STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PASADENA CITY COLLEGE FACULTY ASSOCIATION, Charging Party, v. PASADENA AREA COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-6601-E PERB Order No. Ad-518 August 19, 2024

Appearances: Law Office of David Conway by David Conway, Attorney, for Pasadena City College Faculty Association; McDougal Boehmer Foley Lyon Mitchell & Erickson by Rex Randall Erickson and Joshua Taylor, Attorneys, for Pasadena Area Community College District.

Before Krantz, Paulson, and Nazarian, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on Pasadena Area Community College District's appeal from an administrative determination (AD) by PERB's Office of the General Counsel (OGC). The AD resolves certain compliance issues arising from PERB's order in *Pasadena Area Community College District* (2023) PERB Decision No. HO-U-1762, which issued after neither the District nor Pasadena City College Faculty Association (PCCFA) filed exceptions to a proposed decision of an administrative law judge (ALJ), and the proposed decision therefore became final and binding on the parties. (See *Regents of*

the University of California (2023) PERB Decision No. 2884-H, p. 6 [noting impact of final decisions issued after neither party excepts to a proposed decision].)

By declining to file exceptions to the proposed decision, the District waived its right to challenge the ALJ's conclusions. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 15-17.) Accordingly, the following conclusions (among others) are now undisputed: (1) the District made multiple changes to the calendar governing the work of PCCFA-represented faculty; (2) one such change was moving from a calendar that included a Winter Intersession and a Summer Intersession to a new calendar with two Summer Intersessions and no Winter Intersession; (3) the District did not afford PCCFA adequate advance notice and opportunity to bargain before making its changes, thereby violating the Educational Employment Relations Act (EERA; Gov. Code, § 3540 et seq.); (4) the District must pay damages to faculty who incurred losses due to the District's violations; and (5) the District must pay litigation sanctions to PCCFA because the District took litigation positions that were in bad faith and without arguable merit.[1]

While the above conclusions are final, there remain certain issues that are proper for this appeal. This is true because, after OGC assigned a Board agent to

[1] PCCFA's bargaining unit includes all full-time and part-time credit and non-credit faculty, counselors, librarians, learning center coordinators, physicians, nurses, and psychiatrists. We follow the parties' practice by referring to these diverse titles as falling into one of two categories: full-time (also known as regular) faculty and part-time (also known as temporary or adjunct) faculty. Moreover, as discussed *post*, PCCFA seeks damages only for employees impacted by replacing the Winter Intersession with a second Summer Intersession. Because neither party has suggested that this change impacted non-instructional faculty, we presume that only instructional faculty will be eligible for make-whole relief.

ensure compliance with the Board's remedial order, the Board agent necessarily made certain additional determinations beyond those in the now final decision. Thus, in considering the District's appeal regarding the damages it owes to faculty, we accept the ALJ's conclusions as settled but review the Board agent's determinations de novo to the extent they go beyond the ALJ's conclusions.[2]

Having reviewed the entire record and the parties' arguments, we find that the AD erred in its approach to calculating damages. We therefore reverse the AD and remand for further compliance proceedings consistent with this decision.[3]

BACKGROUND

This is the third unfair practice charge in which PCCFA has challenged District decisions about its Winter Intersession and Summer Intersession. Each charge led to a final decision, and we summarize the three decisions for background purposes.

I. The District's 2009 Action and the Resulting PERB Decision in *Pasadena I*

In *Pasadena Area Community College District* (2011) PERB Decision No. 2218 (*Pasadena I*), PCCFA filed a charge challenging the District's decision to cancel Winter Intersession classes, without moving employee work dates. (*Id*., adopting

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[2] The Board agent also made determinations regarding non-monetary relief, but those determinations are undisputed and therefore now final.

[3] The parties agreed that the Board agent should first resolve make-whole relief for faculty, before turning to litigation sanctions. Because the Board agent has not yet addressed the litigation sanctions the District owes, the AD was an interlocutory order rather than a final one. (See *Morgan Hill Unified School District* (2016) PERB Order No. Ad-443, pp. 4-5 [defining interlocutory orders].) Although the District did not seek permission to file an interlocutory appeal as required in PERB Regulation 32200, we resolve the appeal nonetheless because the AD wrongly stated that the parties could file an appeal under PERB Regulation 32360. (PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.)

proposed decision at p. 2.) Although eliminating classes caused "many faculty members" to experience "a significant decrease in income and benefits" (*ibid*.), the Board dismissed PCCFA's charge based on a two-part analysis. First, the District had no duty to bargain over its decision to cancel Winter Intersession classes, as that decision is a non-mandatory bargaining topic.[4] (*Id.*, adopting proposed decision at pp. 4-6.) Second, although the District had a duty to bargain over the effects of its decision, PCCFA waived its right to bargain such effects. (*Ibid*.)

II. The District's 2012 Action and the Resulting PERB Decision in *Pasadena II*

In *Pasadena Area Community College District* (2015) PERB Decision No. 2444 (*Pasadena II*), the Board considered a different type of District action. This time, the District changed faculty work schedules by moving from a calendar with two semesters plus a Winter Intersession and Summer Intersession to a trimester calendar with no intersessions. (*Id*. at p. 6.) For that type of change, the District had a duty to bargain over both the decision and the effects. (*Id*. at p. 19.) The Board explained that the while merely changing students' academic calendar is not subject to decisional bargaining, if the employer is also changing employees' work calendar, it has a decision bargaining duty. (*Id*. at pp. 14-15 & 19.) Because the District violated its duty to bargain, its new, trimester-based calendar was an unlawful unilateral change. (*Id*. at pp. 16-23.) In its remedial order, the Board directed the District to make affected

[4] "Non-mandatory" describes topics about which parties need not bargain, although they may choose to do so. (*Oakland Unified School District* (2023) PERB Decision No. 2875, p. 3, fn. 4 (*Oakland*).) One can convey the same meaning by labeling topics "permissive," or as falling outside the "scope of bargaining" or "scope of representation." (*Ibid*.) Although such topics are sometimes called "non-negotiable," that is imprecise because it could also mean illegal bargaining subjects. (*Ibid*.)

employees whole and restore the prior status quo by rescinding the trimester calendar and reverting to the previous semester-based calendar with a Winter Intersession and a Summer Intersession. (*Id*. at p. 26.) That remained the status quo when the events at issue here unfolded, as described below.

III. The District's 2020 Action and the Resulting PERB Decision in This Case

After PCCFA filed this case in November 2020, OGC issued a complaint, and thereafter the ALJ granted PCCFA's motion to amend the complaint. The amended complaint primarily alleged that the District violated EERA by: (1) failing to bargain in good faith over a three-year pilot program involving changes to the calendar for the 2021-2022, 2022-2023, and 2023-2024 academic years; (2) unilaterally implementing the pilot program without affording PCCFA reasonable advance notice and a meaningful opportunity to bargain over the decision and/or the effects thereof; and (3) using the Academic Senate and other shared governance institutions to bypass PCCFA and deal directly with bargaining unit members.

At the formal hearing, and in a post-hearing brief to the ALJ, PCCFA argued that the District should be subject to litigation sanctions. One central element of PCCFA's argument was that PERB had previously resolved the central issue in dispute—the negotiability of certain types of changes to the District's calendar—in a prior decision involving the same parties.

After receiving the parties' post-hearing briefs, the ALJ issued a proposed decision finