4.)

A conversation between a supervisor and employee aimed merely at correcting technique, increasing production, or improving workplace communication may thus trigger the right to representation, if sufficiently linked to a realistic prospect of discipline stemming from the employee's poor production or history of conflict. (*Lake Elsinore, supra*, PERB Decision No. 1648; *Quazite Corp. (1994)* 315 NLRB 1068, 1069, review den. and remanded on other grounds (D.C. Cir. 1996) 87 F.3d 493, 494; see also *Columbia Portland Cement Co. (1989)* 294 NLRB 410, 413.) As explained in *County of Santa Clara* (2012) PERB Decision No. 2267-M, regardless of how a meeting may be characterized or envisioned by management, if it serves to elicit incriminating evidence with the potential to impact the employment relationship, then it is "investigatory" for the purposes of the representational rights guaranteed by the PERB-administered statutes. (*Id.* adopting proposed dec. at pp.19-20; see also *California*

*State University, Long Beach* (1991) PERB Decision No. 893-H (*CSU Long Beach*);

*San Diego, supra*, PERB Decision No. 885; *Regents, supra*, PERB Decision No. 403-H.)

Similarly, the right to representation does not apply when the sole function of a meeting is to impose a *predetermined* disciplinary action. (*Placer Hills, supra*, PERB Decision No. 377; *Texaco, Inc.* (1980) 251 NLRB 633, 635-636, enforced (9th Cir. 1981) 659 F.2d 124.) However, unless an employer's questioning is "merely rhetorical," or only serves as "one last chance to comply" with a previously-issued directive, the right to representation attaches whenever the employer goes beyond merely informing the employee of a previously-made disciplinary decision. (*Rio Hondo, supra*, PERB Decision No. 260; *Titanium Metals Corp.* (2003) 340 NLRB 766, enforced in pertinent part (D.C. Cir. 2004) 392 F.3d 439; *General Die Casters, Inc.* (2012) 358 NLRB No. 85; cf. *San Bernardino County Public Defender* (2009) PERB Decision No. 2058-M (*San Bernardino*)). Thus, where an employer informs an employee of a disciplinary action, but then seeks *additional information* in support of discipline; attempts to induce an admission of wrongdoing; or asks the employee to sign a statement whose meaning is incriminating or unclear under the circumstances, the full panoply of representational rights apply. (*Rio Hondo, supra*, PERB Decision No. 260; *Trustees of the California State University* (2006) PERB Decision No. 1853-H; *University of California (Lawrence Berkeley Laboratory)* (1993) PERB Decision No. 998-H; *Los Banos Unified School District* (2007) PERB Decision No. 1935.)<sup>11</sup>

In light of the above precedent, we think the District focuses too narrowly on Chamberlin's testimony that he did not regard the June 2, 2011 meeting as having an investigatory or disciplinary purpose, rather than on the overall context in which the meeting

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<sup>11</sup> See also *General Die Casters, supra*, 358 NLRB No. 85, pp. 1, 11-13; *Becker Group, Inc.* (1999) 329 NLRB 103, 107; *Texaco, Inc., supra*, 251 NLRB 633, 636.

occurred. Crucial to that context are Hause's ongoing criticism of Meals Plus as a misguided threat to the job security of food service workers, the resulting "strained" relationship between Chamberlin and Hause after her previous "argumentative" and "belligerent" comments, and her apparent refusal to follow Chamberlin's directives on the first day of Meals Plus at Niguel Hills. Chamberlin testified that, even by the end of the June 1, 2011 telephone conversation, Hause still had not demonstrated to his satisfaction that she understood and would follow his directives. In fact, Chamberlin's testimony was that Hause "never acknowledged that there was an acceptance of [his directives] or that they were being put in place or in practice." Instead, Hause again launched into "another brutal attack" about "how horrible the program was."

By June 2, 2011, it was thus already apparent that Chamberlin and Hause disagreed sharply over the wisdom and practicality of the Meals Plus program. In this context, the subject of Hause's understanding of, and cooperation with, the Meals Plus roll-out was not simply a "run-of-the-mill" shop floor issue to be solved with additional "training" or friendly suggestions for improving her work technique. At stake was whether Hause would put aside her frequently-expressed opposition to the program and follow the instructions of her immediate supervisor, or whether she would defy those instructions and face disciplinary action.

There is no dispute that, during the June 2, 2011 meeting, Chamberlin asked Hause, repeatedly, whether she understood and could repeat his directives regarding Meals Plus. Chamberlin also asked Hause whether she was following those directives. Regardless of whether Chamberlin considered disciplinary action imminent or even likely at this point, the purpose of his questioning was obviously to determine whether Hause understood his directives, and *whether she intended to comply with* those directives, particularly in light of her previous statements that she "essentially . . . was not going to do this." The District's written reprimand

admits that the purpose of the June 2, 2011 meeting was to “monitor the implementation of the directives given the day before.”<sup>12</sup>

In this context, Chamberlin’s assurance to Hause that he did not intend to discipline her does not fundamentally alter the significance of Chamberlin’s questioning or the circumstances surrounding the meeting. Even accepting Chamberlin’s testimony that he did not plan to take disciplinary action when he convened the meeting,<sup>13</sup> he clearly viewed the meeting as an opportunity for Hause to provide *some* possible explanation for not following his directives on the first day of the Meals Plus roll-out. More importantly, it was an opportunity for her to indicate that she understood *and intended to carry out* those directives.

Hause also testified that, at the June 2, 2011 meeting, Chamberlin repeatedly asked whether she even knew what a directive is and then, mockingly, asked her to explain her understanding of the term. For the reasons set forth in the proposed decision, we generally credit Chamberlin’s account of the June 2, 2011 meeting as more consistent, complete and credible than Hause’s. However, it seems likely that Chamberlin *did* ask Hause at least some version of this question since, by his own account, he was unsure whether Hause appreciated the distinction

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<sup>12</sup> While the District’s characterization of the meeting has no probative value as to what *Hause* reasonably believed at the time she requested representation (see discussion below of “after the fact reasoning”), it may serve as reliable evidence of what *the District intended* to accomplish by its agent’s unannounced visit to Hause’s worksite, and thus as an *admission* that the meeting was “investigative” in nature. (See Evid. Code, §§ 1221, 1222, 1271, 1280; *O’Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 572; *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 315-327.)

<sup>13</sup> Under the federal decisional law relied on by the District, a manager’s stated purpose for calling a meeting, *even when credited*, is not dispositive of whether the meeting is, in fact, “investigatory” in nature. For example, in *Good Hope Refineries, Inc.* (1979) 245 NLRB 380, the employer’s personnel manager began a meeting by stating: “[W]ell, you’re not here for a reprimand, I just want to know why you were off those 3 days.” Because the employer was effectively asking the employee for his explanation of possible wrongdoing, the NLRB concluded that the meeting was “investigatory” within the meaning of *Weingarten*. (*Good Hope, supra*, at p. 385, fn. 1.)

between a directive and a mere suggestion. However characterized, Chamberlin's questioning was designed to get Hause's "side of the story" as to whether she would comply with Chamberlin's instructions, and it thus had an undeniably "investigatory" element under PERB and federal precedent. (*CSU Long Beach, supra*, PERB Decision No. 893-H, citing with approval, *Baton Rouge Water Works, supra*, 246 NLRB 995; see also *El Paso Elec. Co.* (2010) 355 NLRB 428, 441.)

This case is thus distinguishable from *San Bernardino, supra*, PERB Decision No. 2058, where the point of the employer's question was not "fact-finding," but to provide one last chance to comply with a previously-issued directive before facing disciplinary action for insubordination. Here, by contrast, Chamberlin testified that he genuinely did not know whether Hause fully understood, and intended to comply with, his directives, and that he planned to meet with Hause in person to find out. When viewed in the overall context of Hause's ongoing criticism of Meals Plus and her apparent defiance of Chamberlin's directives for implementing the program, his questions about whether Hause understood the directives *and whether she intended to comply with them* were aimed at eliciting information that could impact the employment relationship. (*County of Santa Clara, supra*, PERB Decision No. 2267-M; *CSU Long Beach, supra*, PERB Decision No. 893-H.) We therefore agree with the ALJ that the June 2, 2011 meeting was "investigatory."

2.b. Whether the Subject of the Interview and the Resulting Discipline Must be Related.

As an additional or alternative argument, the District also contends that the right to representation does not arise when the subject of the interview is "completely unrelated" to the reason(s) ultimately relied on for issuing discipline. Again, we disagree. As illustrated by the *Weingarten* decision itself, whether an employer's disciplinary action is related to the subject

of the investigation, or whether, in fact, any disciplinary action even results from the investigation, is not determinative of an employee's right to representation during the interview.

In *Weingarten*, a retail store chain offering various food services, instructed its loss prevention officials to question a salesperson, Leura Collins (Collins), after receiving a report from another employee that Collins had purchased a box of chicken that sold for \$2.98, but had placed only \$1 in the cash register. Collins, whose repeated request for union representation were denied, admitted that she had purchased four pieces of chicken, for which the price was \$1, but that, because the store was out of the small boxes typically used for such purchases, she put the chicken into a larger-sized box used for packaging greater quantities. After confirming Collins' account with the informant, the employer apologized to Collins for any inconvenience and informed her that the matter was closed. (*Weingarten, supra*, 420 U.S. 251, 254-255.)

Overcome with relief, Collins burst into tears and blurted out that the only thing she had ever taken from the store without paying for was the free lunch the employer offered to its employees. Because the store at which Collins worked had no formal "free lunch" policy for employees, the employer resumed its interrogation of Collins, again without regard to her request for representation, but on the now entirely separate subject of whether she had taken "free" lunches without authorization. During the course of this second interrogation, the employer prepared a written statement for Collins to sign, admitting that she owed the store approximately \$160 for unauthorized "free" lunches. (*Weingarten, supra*, 420 U.S. 251, 255-256.)

Upon further investigation, it emerged that Collins had transferred from another store where the employer did indeed offer a "free lunch" to employees, and that, in the absence of any clear policy on the subject at her current worksite, Collins, and virtually every other employee in her department, including supervisors, routinely took lunches without compensation. As with

the previous matter of suspected cash register irregularities, the employer terminated its investigation of Collins for theft of food, without taking disciplinary action.

The Supreme Court held that the employer committed an unfair labor practice by persisting with its investigation after Collins had requested the assistance of a union steward. The Court reasoned that an individual employee without representation “may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors,” whereas a “knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.” (*Weingarten, supra*, 420 U.S. 251, 263.) Thus, the Court recognized the possibility that an unrepresented employee, through inadvertent admissions, incomplete answers, or other “suspicious” behavior might widen or change the scope of an employer’s investigation into matters entirely unrelated to the subject that had prompted the interview in the first place.

Yet, just as clearly, the *Weingarten* Court did not intend to make the right to representation depend on whether the employer ultimately takes disciplinary action, or, if so, whether such action is directly related to the subject of the investigation. In fact, in *Weingarten*, Collins was *never* disciplined at all, yet the Court affirmed the NLRB’s decision that the employer had unlawfully denied her repeated requests for representation. (*Weingarten, supra*, 420 U.S. 251, 255-256; see also *General Die Casters, supra*, 358 NLRB No. 85, p. 1.) We likewise reject the District’s contention that the right to representation under EERA cannot apply, simply because the employer’s questions, or the employee’s responses, are “completely unrelated” to the reasons cited for subsequent disciplinary action.

3. Whether Hause Reasonably Feared Discipline on June 2, 2011.

The District offers several arguments against the ALJ's determination that Hause's "strained relationship" and "acrimonious discussions" with Chamberlin provided a reasonable basis for her to believe that his unannounced visit to her worksite on June 2, 2011 might result in discipline. Primarily, the District contends that Hause could not reasonably have believed discipline would ensue from this meeting, because Chamberlin assured her that he did not intend to take disciplinary action. It also argues that the proposed decision applies "flawed, after-the-fact reasoning" by considering the fact that Hause ultimately was issued a written reprimand for her "failure to follow directives and insubordination," as support for the reasonableness of her belief *at the time* of the June 2, 2011 meeting that discipline may ensue.

Additionally, the District objects to the ALJ's reliance on two NLRB decisions, *Northwest Engineering Co.* (1982) 265 NLRB 190 (*Northwest*) and *AAA Equipment Serv. Co.* (1978) 238 NLRB 390 (*AAA*). The District contends that these decisions either do not support the propositions of law for which they were cited in the proposed decision, and/or that they are no longer good law in the private sector.<sup>14</sup> Specifically, the District argues that the ALJ has misstated the *Weingarten* rule by relying on the intermediate decision of an NLRB ALJ in *Northwest*, rather than on the NLRB's subsequent majority opinion, which reached a different result. The District also contends that any reliance on *AAA* is improper, because, on review of

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<sup>14</sup> Although much of the District's argument against the proposed decision's reliance on *Northwest* and *AAA* appears in its discussion of whether the June 2, 2011 meeting was investigatory in nature, the District also argues that "the proposed decision relies on an erroneous (and overturned) legal proposition that a history of contentious interactions between an employee and a supervisor may provide the basis for finding there is a reasonable belief [that] a meeting between the two is disciplinary in nature." While we address the ALJ's reliance on overturned federal authority in this section of the decision, it should be apparent from the discussion that follows that we find the District's argument on this point equally unpersuasive with respect to whether the ALJ appropriately found the June 2, 2011 meeting to be "investigatory" in nature.

the NLRB's decision in that case, the United States Court of Appeal for the Eighth Circuit disagreed with the NLRB's application of *Weingarten* and denied enforcement. The District therefore urges PERB to adopt the view of the United States Courts of Appeal for the Eighth and Ninth Circuits that discipline must be "probable" or "seriously considered" by the employer before an employee may reasonably believe that it may result from the interview. We address each of these arguments.

3.a. Whether the ALJ's Reliance on Rejected Federal Authority is Reversible Error.

We first consider the District's argument that the ALJ committed reversible error by relying on the NLRB's decision in *AAA*, *supra*, 238 NLRB 390, because that decision was later reversed and denied enforcement by the United States Court of Appeals for the Eighth Circuit. We reject this argument, because it relies on a misunderstanding of the relationship of California statutory and decisional law to federal private-sector authority. Although California has generally "imbibed the federal policy, as it applies to the scope of representation" (*Redwoods v. PERB*, *supra*, 159 Cal.App.3d 617, 624), the representational rights of public-sector employees in California, and of employee organizations to represent them, have *statutory* bases and *judicial* approval which are independent from, and broader than, the "mutual aid or protection" language of section 7 of the NLRA on which *Weingarten* was decided. (*Social Workers' Union*, *supra*, 11 Cal.3d 382, 384; *Redwoods*, *supra*, PERB Decision No. 293, p. 6; *Redwoods v. PERB*, *supra*, 159 Cal.App.3d 617, 623; *Placer Hills*, *supra*, PERB Decision No. 377, p. 40.) By choosing to follow federal authority on a particular issue, PERB is not automatically bound by subsequent developments in federal law on that point. Thus, the determinative issue is not whether federal

cases relied on by the ALJ remain good law in the private sector, but whether they are consistent with the language and purposes of the PERB-administered statutes.<sup>15</sup>

In AAA, an employee who had missed work the previous day was asked by his foreman about the reason for his absence. Believing he had complied with the collectively-bargained procedure for calling in sick, and had thus already discharged any duty to explain the absence, the employee responded that, "It's none of anybody's fucking business what I do when I take off." The foreman stated that, if asked by a manager, he would have to report what the employee had said. The employee said, "I don't give a fuck what you does. . . . It's none of their fucking business or yours either one" and then asserted that, "the next time you talk to me, I want my shop steward."

The following day, a manager approached the employee to discuss both the reason for his absence and the disrespectful manner in which he had addressed the foreman. However, before the manager could state the purpose of the conversation, the employee shouted that he would not participate in the discussion without a shop steward. The manager repeated several times that he wanted to talk to the employee, while the employee continued yelling that he wanted his shop steward. Eventually realizing that the manager would not postpone the

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<sup>15</sup> We do not adopt the proposed decision to the extent it holds that the right to representation "is derived from *Weingarten*." We regard the *Weingarten* line of cases under federal law as illustrative, but not exhaustive, of the representational rights of employees under California statutory and decisional law. (*Rio Hondo, supra*, PERB Decision No. 260, pp. 16-17.) Moreover, the federal private-sector authorities offer no guidance whatsoever regarding the separate statutory right of *employee organizations* to represent employees in such proceedings, which has no counterpart in the NLRA. (*Rio Hondo; Redwoods v. PERB, supra*, 159 Cal.App.3d 617, 622.) It is therefore not entirely accurate to say that "there is no violation of [the right to representation] when the employee fails to affirmatively request representation at the meeting," inasmuch as the employee organization may convey the request on behalf of the employee (*Fremont, supra*, at pp. 9-10) and, even under *Weingarten*, "it makes no difference" whether the employee or the representative invokes representational rights. (*United States Postal Serv., supra*, 303 NLRB 463, 467.)

conversation until a steward arrived, the employee turned to walk away. The manager told the employee, that “if you walk off and leave me here and refuse a direct order, you are terminated.” The employee said, “I’m getting my shop steward, fuck you” and walked away. He was summarily fired for walking away while his manager was trying to speak to him. (AAA, *supra*, 238 NLRB 390, 395.)

The NLRB held that the employee’s termination was unlawful because he was denied the right to representation pursuant to *Weingarten*. The NLRB’s decision thus stands for the proposition that prior events, such as a “heated verbal exchange” with a coworker or supervisor, may provide a reasonable basis for an employee to believe that discipline or other adverse consequences may follow, even before the purpose of the interview has been revealed to the employee. (AAA, *supra*, 238 NLRB 390, 390-391; see also *Lennox Industries, Inc.* (1979) 244 NLRB 607, 607-608 (*Lennox*), enforced (5th Cir. 1981) 637 F.2d 340; *Brown & Connolly, Inc.* (1978) 237 NLRB 271, 286, enforced (1st Cir. 1979) 593 F.2d 1373; and *State of California (Department of Social Services)* (2009) PERB Decision No. 2072-S (*Social Services*), p. 30.)

On review by the Eighth Circuit Court of Appeal, the NLRB’s decision in AAA was reversed and enforcement of its order that the terminated employee be reinstated was denied. In the view of the Eighth Circuit Court of Appeal, the NLRB’s decision improperly expanded employees’ *Weingarten* rights, because the employee was not terminated for refusing to meet without representation but because he walked away before the manager could even explain the purpose of the interview or provide any other grounds on which the employee might *reasonably* anticipate that the interview would result in discipline. The Eighth Circuit Court also agreed with the standard previously announced by the Ninth Circuit Court of Appeal whereby the prospect of disciplinary action must be “probable” or “seriously considered” by the employer before an employee’s “latent” right to representation “matures.” (AAA

*Equipment Service Co. v. NLRB* (8th Cir. 1979) 598 F.2d 1142, 1144-1146; see also *Alfred M. Lewis, Inc. v. NLRB* (9th Cir. 1978) 587 F.2d 403, 411.)

The District argues that the ALJ improperly relied on AAA, because that decision was reversed, and urges PERB to formally adopt the view of the Court of Appeal for the Eighth and Ninth Circuits, that discipline must be “probable” or “seriously considered” before an employee may hold a “reasonable belief” that discipline might result from the investigatory interview. However, we do not regard the ALJ’s reliance on AAA in this instance as a reversible error, solely because that decision was reversed and denied enforcement.

Although not discussed in the District’s brief, the view among the federal courts on this issue is not unanimous. While the Eighth and Ninth Circuits Courts of Appeal have rejected the NLRB’s interpretation, other federal courts of appeal, including those for the Fifth Circuit and for the District of Columbia Circuit, have endorsed the NLRB’s view that the reasonableness of an employee’s belief that discipline might result from an interview may turn on the employee’s history or previous communications with management. (*Lennox Industries, Inc. v. NLRB* (5th Cir. 1981) 637 F.2d 340, 344 (*Lennox*); *Internal Revenue Serv., Washington, D. C. v. Federal Labor Relations Authority* (D.C. Cir. 1982) 671 F.2d 560, 563.)

In *Lennox Industries, Inc.*, *supra*, 244 NLRB 607, the NLRB held that even when not accompanied by the threat of discipline, an employer’s accusation that an employee has engaged in misconduct may be sufficient for the employee to invoke his or her right to representation, because the accusation creates an expectation that the employee will respond, rather than permit his or her silence to be perceived as an admission of guilt. (*Id.* at pp. 608-609.) In affirming the NLRB’s interpretation of *Weingarten*, the Fifth Circuit Court of Appeal observed that one purpose of the interview may be to decide whether discipline is an option to be seriously considered. (*Lennox, supra*, 637 F.2d 340, 344.)

Likewise, “an interview in which work-related questions are asked of an employee, but which the employer does not intend to result in discipline may nevertheless result in discipline if the employee surprises the employer with an answer which the employer finds unsatisfactory or threatening.” (*Ibid.*; see also *Weingarten, supra*, 420 U.S. 260.) Thus, “even if the employer had previously decided that discipline would definitely not result from the interview in question, information could be elicited at that interview which might enable the employer to build a case against the employee, culminating in discipline at some later date.” (*Lennox, supra*, 637 F.2d 340, 344.) Because the *Weingarten* rule was specifically fashioned to protect “fearful” or “inarticulate” employees during work-related interviews (*Weingarten, supra*, at pp. 262-263; see also *Penn-Dixie Steel Corp.* (1980) 253 NLRB 91, 93-96 (*Penn-Dixie*)), the *Lennox* Court and other authorities have rejected the narrower view adopted by the Eighth and Ninth Circuits and urged here by the District. (See also *Internal Revenue Serv. v. FLRA, supra*, 671 F.2d 560, 563.)

In addition to the split of authority among the federal judiciary, there remains also the view of the NLRB itself. The NLRB is the administrative body charged with interpreting the federal labor relations statutes governing most private-sector employees. Its establishment and Congressionally-declared purpose as the expert authority on private-sector labor relations reflects a strong federal policy and long-standing recognition, dating back to the early 20th Century, that the judiciary has no special expertise in collective bargaining and labor relations matters. (29 U.S.C. § 160, subd. (a).)<sup>16</sup>

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<sup>16</sup> Even before passage of the NLRA in 1935, Congress expressed great concern over the judiciary’s competence in regulating labor relations. For example, the Clayton Act of 1914 (29 U.S.C., § 52), removed federal court jurisdiction to use antitrust laws to regulate unionization and other concerted employee activities. In 1932, Congress enacted the

Thus, the fact that one or more federal courts may disagree with the NLRB on a particular issue does not mean that the NLRB must abandon its position. Because it is charged with the uniform and orderly administration of federal labor law *in all circuits*, in each instance when a federal court takes a view contrary to that of the NLRB, the agency must determine for itself whether to acquiesce or to hold fast to its position, until circumstances change or the disagreement is resolved by the U.S. Supreme Court. (*Iowa Beef Packers, Inc.* (1963) 144 NLRB 615, 616.) As a result, it is not uncommon for the NLRB to continue to adhere to a particular position, even after it has been rejected by one or more of the federal courts.

Such is to the case here, as the NLRB has not acquiesced to the view of the Eighth and Ninth Circuits. Despite the passage of several decades, NLRB precedent remains that the particular circumstances of each case, which may include the employee's disciplinary history or previous communications with management, determine the reasonableness of the employee's belief that discipline may ensue. (See, e.g., *Good Hope Refineries, Inc.* (1979) 245 NLRB 380, 383-384, enforced (5th Cir. 1980) 620 F.2d 57, cert. den. (1980) 449 U.S. 1012; *Southwestern Bell Tel. Co.* (2002) 338 NLRB 552, 557; cf. *Amoco Chemicals Corp.* (1978) 237 NLRB 394, 396-397; and *Board of Equalization, supra*, PERB Decision No. 2237-S.)

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Norris-La Guardia Act (29 U.S.C., §§ 101 et seq.), which also deprives federal courts of jurisdiction to grant injunctive relief in labor disputes, except in limited circumstances. The purpose of the Norris-LaGuardia Act was to protect the rights of labor, which Congress thought it had formulated in the section of the Clayton Act restricting injunctions in labor cases, but which had been frustrated by the federal courts. (*New Negro Alliance v. Sanitary Grocery Co.* (1938) 303 U.S. 552, 562-63; *United States v. Hutcheson* (1941) 312 U.S. 219, 235-236 [reviewing legislative history]; see also section 301 of the Labor Management Relations Act [granting federal courts only limited jurisdiction to enforce "no strike" clauses and arbitration provisions of collective bargaining agreements] and *Boys Markets, Inc. v. Retail Clerk's Union, Local 770* (1970) 398 U.S. 235, 238; and, generally, Robert A. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* (West, 1976), pp. 2-5.)

The rule is the same in the federal public sector. Even a government employer's promise of immunity from criminal prosecution will not necessarily negate the reasonableness of an employee's belief that an interview may result in discipline and that union representation is therefore justified at the investigatory interview. (*American Federation of Government Employees, Local 2544 v. Federal Labor Relations Authority* (D.C. Cir. 1985) 779 F.2d 719, 724-727, reversing and remanding *United States Immigration & Naturalization Serv., San Diego, California & American Federation of Government Employees, AFL-CIO, Local 2544* (July 24, 1984) 15 FLRA 383, 385, on remand *United States Immigration & Naturalization Serv., San Diego, California & American Federation of Government Employees, AFL-CIO, Local 2544* (Apr. 7, 1986) 21 FLRA 240, 241.) Even the fact that the interview may overlap with a criminal investigation does not alter the result. (*Federal Labor Relations Authority, supra*, 779 F.2d 719, 730.)

Like its counterparts in the federal private and public sectors, PERB has also held that an employer's partial or ambiguous assurance that no discipline is intended will not suffice to dispense with an employee's otherwise effective request for representation at an investigatory interview. (*Mammoth, supra*, PERB Decision No. 371; *Lake Elsinore, supra*, PERB Decision No. 1648.) In each case, the reasonableness of the employee's request will turn on the totality of circumstances, which may include the employee's history and previous communications with management on matters related to the subject of the interview. (*State of California (Department of Social Services)* (2009) PERB Decision No. 2072-S, adopting proposed dec. at pp. 30-31.) Thus, contrary to the District's contention, the fact that the NLRB's decision in AAA was rejected by a federal appellate court does not mean that *the principle* for which that case stands is without support by other authorities.

More importantly, AAA's rejection by a federal court does not automatically dispose of its reasoning nor affect whether PERB may rely on such reasoning when interpreting California law. (*City of Vallejo, supra*, 12 Cal.3d 608, 611.) Regardless of any disagreement between the NLRB and the federal judiciary, or among the federal courts themselves, the touchstone for whether private-sector decisional law or any other authority is applicable to the PERB-administered statutes remains whether the underlying *reasoning* is consistent with the language and policies of the California statutes. (*Id.* at p. 611; *McPherson, supra*, 189 Cal.App.3d 293; *City of Oakland (Lewis), supra*, PERB Decision No. 2387-M, pp. 25-26; *Modesto City Schools, supra*, PERB Decision No. 291, pp. 60-61.)

In the present case, the principle of law for which AAA was cited by the ALJ is consistent with the language and declared purposes of EERA, including the broadly-worded right of employees to participate in employee organizations "for the purpose of representation on all matters of employer/employee relations," and the corollary right of employee organizations to "represent their members in their employment relations" with public school employers. (EERA, §§ 3543, subd. (a), 3543.1, subd. (a).) This principle is well established in PERB's decisional law. In *Mammoth, supra*, PERB Decision No. 371, the Board endorsed the objective standard used in the private sector for evaluating the reasonableness of an employee's belief that discipline or other adverse consequences could ensue from an investigative interview. In *Social Services, supra*, PERB Decision No. 2072-S, the Board applied that standard to conclude that the circumstances leading up to an investigatory interview, including an employee's record of counseling and the complaints of coworkers against him, may provide a reasonable basis to suspect that an interview on the same or related matters will "set the stage for formal discipline." (*Id.* at pp. 30-31.) Thus, we agree with the ALJ's conclusion that the history of "acrimonious discussions" between Hause and Chamberlin regarding Meals Plus,

and her apparent defiance of Chamberlin's directives for implementing the program, provided a reasonable basis for Hause to believe that the June 2, 2011 meeting on the same subject might result in discipline. This conclusion is supported by the evidence and consistent with applicable law.

For similar reasons, we do not regard the ALJ's reliance on the reasoning of an intermediate decision in *Northwest* as fatal to the proposed decision, even if that reasoning was later rejected by a majority of the NLRB. The proposition for which the *Northwest* ALJ's decision was cited in the present case may be stated as follows: a meeting where some "give and take" between an employee and management occurs on matters that may affect the employment relationship constitutes an "investigatory interview." The same rule has been repeatedly endorsed in PERB decisional law, including *CSU Long Beach, supra*, PERB Decision No. 893-H and *Placer Hills, supra*, PERB Decision No. 377, both of which are also cited in the proposed decision's discussion of this point. (See also *Regents, supra*, PERB Decision No. 403-H, p. 10; and *Baton Rouge Water Works, supra*, 246 NLRB 995, cited with approval by PERB in *Rio Hondo, supra*, PERB Decision No. 260, pp. 17-18; and, *Quality Manufacturing, supra*, 195 NLRB 197, 199.) We therefore reject the District's contention that the ALJ's reliance on *the reasoning* of overturned federal authorities is necessarily reversible error, because the ALJ *also* relied on controlling PERB authority for the same point of law. (*Rio Hondo Community College District* (2013) PERB Decision No. 2313, p. 21.)

3.b. Whether PERB Should Follow the Eighth and Ninth Circuit Test for Evaluating the "Reasonableness" of an Employee's Fear of Discipline.

For both policy and practical reasons, we also decline the District's invitation to follow the view of the United States Courts of Appeal for the Eighth and Ninth Circuits. Our policy concerns are essentially those already identified in the discussion of *Lennox* and *Weingarten*

above. Like the *Weingarten* rule under federal law, the statutory right to representation under EERA and the other PERB-administered statutes is designed, in part, to protect “fearful” or “inarticulate” employees from their own unwitting admissions, obtained without the benefit of representation. (*Weingarten, supra*, 420 U.S. 251, 263; *Lake Elsinore, supra*, PERB Decision No. 1648, pp. 8-9; *Social Workers’ Union, supra*, 11 Cal.3d 382, 384; *Redwoods, supra*, PERB Decision No. 293, p. 7.) Because a meeting with management whose purpose is to elicit damaging facts from the employee has the potential to impact the employment relationship, denying an employee the assistance of the employee organization frustrates the statutory purposes of representation. (*Board of Equalization, supra*, PERB Decision No. 2237-S, p. 7.) Whether discipline seems “probable” or has been “seriously considered” by the employer at the outset of a meeting may have little or no bearing on how the meeting unfolds and thus, on whether an employee’s fear of discipline or other adverse consequences is “reasonable.” (*Lake Elsinore, supra*, PERB Decision No. 1648, p. 8; see also *Fremont, supra*, PERB Decision No. 301.)<sup>17</sup>

There are also conceptual and practical problems with the standard urged by the District. Just as “any rule that requires a probe of an employee’s subjective motivations” must be rejected as “an endless and unreliable inquiry” (*Weingarten, supra*, 420 U.S. 251, 257, fn. 5; see also *Mammoth, supra*, PERB Decision No. 371, proposed dec. at pp. 32-33), the same may be said about evaluating the reasonableness of an employee’s belief, *based on the subjective*

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<sup>17</sup> We do not suggest that Hause’s opposition to the Meals Plus program, or the manner in which she expressed that opposition, or her demeanor towards her supervisor was “reasonable.” Instead, the inquiry here is whether, when Hause made her request for union representation was it reasonable under the circumstances for her to believe that disciplinary action could ensue from the June 2, 2011 meeting with Chamberlin. Given what had transpired between Hause and Chamberlin leading up Hause’s request for representation on June 2, 2011, we agree with the ALJ that it was “reasonable” for Hause to believe that she might face disciplinary action.

*intentions of the employer.* (Consolidated Edison Co. of New York, Inc. (1997) 323 NLRB 910, 910-911; see also *NV Energy, Inc. & Arthur Goodspeed* (2010) 355 NLRB 41.) An employer's assurance that no discipline is contemplated may be *one* circumstance to consider when evaluating the reasonableness of an employee's request for representation (*Barstow Unified School District* (1996) PERB Decision No. 1164), but it cannot be *the sole* determinate. (*Lake Elsinore, supra*, PERB Decision No. 1648, pp. 5-6, and cases cited therein; *Mammoth, supra*, PERB Decision No. 371.)

3.c. Whether Employer Assurances Dispose of any "Reasonable" Fear of Discipline

Similar to its argument *above* that the employer's purpose in calling a meeting determines whether it is "investigatory" or "disciplinary," the District urges PERB to accept Chamberlin's assurance that he did not intend for the June 2 meeting to result in discipline, *and to ignore all other circumstances*. Although we generally credit Chamberlin's account of the June 2, 2011 meeting as more consistent and credible than Hause's, we do not accept the District's argument that, simply because Chamberlin reassured Hause that he did not come to her worksite with the intention of taking disciplinary action, that therefore even *the possibility* of discipline was so remote as to make Hause's request for representation unreasonable under the circumstances.<sup>18</sup> As explained above, notwithstanding Chamberlin's assurances to the contrary,

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<sup>18</sup> Nor, do we read more into Chamberlin's testimony than what was actually said. Chamberlin testified that, until the roll-out had been completed at all twelve middle schools under his supervision, the overriding concern was to make the transition to Meals Plus as smooth as possible. When questioned about the belligerent tone used by Hause with Chamberlin, and about her apparent refusal to follow his directions on the first day of the Meals Plus roll-out, Chamberlin did not testify that no disciplinary action was contemplated. Instead, he responded that "other things" could be dealt with "at another time." Although he testified that he had not planned to discipline Hause on June 2, 2011, even if she had deliberately sabotaged the Meals Plus roll-out at Niguel Hills, he did not indicate that she would not be disciplined at some point for her actions leading up to the roll-out, and it stretches credulity to believe that, after being "berated" and hung-up on by Hause, that Chamberlin had not at least considered the possibility

other circumstances were present which made discipline or other adverse action a realistic possibility, including Hause's strident opposition to Meals Plus, her apparent disregard of Chamberlin's directives, and the fact that the subject of the interview was whether Hause understood *and would comply with* Chamberlin's directives.<sup>19</sup> Even crediting Chamberlin's testimony that he had not yet considered disciplinary action, under the circumstances, Hause may have nonetheless reasonably believed that her pattern of resistance to the Meals Plus program "could end up written down . . . and possibly . . . end up somewhere" for further action at a later date. (See *Mammoth, supra*, PERB Decision No. 371.)<sup>20</sup>

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of issuing a written reprimand, once the roll-out was complete and he could turn his attention to "other things."

<sup>19</sup> While the District criticizes the ALJ's reliance on an interim decision in *Northwest, supra*, 265 NLRB 190, the majority opinion in *Northwest* also offers little support for the District's position. In *Northwest*, a divided NLRB held that, under all the circumstances present, an employee, who was disciplined for calling a manager an "asshole" at a meeting of all employees could not have held a reasonable fear that the meeting would result in discipline, and was therefore not entitled to representation. Although the NLRB was divided over whether the meeting itself was "investigatory" and whether employees who had been questioned the previous day in the presence of a steward could reasonably fear discipline at the meeting the following day, *both* the majority and dissenting opinions *agreed* that the appropriate test for making such determinations was an analysis of all the circumstances present, and *not* an exclusive focus on whether the employer had initiated the meeting with assurances that the meeting was not investigatory or disciplinary. For the majority and dissenting views, compare *Northwest, supra*, at pages 190-191 with pages 192-194.

<sup>20</sup> The District similarly contends that Hause should have no right to representation in the present case, because any "reasonable belief" she held as to the likelihood of discipline was due to her own misconduct, including her "unprofessional" and "disrespectful" treatment of her supervisor both before and during the June 2, 2011 meeting, as opposed to Chamberlin's purpose in convening the meeting. However, there is no rule stating that an employee's previous conduct, including misconduct, cannot provide the basis for a reasonable belief that discipline or other adverse consequences may result from a meeting with management. (*Mammoth, supra*, PERB Decision No. 371; *Social Services, supra*, PERB Decision No. 2072-S.) To hold otherwise would require employees to forfeit their statutory rights to representation based on past conduct.

3.d. Whether the ALJ Relied on Flawed After-the-Fact Reasoning

The District also excepts to the ALJ's reliance on *post facto* analysis, i.e., citing the fact that a written reprimand ultimately issued as evidence in support of a determination that, *at the time of her request*, Hause "reasonably" believed that discipline may be in the offing. The objective test adopted by PERB is whether an employee reasonably believes a meeting might result in discipline *at the time the employee requests representation*.

We agree with the District that, to the extent the proposed decision relies on the fact that Hause ultimately was reprimanded to evaluate the reasonableness of her belief in the prospect of discipline *at the time* she requested representation, it employs "flawed, after-the-fact reasoning." An individual's action, or his or her motivation for taking action, cannot be *caused by* a subsequently-occurring event for the simple reason that the actor could not have known of the subsequently-occurring event at the time of the action. However, because the ALJ's conclusion regarding the "reasonable belief" requirement is amply supported by other evidence and is consistent with applicable law, the error would not affect the ALJ's conclusion that Hause reasonably feared discipline when Chamberlin arrived unannounced at her worksite to discuss implementation of Meals Plus.

4. Whether the District Denied Hause's Request for Representation.

The District also excepts to the ALJ's conclusion "that Hause requested CSEA assistance during the June 2, 2011 meeting," and "that she called CSEA steward Jensen during the course of the meeting." The District argues that, by the time Hause communicated her desire for representation by leaving a voicemail message for Jensen within earshot of Chamberlin, any communications by Chamberlin that could fairly be characterized as "questioning" had already ceased. However, the District's exception misstates both the law and the record.

An employer may not interfere with, restrain, or coerce employees to secure a waiver of statutorily-protected rights, including their right to representation. (EERA, § 3543.5, subd. (a); *Marin, supra*, PERB Decision No. 145, pp. 13-14; *Southwestern Bell Tel. Co., supra*, 227 NLRB 1223; *Department of Justice Immigration & Naturalization Serv., Border Patrol, El Paso, Texas* (1990) 36 FLRA 41, 45.) Because a waiver of a statutory right is not lightly inferred (*Mt. San Antonio Community College District* (1982) PERB Decision No. 224), our cases hold that once the employee communicates the request for representation, the employer must terminate the discussion, absent objective evidence that the employee has knowingly and voluntarily agreed to continue the interview without representation. (*CSU Long Beach, supra*, PERB Decision No. 893-H, pp. 24-25.) Thus, *Lake Elsinore* and similar authorities require employees to make only *one* request for representation. (*Id.* at p. 8; *United States Postal Serv.* (1979) 241 NLRB 141, 141-142; *Lennox, supra*, 244 NLRB 607, 608-609.) Even if a “surprise” response from an employee turns an otherwise “ordinary” shop floor conversation into an investigatory or disciplinary meeting, the employee is under no obligation to repeat his or her request. At that point, an employer who continues the interrogation effectively denies the request and commits an unfair practice. (*CSU Long Beach, supra*, PERB Decision No. 893-H, pp. 22, 24; *Brown & Connolly, Inc.* (1978) 237 NLRB 271, 286, enforced (1<sup>st</sup> Cir. 1979) 593 F.2d 1373; *E.I. Du Pont De Nemours and Co.* (1982) 259 NLRB 1210 (*Du Pont*).)

Here, the District admits that Chamberlin asked Hause about her understanding of, and compliance with, his directives *after* Hause had already stated that, “if this is going to be disciplinary,” she wanted representation. Because we reject the District’s argument (*above*) that this statement was ineffective as a request for representation, we likewise reject the contention that Chamberlin was authorized to continue questioning Hause *after* she made this statement. Additionally, because there was no evidence that Hause voluntarily consented to waive her right

to representation, we conclude that her refusal to respond to Chamberlin's question was also protected (*Quality Manufacturing, supra*, 420 U.S. 276, 279-281; *Marin, supra*, PERB Decision No. 145, p. 13), and that she did not waive her right to representation by eventually responding to Chamberlin's repeated questioning. (*Lake Elsinore, supra*, PERB Decision No. 1648, pp. 8-9; *Weingarten, supra*, 420 U.S. 251, 256.)

5. Whether the ALJ's Purge Order Exceeded PERB's Authority.

Lastly, the District excepts to make whole relief as excessive, contrary to Board precedent, and "wildly inappropriate," because, according to the District, it creates perverse incentives for employees to engage in misconduct with impunity. We consider each of these contentions.

5.a. Whether Make Whole Relief is Excessive or Punitive.

According to the District, the proposed remedy is excessive, because it would require the District to rescind and expunge the entire reprimand, including matters occurring before or otherwise unrelated to the June 2, 2011 meeting. The District appears to argue that, because CSEA withdrew its allegation that the written reprimand was retaliatory, any remedy in this case must be limited to rescinding and expunging only those portions of the reprimand which were a "product" of the unlawful interview.

Moreover, since the reprimand did not relate to the subject of the June 2, 2011 meeting or rely on information obtained at that meeting, the Board should reject the ALJ's proposed make whole order. The District cites at least two categories of alleged misconduct referenced in the reprimand which, it claims, were not a product of the June 2, 2011 meeting and which, therefore, should not be expunged. First, the District argues that it should be free to discipline Hause for any alleged misconduct occurring *before* the June 2, 2011 meeting, notwithstanding Chamberlin's assurance at the outset of the June 2, 2011 meeting that no discipline was

contemplated. The District points out that Chamberlin neither questioned Hause about pre-June 2, 2011 events, nor otherwise obtained any information about such events at the June 2, 2011 interview. Relying on *CSU Long Beach, supra*, PERB Decision No. 893-H, the District argues that, because it already possessed evidence of Hause's misconduct occurring before the June 2, 2011 meeting, any remedy affecting pre-June 2, 2011 events would be excessive.

The District similarly contends that it should be free to discipline Hause for insubordinate *behavior* occurring at the June 2, 2011 meeting. According to the District, *Weingarten* was only intended to protect employees from their *admissions, i.e.,* from *information* obtained without the benefit of representation, but *not* from the consequences of their *conduct*, including any misconduct occurring at a meeting with management, regardless of whether the meeting was held under unlawful circumstances. Therefore, the District argues, the reprimand should not be expunged, even assuming representational rights were denied, because, while the document "*references* Hause's conduct" at the June 2, 2011 meeting, it "does not relate to *any information learned as a result of Chamberlin's questioning,*" nor "reference anything brought about through Chamberlin's choosing."

Additionally, the District objects to make whole relief on policy grounds. It argues that if adopted by the Board, the proposed remedy in this case would amount to a "free pass" for an employee "to unilaterally behave inappropriately and outrageously in a commonplace meeting with one's supervisors with impunity." In effect, the District argues that the nature of Hause's alleged misconduct at the June 2, 2011 meeting outweighs any wrongdoing by the District in this case and that if the ALJ's proposed remedy is adopted by the Board "any mundane conversation with a supervisor, and any outrageous or inappropriate conduct exhibited by [an] employee during such a conversation could not constitute cause for discipline."

5.a.1. Whether a Purge Order is Appropriate for Discipline that is not Retaliatory.

We first consider the District's argument that a purge order is excessive, because there has been no separate determination that the reprimand was issued for an unlawful retaliatory purpose. The District correctly observes that CSEA has withdrawn its allegation that the District retaliated against Hause for her protected conduct, and that the only issues properly before the Board are: (1) whether the District violated representational rights; and (2) if so, what is the appropriate remedy for such violation.

However, the Board has not hesitated to issue a purge order for disciplinary documents stemming in whole or in part from a denial of representational rights, *regardless* of whether the disciplinary action itself was determined to be for an unlawful, retaliatory purpose. (*Marin, supra*, PERB Decision No. 145, p. 20; *Placerville, supra*, PERB Decision No. 377, p. 41; *Rio Hondo, supra*, PERB Decision No. 260, p. 20.) The fact that this case contains no retaliation or discrimination allegation is not dispositive of whether a purge order is appropriate for the District's denial of representational rights. Rather, the relevant inquiry, as suggested elsewhere in the District's statement of exceptions, is whether the reprimand stems, in whole or in part, from the unlawful interview. We now turn to that inquiry.

5.a.2. Whether Events Occurring Before June 2, 2011 May be Purged.

The District argues that the proposed remedy is excessive, insofar as it would rescind the entire reprimand, or expunge from it, matters allegedly occurring before June 2, 2011, not discussed at the June 2, 2011 meeting, and otherwise "unrelated to" any denial of representational rights. Citing *CSU Long Beach, supra*, PERB Decision No. 893-H, the District reasons that, because they occurred before June 2, 2011 and/or were not discussed at the June 2, 2011 meeting, the conduct and statements attributed to Hause in the first five

paragraphs of the reprimand were not a “product” of the unlawful interview and should therefore not be expunged.<sup>21</sup>

As to alleged events or statements occurring before the June 2, 2011 interview, in theory, an appropriate remedy would excise any protected conduct from the written reprimand, while leaving the remaining material for Hause and CSEA to accept or dispute, as they wish, through the contractual grievance and arbitration procedures or any other available remedies. However, fashioning a “partial-expungement” remedy poses serious conceptual and practical problems, particularly on the limited issues and record properly before us. While PERB’s remedial authority is broad, “EERA does not empower the Board to right every wrongful act” (*Alisal Union Elementary School District* (1998) PERB Decision No. 1248, pp. 5-6.) In particular, PERB lacks jurisdiction to review discipline or other adverse actions unrelated to the commission of an unfair practice (EERA, §§ 3543.1, subd. (i), 3541.5, subd. (b); *Jurupa, supra*, PERB Decision No. 2283, p. 13), and the Board is not in the business of re-writing disciplinary documents for employers, nor attempting to achieve the same result, by parsing protected from unprotected conduct referenced or relied on in such documents. (*San Ysidro School District* (1980) PERB Decision No. 134 (*San Ysidro*), p. 19.) Where an employer bases disciplinary action on “mixed” conduct, *i.e.*, part of which was protected and part of which may not be protected, rather than attempt to determine what portion of the discipline is *not* in violation of EERA, the more appropriate course of action is to order rescission of the entire penalty. (*Ibid.*) Because of the conceptual, practical and jurisdictional problems posed by a

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<sup>21</sup> The District excepts to the proposed remedy of expunging the *entire* reprimand. Nevertheless, because it argues that *some* of its contents are “unrelated” to the June 2, 2011 meeting, we read this exception as a request to reverse expungement of the entire document or, in the alternative, to retain the balance of the reprimand, in the event any portion of the document is purged.

partial expungement order in this case, we decline to exclude only those portions of the reprimand that reference or rely on pre-June 2, 2011 conduct attributed to Hause.

5.b. Whether the Remedy for Denying Representational Rights May Extend to Employee Conduct at an Unlawful Interview.

Similar to its argument above with respect to pre-June 2, 2011 events, the District argues that portions of the reprimand referencing Hause's conduct during the meeting are "unrelated" to any denial of representational rights and, consequently, that the ALJ exceeded his authority by ordering the entire document expunged. We likewise reject this argument.

Hause's protected conduct at the June 2, 2011 meeting included her request for CSEA representation, which was also an assertion of her collectively-bargained right to 24 hours' notice for an investigatory or disciplinary meeting, and her initial refusal to respond to Chamberlin's questioning after her request for representation was effectively denied. (*Marin, supra*, PERB Decision No. 145, p. 13; *Quality Manufacturing, supra*, 420 U.S. 276, 279-281.) Determining what, if any role such protected conduct played in the District's decision to reprimand Hause is especially problematic, in light of Chamberlin's credited testimony that, as of the morning of the June 2, 2011, there were no plans to discipline Hause, *even if it turned out that she had deliberately sabotaged the Meals Plus program*. If nothing Hause said or did *before* June 2, 2011, including her open defiance of Chamberlin's authority, warranted disciplinary action, then we must conclude that *something* Hause said or did at the June 2, 2011 meeting *was the cause* of the written reprimand.<sup>22</sup>

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<sup>22</sup> Because the June 2, 2011 meeting occurred on the last day of work before the summer break, and because the District promptly presented its reprimand to Hause upon her return after the summer break, we conclude that she was not disciplined for any alleged misconduct occurring after the June 2, 2011 meeting.

The District attempts to address this problem by suggesting that it should be free to discipline Hause for aggressive and insubordinate *conduct* at the meeting because such conduct was not a “product” of the unlawful interview. We can agree that the reprimand does not appear to be based on *admissions* or other *information* obtained from Hause as a result of the June 2, 2011 meeting with Chamberlin, nor on “anything brought about through Chamberlin’s choosing.” From Chamberlin’s perspective, most of Hause’s statements at the June 2, 2011 meeting, including her extended criticism of Meals Plus and of the District’s managers, were neither responsive to his questioning nor appropriate under the circumstances. However, that does not dispose of the issue. Although we recognize a legitimate distinction between *information or admissions* obtained from an unrepresented employee and *misconduct* occurring at an unlawful interview, we are not persuaded by the District’s argument that conduct, *including employee misconduct*, occurring at or in the immediate aftermath of an unlawful interview can never be the “product” of the employer’s denial of representational rights.

As the Supreme Court explained in *Weingarten*, an important purpose of the right to representation is to assist employees in their efforts to vindicate themselves. In the highly charged and emotional atmosphere of an investigatory interview, the presence of a union representative may have a moderating effect on both the employee and the employer. (*Id.* at pp. 263–264; *Redwoods, supra*, PERB Decision No. 293, p. 7; see also *NLRB v. Southwestern Bell Tel. Co.* (5th Cir. 1984) 730 F.2d 166, 172; *Penn-Dixie, supra*, 253 NLRB 91, 95-96; and *Certified Grocers of California, Ltd.* (1977) 227 NLRB 1211, 1215, enforcement den. on other grounds (9th Cir. 1978) 587 F.2d 449, 451.) The logic of *Weingarten* and PERB’s own decisional law suggests that the protections afforded by EERA should extend to employee conduct in circumstances where a representative could have prevented an employee from losing his or her temper, becoming insubordinate, lying, or engaging in other misconduct, and

thereby giving the employer additional grounds for discipline. (*Weingarten, supra*, 420 U.S. 251, 264, fn. 7; *Lake Elsinore, supra*, PERB Decision No. 1648, pp. 8-9; *Redwoods, supra*, PERB Decision No. 293, p. 7; see also *Social Workers' Union, supra*, 11 Cal.3d 382, 384.)

Contrary to the District's assertion, there *is* considerable federal authority holding that expungement of discipline and other forms of make-whole relief, including reinstatement and back pay, *are* available for an employee who has been disciplined for misconduct occurring as a result of an unlawful investigatory interview.

First, there is the NLRB's decisional law which, until the mid-1980s, routinely awarded make-whole relief for *Weingarten* violations, even for employees with serious performance or misconduct issues. (*Illinois Bell Tel. Co.* (1975) 221 NLRB 989, 991 [reinstatement with back pay of employee discharged for suspected workplace theft]; *Southwestern Bell Tel. Co., supra*, 227 NLRB 1223, 1223, n. 1 [reinstatement with back pay for employees discharged or suspended for making false injury reports]; *Southwestern Bell Tel. Co., supra*, 251 NLRB 612, 613, 615, enforcement den. (5th Cir. 1982) 667 F.2d 470 [NLRB ordering reinstatement with back pay for employee discharged for theft of company property where confession obtained at unlawful interview]; *Certified Grocers of California, supra*, 227 NLRB 1211 [back pay and rescission of two-week disciplinary layoff for low production], enforcement den. (9th Cir. 1978) 587 F.2d 449; *Texaco, Inc., supra*, 251 NLRB 633, 636-637, enforced (9th Cir. 1981) 659 F.2d 124 [expunging discipline for admitted safety violations where union representative was silenced at investigative interview].) At that time, the NLRB followed a burden-shifting approach, under *Kraft Foods, Inc.* (1980) 251 NLRB 598 (*Kraft Foods*), where the NLRB General Counsel could make a prima facie showing that make-whole relief was appropriate by demonstrating that the employee subjected to an unlawful interview was

disciplined for conduct that was the subject of the interview. The burden then shifted to the respondent, who could avoid a make-whole remedy by demonstrating that the decision to discipline the employee was not based *on* information obtained at the interview. (*Ibid.*)

In addition to the *Kraft Foods* “exclusionary rule” for *information* obtained in violation of *Weingarten*, in a handful of cases the NLRB also recognized that employees subjected to an unlawful interview should not be disciplined for intemperate or even insubordinate *conduct* occurring at or in the immediate aftermath of the investigative meeting, if the presence of a union representative might have prevented or mitigated the misconduct. (*Du Pont, supra*, 259 NLRB 1210; *United States Postal Serv.* (1981) 256 NLRB 78, 81-82, *revd.* and *enforcement den.* (9th Cir. 1982) 689 F.2d 835; *Louisiana Council No. 17, AFSCME, AFL-CIO* (1980) 250 NLRB 880, 899-900; *Anchortank, Inc.* (1978) 239 NLRB 430, 431.) Although the NLRB later overruled *Kraft Foods* and determined, in *Taracorp Industries, a Div. of Taracorp, Inc.* (1984) 273 NLRB 221 (*Taracorp*), that make-whole relief is generally inappropriate for *Weingarten* violations,<sup>23</sup> the NLRB’s pre-*Taracorp* decisional law remains persuasive authority for PERB, inasmuch as it was the federal precedent in place at the time PERB adopted the *Weingarten* doctrine (see *Rio Hondo CCD, supra*, PERB Decision No. 260, pp. 15-19), and inasmuch as PERB has never endorsed the *Taracorp* rule that make-whole

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<sup>23</sup> See *Taracorp, supra*, 273 NLRB 221, 222; *Greyhound Lines* (1985) 273 NLRB 1443; *Montgomery Ward & Co.* (1984) 273 NLRB 1226, 1227; *Illinois Bell Tel. Co.* (1985) 275 NLRB 148, 1-149; *New Jersey Bell Tel. Co.* (1990) 300 NLRB 42, 44, 54-56; and, *Barnard College, supra*, 340 NLRB 934, 942 [“The Board will not order a make-whole remedy for a *Weingarten* violation unless the General Counsel can show that the discipline was the direct result of the employee’s assertion of his *Weingarten* rights”]; cf. *Preferred Transp., Inc.* (2003) 339 NLRB 1, holding that make-whole relief available where discipline or discharge “was not based on misconduct *uncovered* by the investigation, but rather on misconduct that was triggered by and elicited during the investigation.” (*Id.* at p. 3, *emphasis in original.*) The NLRB explained that make-whole relief is appropriate where the investigation itself was unlawfully motivated, because in such instances, there is “a clear and direct connection between the employer’s unlawful conduct and the reason for discipline.”

relief is unavailable for violations of the representational rights guaranteed by the PERB-administered statutes.<sup>24</sup>

More recently, the NLRB has explicitly recognized an exception to *Taracorp* whereby make-whole relief may be available in cases where an employee is disciplined for misconduct precipitated by and occurring during an unlawful interview. On May 29, 2015, the NLRB issued *E.I. Dupont de Nemours & Co., Inc.* (2015) 362 NLRB No. 98 (*Dupont*) in which a three-member panel of the NLRB concluded that the respondent violated section 8(a)(1) of the NLRA by denying an employee a union representative during investigative interviews into a workplace accident. The employee was terminated for misconduct including dishonesty and inconsistency during the interviews. In addition to the standard cease-and-desist order for *Weingarten* violations, a majority of the panel ordered the matter remanded to determine whether the employee was also entitled to make-whole relief. In what the majority characterized as “an issue of first impression post-*Taracorp*,” it explained that, because the alleged misconduct occurred during and potentially as a result of the employer’s unlawful interviews, section 10(c) and the

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<sup>24</sup> In *CSU Long Beach, supra*, PERB Decision No. 893-H, the Board affirmed a proposed decision which cited *Taracorp* and PERB precedent to reject make-whole relief when the investigative interview had no effect on the employer’s decision to mete out discipline. While the Board took note of the ALJ’s discussion of *Taracorp*, nothing in the Board’s decision indicates its agreement with or endorsement of *Taracorp* and the Board has never overruled its earlier cases holding that make whole relief *is* available when the resulting discipline stems in whole or in part from an unlawful interview. (See *Redwoods, supra*, PERB Decision No. 293, *affd.* in relevant part at 159 Cal.App.3d 617; *Lake Elsinore, supra*, PERB Decision No. 1648.)

We also note that *Taracorp* relies in part on statutory language with no counterpart in EERA or any of the other PERB-administered statutes. Section 10(c) of the NLRA prohibits the NLRB from ordering reinstatement or back pay for employees suspended or discharged “for cause.” Here, as elsewhere, the absence of statutory language even remotely comparable to that found in section 10(c) of the NLRA “provides an ample basis for departing from the strictures of *Weingarten*.” (*Redwoods, supra*, PERB Decision No. 293, p. 6; see also *Mt. Diablo, supra*, EERB Decision No. 44, pp. 8-9; see also *Sonoma, supra*, PERB Decision No. 2409-C, p. 8.)

*Taracorp* line of cases were inapplicable. On remand, an ALJ was to determine whether the employee's discharge was due at least in part to his conduct during the unlawful interviews and, if so, whether the respondent could show that it would have terminated the employee for reasons independent of his conduct during the unlawful interviews. If the respondent failed to make this showing, the employee would be entitled to the make-whole relief of reinstatement and back-pay. In responding to the dissent's concern that there is no limiting principle and that employees could wind up getting make-whole relief for "all sorts of outlandish, even criminal, behavior that possibly could occur during an unlawful *Weingarten* interview," the *Dupont* majority explained that its decision "does not alter the well-established principle that the Board's make-whole remedy is not available for conduct that is objectively 'so egregious as to take it outside the protection of the Act, or . . . render the employee unfit for further service'." (*Id.* at p. 5.)

In addition to the recent *Dupont* decision and the NLRB's pre-*Taracorp* decisional law are the decisions of our counterpart in the federal *public* sector, the Federal Labor Relations Authority (FLRA), which have harmonized *Weingarten* with statutory language that is, in important respects, similar to that found in EERA and other PERB-administered statutes.<sup>25</sup> Although the FLRA interprets the federal public-sector statute as a codification of *Weingarten*, it recognizes the need for *some* effective remedy for interference with representational rights,

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<sup>25</sup> In some respects, the Federal Service Labor-Management Relations Statute (5 U.S.C., §§ 7101 et seq.) section 7114(a)(2)(B) is like EERA, and unlike the NLRA. Although a federal government employee must request representation, the statutory right (and duty) to represent employees in investigative interviews actually belongs to the exclusive representative. Although EERA does not specifically mention such interviews, as discussed above, the rights of employees to representation "on *all* matters of employer-employee relations," and the right of employee organizations, without qualification, to represent employees "in their employment relations" certainly encompass investigative and disciplinary interviews. (*Redwoods, supra*, PERB Decision No. 293, pp. 5-6.)

including in cases where a federal government employee is disciplined or discharged, at least in part, for alleged misconduct occurring at an unlawful interview. The rule adopted by the FLRA is similar to that long followed by PERB's "mixed motive" discrimination cases. (*San Ysidro, supra*, PERB Decision No. 134, p. 19.) That is, unless the employer can demonstrate that it would have taken the *same* disciplinary action for misconduct occurring outside the unlawful interview, the appropriate remedy is to rescind and expunge the disciplinary action, and to permit the employer to reconsider disciplinary proceedings against the employee based only on the basis of a second, untainted interview or, if no second interview is conducted, on the basis of any evidence obtained independently of the previous unlawful interview. (*United States, Department of Justice, Bureau of Prisons, Metro. Corr. Ctr., New York, New York & American Federation of Government Employees, AFL-CIO, Local 3148* (June 29, 1987) 27 FLRA 874, 881; *United States, Department of Justice, Bureau of Prisons, Safford, Arizona & American Federation of Government Employees, Local 2313, AFL-CIO* (Apr. 6, 1990) 35 FLRA 431; see also *Du Pont, supra*, 259 NLRB 1210, 1215, holding that a disciplinary action that is "an outgrowth of the unlawful interview, . . . must be rescinded and expunged from [the employee's] personnel file.")

Thus, there is ample authority from the federal public sector, from the NLRB's pre-*Taracorp* decisions, and from the NLRB's recent reexamination of this issue in *Dupont, supra*, 362 NLRB No. 98, that make-whole relief may be appropriate when employee misconduct occurs during and as a result of an unlawful interview. Depending upon the particular circumstances and which test is used, the available remedies may range from rescinding the discipline and re-convening the interview under lawful conditions to determine whether discipline is appropriate (*United States, Department of Justice, Bureau of Prisons* (1990) 35 FLRA 431) to full, make whole relief, including rescission of discipline with reinstatement

and back pay, unless the employer can demonstrate that it would have taken the same disciplinary action for misconduct unrelated to the unlawful interview. (*Dupont, supra*, 362 NLRB No. 98, p. 4; *L. A. Water Treatment* (1982) 263 NLRB 244, 245 and *Communication Workers v. NLRB, supra*, 784 F.2d 847, 850-851.)

In the present case, there is ample evidence to conclude that had Jensen or another CSEA representative been permitted to attend the June 2, 2011 meeting, Hause's unwarranted conduct at that meeting might have been prevented or at least mitigated. Chamberlin admitted that the meeting had not gone as planned and that, at some point, he would have welcomed the presence of a union representative as "absolutely . . . beneficial." There was also undisputed evidence that Jensen had previously attended such meetings with Hause without incident, notwithstanding the "strained relationship" between Hause and Chamberlin. Presumably, permitting the presence of a representative could have calmed Hause and persuaded her to listen to her supervisor, before engaging in some of the conduct for which she was later reprimanded. Yet, because Chamberlin did not think representation was "necessary," even after Hause communicated her desire for a representative, he did not halt the meeting and wait until Jensen or another representative was available.

Although reasonable minds may differ as to whether Jensen or another representative could have controlled Hause at the June 2, 2011 meeting and changed the course of events, any doubt must be resolved against the party whose unlawful conduct made it possible. (*City of Pasadena* (2016) PERB Order No. Ad-406-M, pp. 12-13, 26; *J. H. Rutter-Rex Mfg. Co.* (1971) 194 NLRB 19, 24.) Accordingly, we reject the District's argument that representational rights may only ever protect employees from their admissions but not from their conduct, including any misconduct, occurring as the result of an unlawful interview. We likewise reject its argument that, in this particular case, its interference with representational

rights had no effect on the course of the meeting or its subsequent decision to reprimand Hause for her conduct at the June 2, 2011 meeting.

5.c. Whether Hause's Alleged Misconduct Deprives Her of Any Protection.

The District also argues that “any wrongdoing by the District” in this case does not justify make whole relief, because the result would be to “permit[] Hause to harass and mistreat other District employees without consequence.” Implicit in this exception is the view that because Hause’s alleged or admitted conduct at the June 2, 2011 meeting was “outrageous,” “inappropriate,” and even “insubordinate,” she must lose any protection afforded by EERA for her otherwise protected conduct. However, protected conduct does not cease to be protected, simply because the employer regards the employee as “insubordinate.” (*Marin, supra*, PERB Decision No. 145, pp. 12-15.)

We reject the District’s exception here for two reasons. First, in response to Hause’s request for representation, Chamberlin assured her that he did not intend to discipline her for any conduct occurring before June 2, 2011. As explained in the proposed decision, an employer who refuses an employee’s request for representation by assuring the employee that no discipline will ensue from the interview may not then impose discipline as a result of the interview. (*Lake Elsinore, supra*, PERB Decision No. 1648, p. 8.) In accordance with PERB precedent, the ALJ therefore appropriately ordered that any pre-June 2, 2011 events be expunged from the written reprimand.

Second, we agree with the ALJ that the District’s reprimand was, at least in part, a product or outgrowth of the unlawful conditions under which the June 2, 2011 meeting occurred and that rescission and expungement were likewise appropriate with respect to Hause’s conduct at the June 2, 2011 meeting. (*Redwoods, supra*, PERB Decision No. 293, p. 10; *Du Pont, supra*, 259 NLRB 1210, 1215; cf. *CSU Long Beach, supra*, PERB Decision No. 893-H, p. 26.) The

record demonstrates that the District has had “a good relationship with the Union,” that it has agreed to provide 24 hours’ notice to Hause for such meetings, and that Jensen’s involvement in such meetings had contributed to a positive outcome. Under the circumstances, it seems unlikely that Hause would have engaged in the misconduct alleged by the District, if Chamberlin had simply complied with her initial request for representation, pursuant to EERA and the District’s contractual arrangement with CSEA. We therefore reject the District’s contention that *any* remedy in this case is unwarranted, because of Hause’s alleged misconduct.

5.d. Whether Make Whole Relief Incentivizes Employee Misconduct.

We next address the District’s policy concern that expungement is an “unwarranted” invocation of *Weingarten* that will provide employees with “a free pass to unilaterally behave inappropriately and outrageously in a commonplace meeting with one’s supervisors with impunity.” We think the District’s fears are misplaced and exaggerated. As suggested above, expungement is necessary to provide some form of effective remedy to the representative and the affected employee for an employer’s denial of representational rights. A cease-and-desist order alone is inadequate, because its exclusive focus on prohibiting *future* violations effectively rewards the employer for its past misconduct, without attempting to restore the conditions and relationships that existed or would have existed, but for the commission of the unfair practice. (*Santa Clara Unified School District* (1979) PERB Decision No. 104, p. 26.)

It also seems improbable that employees who find themselves in an investigatory meeting, and who, by definition, already entertain a reasonable fear of discipline, will use the present decision as license to engage in misconduct *at the interview*, simply because the employer has denied their request for representation. In any event, employers can easily protect themselves from the dire consequences predicted by the District by simply granting an employee’s valid request for representation in the first place.

Having determined that an unfair practice occurred when the District issued its written reprimand to Hause, based in part, on her exercise of protected conduct at the June 2, 2011 meeting with Chamberlin, we adopt the proposed decision and order, as modified.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this case and pursuant to the Educational Employment Relations Act (EERA), Government Code section 3540, the Public Employment Relations Board (PERB or Board) AFFIRMS the proposed decision of the administrative law judge and finds that the Capistrano Unified School District (District) violated section 3543.5, subdivision (a), of the Government Code by denying Theresa Hause (Hause) the right to representation by an employee organization during an investigatory interview. The above conduct also violated subdivision (b) of section 3543.5 of EERA, by denying the California School Employees Association and its Capistrano Chapter 224 (collectively, CSEA) its right to represent employees in investigatory interviews.

The District, its governing board and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Denying Hause the right to be represented in investigatory interviews involving potential disciplinary action.

2. Denying CSEA rights guaranteed by EERA, including the right to represent employees in investigatory interviews with the educational employer.

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

1. Rescind and expunge from Hause's personnel files the September 1, 2011 Written Reprimand issued to Hause.

2. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to employees in the District are customarily posted, copies of the Notice attached hereto as an Appendix, signed by an authorized agent of the District and indicating that the District will comply with the terms of this Order. Such posting shall be maintained for at least thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees in the District's Food and Nutrition Services Department. (*City of Sacramento* (2013) PERB Decision No. 2351-M.) The District, its governing board and its representatives shall take reasonable steps to ensure that the posted Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on CSEA.

Members Huguenin and Winslow joined in this Decision.

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
An Agency of the State of California**



After a hearing in Unfair Practice Case No. LA-CE-5621-E, *California School Employees Association & its Capistrano Chapter 224 v. Capistrano Unified School District*, in which all parties had the right to participate, it has been found that the Capistrano Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivision (a), by denying Theresa Hause (Hause) the right to representation by an employee organization during an investigatory interview. The above conduct also violated EERA, Government Code section 3543.5, subdivision (b), by denying the California School Employees Association and its Capistrano Chapter 224 (collectively, CSEA) rights to represent educational employees in investigatory interviews.

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

**A. CEASE AND DESIST FROM:**

1. Denying Hause the right to be represented in investigatory interviews involving potential disciplinary action.
2. Denying CSEA rights guaranteed by EERA, including the right to represent employees in investigatory interviews with the educational employer.

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

Rescind and expunge from Hause's personnel files the September 1, 2011 Written Reprimand issued to Hause.

Dated: \_\_\_\_\_

CAPISTRANO UNIFIED SCHOOL DISTRICT

By: \_\_\_\_\_  
Authorized Agent

**THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.**

STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES  
ASSOCIATION & ITS CHAPTER 224,

Charging Party,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT,

Respondent.

UNFAIR PRACTICE  
CASE NO. LA-CE-5621-E

PROPOSED DECISION  
(10/10/2012)

Appearances: Nathan Banditelli, Labor Relations Representative, on behalf of California School Employees Association & its Chapter 224; Anthony DeMarco and Amy Estrada, Attorneys, on behalf of Capistrano Unified School District.

Before Eric J. Cu, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union alleges that a public school employer violated the Educational Employment Relations Act (EERA)<sup>1</sup> by interfering with an employee's rights to have a union representative present during an investigatory interview. The employer denies a violation.

On November 7, 2011, the California School Employees Association and its Chapter 224 (CSEA) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board), alleging that the Capistrano Unified School District (District) committed multiple violations of EERA. On January 20, 2012, CSEA withdrew all allegations except the claim that the District unlawfully denied a CSEA-represented employee the right to have a CSEA representative present during an investigatory interview and disciplined her as a result of that interview. That day, the PERB Office of the General Counsel issued a complaint on the remaining claim. The District filed an answer to the PERB complaint on February 16, 2012, denying that a violation occurred and asserting multiple affirmative defenses.

<sup>1</sup> EERA is codified at Government Code section 3540 et seq.

On March 14, 2012, the parties participated in an informal settlement conference but the matter was not resolved. On June 13-14, 2012, the parties participated in a formal hearing. The parties filed simultaneous closing briefs on August 24, 2012. At that point, the record was closed and the matter was submitted for a proposed decision.

### FINDINGS OF FACT

#### The Parties

The District is a public school employer within the meaning of EERA section 3540.1(k). CSEA is an exclusive representative within the meaning of EERA section 3540.1(e) and represents a bargaining unit that includes the District's food service workers. Theresa Hause is a public school employee within the meaning of EERA section 3540.1(j) and is employed by the District in a position represented by CSEA.

#### Hause's Employment at the District

Hause has been employed at the District as a Lead Food Service Worker II for 19 years as part of the Food and Nutrition Services (FNS) department. At the times relevant to the PERB complaint, Hause worked at Niguel Hills Middle School. Her essential job duties include ordering and preparing food, directing three food service workers, and serving food to students. Hause also makes recommendations for saving money and improving service. Hause's direct supervisor is FNS Supervisor John Chamberlin. Chamberlin's supervisor is FNS Director Dawn Davey.

Niguel Hills has breakfast, mid-morning, and lunch service. In addition, the site serves à la carte items, consisting mostly of snacks. Food service is typically done at service windows adjacent to a central quad. As of May 26, 2011, Niguel Hills also served food on a separate cart. The District tracks student food purchases such as how many free or reduced-fee lunches are served.

## Implementation of the Meals Plus Software

In 2011, the District decided to upgrade software used by the FNS department. That software, called Meals Plus, enabled the District to do more sophisticated tracking of inventory and student data. The District began implementing Meals Plus one school site at a time, starting April 2011.

Niguel Hills was scheduled to implement Meals Plus on May 26, 2011. On or around May 20, 2011, Chamberlin spoke with Hause over the telephone to discuss the roll-out. Hause expressed her opinion that the Meals Plus software would not work effectively, but would reduce sales and eliminate food service worker positions. Chamberlin described Hause's tone as argumentative and belligerent. Hause hung up the telephone before the conversation was completed. Chamberlin tried to call back, but Hause did not answer and did not return his call. Hause does not deny hanging up on Chamberlin.

On May 23, 2011, Chamberlin met with Hause at Niguel Hills. According to Chamberlin, he offered to have Hause work at a different school site on May 26, 2011, if the stress of the Meals Plus roll-out was too great. According to Hause, Chamberlin said he would involuntarily transfer her to a different site if she planned on "sabotaging" the implementation of Meals Plus. Hause was not transferred or temporarily reassigned as a result of this meeting.

The new software was implemented at Niguel Hills on May 26, 2011 as planned. Hause worked at the outside food cart and served both meals and à la carte items during the lunch service that day.

On June 1, 2011, Chamberlin contacted Hause by telephone to give her some instructions. First, Chamberlin instructed Hause to stop working at the food service cart and to instead work at the food service windows. Second, Chamberlin directed that only à la carte items, not meals, be served from the cart. Hause did not formally acknowledge Chamberlin's

instructions but continued to criticize the Meals Plus program. Hause again hung up the telephone before Chamberlin considered the conversation to be finished. Hause does not deny this. Hause complied with Chamberlin's directives that day.

#### The Incidents of June 2, 2011

On June 2, 2011, the last work day of the 2010-2011 year, Chamberlin visited the Niguel Hills food service area at approximately 8:40 a.m. Hause was the only FNS employee on site at the time. Chamberlin and Hause have very different recollections of this encounter. Each witness's account will be outlined below followed by a resolution of those credibility issues that are relevant to deciding the issues in this case.

#### Chamberlin's Account

According to Chamberlin, he greeted Hause and stated that he wanted to speak with her about the directives from June 1, 2012. Hause yelled for Chamberlin to "get out of [her] kitchen!" Chamberlin replied that he had the right to be there as her supervisor. He also spoke in an elevated voice because of Hause's tone and because the fans in the kitchen were loud. At that point, Hause turned away from Chamberlin and walked into her office.

Chamberlin followed her into the office and sat down. Hause immediately expressed fear of being disciplined and requested CSEA representation. Chamberlin responded that he did not intend the meeting to be disciplinary and that he wanted to find out whether his directives were understood and being implemented. He also said that he would allow her to have a CSEA representative present.

Chamberlin then proceeded to question Hause. He asked her whether she understood his directives and was following them. Hause initially did not reply but after being asked multiple times, she accurately reiterated Chamberlin's two directives and confirmed that she was following them.

Hause then began loudly criticizing the implementation of the Meals Plus software at Niguel Hills. Among her complaints were that the screens and keyboards were not effective for the new software, that other sites had newer equipment, and that she felt that the new system would be cause for eliminating food service positions. Chamberlin considered Hause's comments and tone to be abusive. At that point, Hause left the office and unsuccessfully attempted to contact CSEA Chief Steward Ken Jensen on her mobile telephone.

Hause moved towards the kitchen and yelled "I want you to get out of my kitchen now!" Chamberlin needed to collect himself for a moment and he then began taking notes on a notepad he brought with him.

Hause came back in and said she was not feeling well and was going to leave for the day. She then left the premises. Chamberlin got emotional as well and began to cry. He contacted Davey who asked if he was alright and if he was capable of running the breakfast service scheduled to begin at Niguel Hills in around 10 minutes. Chamberlain said he would and completed the breakfast service that day until other food service employees arrived.

Chamberlin testified that the purpose of the meeting was to determine whether Hause understood and would comply with his June 1, 2011 directives because he was unsure whether Hause had heard them correctly. He also wanted to discuss and observe the roll-out of Meals Plus at Niguel Hills.

#### Hause's Account

According to Hause, Chamberlin ordered her to follow him into her office and "aggressively" asked "did you follow my directives from yesterday?" Hause replied, "yes." Chamberlin repeated the question and Hause repeated her answer. Chamberlin then asked "do you even know what a directive is?" Hause replied, "yes, I do."

At that point, Hause requested CSEA representation but Chamberlin did not respond. Hause then called Jensen using her mobile telephone and left him a voicemail message stating she was feeling threatened by Chamberlin and felt that she needed CSEA representation.

Chamberlin continued to ask something to the effect of “do you even know what a directive is?” Hause described Chamberlin’s voice as loud, just below yelling. At some point, Hause stated “this has to stop.” Chamberlin replied “I am the supervisor and you are the employee. You do what I tell you to do.” Hause then left the office and returned to the food service area. Chamberlin moved past her and obstructed her path. Hause said “this is my kitchen, you need to leave me alone.” Chamberlin replied “I am the supervisor. You must do as you are told. I can come here whenever I want.”

Hause then left the food service area and told Niguel Hills Vice Principal Al Rios that she was being harassed and felt ill. She told Rios that she was going to leave for the day. Rios informed Chamberlin that Hause was going to leave.

#### Credibility Determination

To the extent that it is necessary, Chamberlin’s testimony is credited over Hause’s about the events of the June 2, 2011 meeting. Inconsistencies in her testimony cast doubt on her ability to recall the meeting clearly. For example, on direct examination, Hause did not testify that she ever formally requested CSEA representation. She only later recalled doing so during cross examination. In addition, Hause testified inconsistently about the number of times Chamberlin asked her questions.

More importantly, Hause’s recollection of Chamberlin’s questioning is contradicted by an e-mail message Hause sent to Jensen about the June 2, 2011 meeting the next day. During the hearing, Hause testified that Chamberlin repeatedly asked her only two questions, whether she followed his directives and whether she even understood what a directive is. In contrast, in

the June 3, 2011 e-mail message, Hause wrote that Chamberlin asked her “to explain to him what his directives were per [their] phone call.” This e-mail message is consistent with Chamberlin’s testimony and inconsistent with Hause’s. Furthermore, based on my own observations of Chamberlin, I find it implausible that he would continuously ask an essentially rhetorical question after Hause already gave her response. For these reasons, it is concluded that Chamberlin asked Hause whether she followed his June 1, 2011 directives and whether Hause would articulate those directives for Chamberlin.

#### Issuance of the Written Reprimand

On September 7, 2011, Hause returned to work for the 2011-2012 school year. The District issued her a document entitled “WRITTEN REPRIMAND: FAILURE TO FOLLOW DIRECTIVES AND INSUBORDINATION.” FNS Director Davey authored the document based on Chamberlin’s input. The document stated that the purpose of Chamberlin’s June 2, 2011 visit was to “monitor the implementation of the directives given the day before.” The document also referenced Hause’s responses to Chamberlin’s questions and that Hause yelled for Chamberlin to “get out of [her] kitchen!” The District considered Hause’s behavior that day to be “unprofessional, disrespectful, insubordinate and willfully disobedient.” Davey also referenced the two times that Hause hung up the telephone during conversations with Chamberlin. Hause filed a response to the Written Reprimand on September 21, 2011.

#### ISSUE

Did the District interfere with protected rights by denying Hause the right to have a CSEA representative present at the June 2, 2011 meeting?

#### CONCLUSIONS OF LAW

EERA section 3543.5(a) protects an employee’s right to be represented on employer-employee relations matters. (*Santa Barbara Community College District (2011) PERB*

Decision No. 2212; *Fontana Unified School District* (2010) PERB Decision No. 2147.) This includes the right to union representation during certain meetings with his or her employer. (*Los Banos Unified School District* (2007) PERB Decision No. 1935 (*Los Banos USD*)). This right is derived from the U.S. Supreme Court decision in *National Labor Relations Board (NLRB) v. J. Weingarten, Inc.* (1975) 420 U.S. 251 (*Weingarten*), which found a substantially similar right under the National Labor Relations Act (NLRA). (See *Rio Hondo Community College District* (1982) PERB Decision No. 260.)

Under EERA, an employee required to attend an investigatory interview with the employer, whether or not it is labeled as such, is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. (*Los Banos USD, supra*, PERB Decision No. 1935.) Thus, an employer violates this right where:

- (a) the employee requests representation, (b) for an investigatory meeting, (c) which the employee reasonably believed might result in disciplinary action, and (d) the employer denied the request.

(*Id.*, [citations omitted].)<sup>2</sup> These elements will be applied to this case.

a. Hause's Request for Representation

The first issue is whether Hause requested representation during the June 2, 2011 meeting. The right to representation is only triggered by the employee's request. (*San Bernardino County Public Defender* (2009) PERB Decision No. 2058-M (*San Bernardino County*)). Conversely, there is no violation of this right when the employee fails to affirmatively request representation at the meeting. (*Ibid.*) In this case, it is undisputed that Hause requested CSEA assistance during the June 2, 2011 meeting and that she called CSEA

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<sup>2</sup> Even when these elements are not present, PERB may find a right to a representative in meetings arising under "highly unusual circumstances." (*Redwoods Community College District v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617.) One example of such a meeting is where an employee was required to attend a meeting with a high-ranking employer official to discuss her performance evaluation, the meeting was investigatory and formal, and the official exhibited a hostile attitude toward the employee. (*Id.* at 625.)

steward Jensen during the course of the meeting. This is sufficient to establish that Hause requested CSEA representation.

b. Investigatory Nature of the Meeting

The second issue is whether the June 2, 2011 meeting was investigatory in nature. The right to representation attaches during meetings where the essential purpose is to elicit information that may impact the employment relationship. (*County of Santa Clara* (2012) PERB Decision No. 2267-M, citing *Placer Hills Union School District* (1984) PERB Decision No. 377.) On the other hand, this right does not extend to all meetings with the employer. For example, there is no right to representation where the purpose of the meeting is merely to inform the employee that he or she is being disciplined. (*Ibid.*) Likewise, the right to representation does not apply to “run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques.” (*Weingarten, supra*, 420 U.S. at pp. 255-258, quoting *Quality Manufacturing Co.* (1972) 195 NLRB 197, 199.)

In *California State University, Long Beach* (1991) PERB Decision No. 893-H (*CSU*), the Board found a meeting to get an employee’s “side of the story” was an investigatory interview sufficient to trigger the right to representation. In *Northwest Engineering Company* (1982) 265 NLRB 190 (*Northwest*), a meeting where “a give and take between employees and supervisors was anticipated . . . was, in effect, an interview to which the right to union representation as a condition of employee participation was applicable.” (*Id.* at 197, [internal quotations omitted]; see also *AAA Equipment Service Co.* (1978) 238 NLRB 390, [meeting to “elicit facts” from employee was more than a mere shop-floor conversation.])

In contrast, in *State of California (Department of California Highway Patrol)* (1997) PERB Decision No. 1210-S (*State of CA*), the Board found no right to representation during a

meeting, the purpose of which was to inform the employee that her abrasive and curt demeanor towards the public was unacceptable. No questions were asked of the employee during the meeting. Similarly, the Board found no right to representation during a meeting where the employer sought to enforce its directive that an employee move her workstation. (*San Bernardino County, supra*, PERB Decision No. 2058-M.) In that case, the employer twice directed the employee to move her station but she did not obey. Although the employer asked whether the employee would comply with the directives, the Board concluded that the purpose of the meeting was not to investigate the employee's conduct; it already knew that she had not moved her workstation. Rather, the purpose of the meeting was to give the employee one final opportunity to comply with the order to move her work station. (*Ibid.*)

In the present case, Chamberlin testified that he did not know whether Hause understood and complied with his instructions from June 1, 2011 and that he went to Niguel Hills the next day to find out. Accordingly, Chamberlin asked her to "explain her interpretation of the directive[s]." He also asked Hause whether she followed those directives. Chamberlin testified that, if Hause had not implemented his directives, he would "listen to her" as to why. Chamberlin brought a notepad with him to the meeting and took notes about Hause's comments. According to the September 1, 2011 Written Reprimand, which Chamberlin read and approved, the purpose of the visit was to "monitor the implementation of the directives given the day before." Based on these facts, it is concluded that Chamberlin went to Niguel Hills on June 2, 2011, to gather information from Hause about his June 1, 2011 directives and, in a broader sense, about implementation of Meals Plus at Niguel Hills. This case is similar to *CSU, supra*, PERB Decision No. 893-H, because Chamberlin sought Hause's "side of the story" about the roll-out of Meals Plus at her site. This questioning is consistent with an investigatory interview.

This case is distinguishable from *San Bernardino County, supra*, PERB Decision No. 2058-M, because Chamberlin did not come to Niguel Hills solely to give Hause another opportunity to follow his instructions. Furthermore, Chamberlin's questions were not, as the District maintains, designed to ensure comprehension of directives and to provide corrective guidance. (See *State of CA, supra*, PERB Decision No. 1210-S.) Chamberlin admitted that he questioned Hause precisely because he did not know whether his directives were being followed and did not know if corrective action was needed. If his instructions were not carried out, Chamberlin testified he would have discussed the matter with Hause. This is sufficient information to conclude that the June 2, 2011 meeting was investigatory.

c. Reasonable Belief of Discipline

The third issue is whether Hause had a reasonable belief that discipline would follow from the meeting. In *Mammoth Unified School District* (1983) PERB Decision No. 371 (*Mammoth USD*), the Board found that an employee had a reasonable belief that an investigatory meeting would lead to discipline even though the employer expressly told him that it was not disciplinary in nature. There, the employer had a history of angry confrontations with his supervisor and the meeting was called the same day that the employee had registered a complaint about his supervisor's directives. (*Ibid.*; see also *Lake Elsinore Unified School District* (2004) PERB Decision No. 1648.)

In *Barstow Unified School District* (1996) PERB Decision No. 1164, the Board found that an employee had no reasonable expectation of discipline when the employer made it clear from the outset that the meeting concerned a student matter, not the employee's performance.

Here, Hause had a reasonable belief that Chamberlin's unannounced June 2, 2011 meeting could lead to discipline. Hause and Chamberlin had a history of acrimonious discussions about FNS operations, culminating in Hause abruptly hanging up the telephone on

Chamberlin two different times. One of those times was on June 1, 2011, the day before the meeting in question. During the meeting itself, both Hause and Chamberlin spoke with raised voices. Given this history of conflict culminating in Chamberlin's unannounced visit to Niguel Hills, Hause had a reasonable belief that Chamberlin was there to discipline her. Hause likewise had a reasonable belief that Chamberlin's questions regarding his directives could result in discipline because the failure to follow an employer's instructions is legitimate grounds for discipline. (See e.g., *Riverside Unified School District* (1987) PERB Decision No. 639.)

Moreover, Hause's concern about receiving discipline turned out to be well-founded. The September 1, 2011 Written Reprimand references both hanging-up incidents as well as Hause's failure to follow Chamberlin's instructions as the basis for its discipline. Under these circumstances, Hause had a reasonable belief that discipline would result from the June 2, 2011 meeting.

d. Denial of Request

The fourth issue is whether Chamberlin denied Hause's request for representation. Once an employee invokes the right to representation during an applicable meeting, the employer may simply discontinue the interview and proceed with its investigation through other means. In the alternative, the employer may instruct the employee that he or she has the option of continuing the interview unrepresented or having no interview at all. (*San Bernardino City Unified School District* (1998) PERB Decision No. 1270, citing *Weingarten, supra*, 420 U.S. 251.) The employer may also reschedule the interview to a time when a union representative is able to attend. (*Ibid.*)

In this case, the District contends that Chamberlin ended the interview after Hause requested representation. However, this assertion is not consistent with the record.

Chamberlin stated that he would allow Hause to have a CSEA representative present at the meeting but proceeded to question her before she even attempted to contact Jensen. He made no attempt to reschedule the meeting, cancel it, or give Hause the option of proceeding without representation or without an interview at all. Chamberlin's decision to proceed with the interview after Hause requested representation amounts to a denial of representation in violation of EERA section 3543.5(a) and (b).

#### REMEDY

PERB has broad remedial powers to effectuate the purposes of EERA. EERA section 3541.5(c) states:

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

The typical remedy in cases involving the denial of the right to representation is an order to cease and desist from the unlawful conduct. (*City of Monterey* (2005) PERB Decision No. 1766-M.)

In addition, in *Lake Elsinore Unified School District, supra*, PERB Decision No. 1648 the Board found that "once the employee has made a request for representation during an interview and the employer refuses the request, stating that no discipline would result from the interview, then the employer may not impose discipline as a result of the interview." In *Redwoods Community College District* (1983) PERB Decision No. 293, the Board found that an employer interfered with protected rights where it denied an employee's request for representation during a meeting to discuss a disputed performance evaluation. The Board found it appropriate to purge documents that were a product of the meeting from the

employee's personnel file, including a report making negative remarks about the employee's performance.

In contrast, in *CSU, supra*, PERB Decision No. 893-H, the Board found it inappropriate to expunge documents from an employees' personnel file where those documents were created prior to the investigatory meeting and were not based "in whole, or in any part, on any information or other evidence acquired by the Respondent as a result of the meetings."

In this case, the September 1, 2011 Written Reprimand references Hause's conduct before, during, and after the June 2, 2011 investigatory meeting. This includes specific reference to Hause's responses to Chamberlin's questions. Accordingly, because the Written Reprimand was based, at least in part, on an investigatory interview where Hause was denied the right to representation, it is appropriate to rescind this document.

#### PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Capistrano Unified School District (District) violated the Educational Employment Relations Act (Act), Government Code section 3543.5(a) and (b). The District violated the Act by denying an employee the right to representation during an investigatory interview.

Pursuant to section 3541.5(c) of the Act, it hereby is ORDERED that the District, its governing board and its representatives shall:

- A. CEASE AND DESIST FROM:
  1. Denying Theresa Hause the right to be represented in investigatory meetings involving potential disciplinary action; and
  2. Denying California School Employees Association and its Chapter #224 (CSEA) the right to represent its members.

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

1. Rescind the September 1, 2011 Written Reprimand issued to Hause; and
2. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the District customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.
3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on CSEA.

Right to Appeal

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

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

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

A document is considered “filed” when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered “filed” when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet 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.)

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

Eric J. Cu  
Administrative Law Judge

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
An Agency of the State of California**



After a hearing in Unfair Practice Case No. LA-CE-5621-E, *California School Employees Association and its Chapter 224 (CSEA) v. Capistrano Unified School District (District)* in which all parties had the right to participate, it has been found that the District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by denying a represented employee the right to be represented by CSEA in an investigatory meeting where there was reasonable potential for discipline.

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

A. CEASE AND DESIST FROM:

1. Denying Theresa Hause the right to be represented in investigatory meetings involving potential disciplinary action; and
2. Denying CSEA the right to represent its members.

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

1. Rescind the September 1, 2011 Written Reprimand issued to Hause.

Dated: \_\_\_\_\_

Capistrano Unified School District

By: \_\_\_\_\_

Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED, OR COVERED WITH ANY OTHER MATERIAL.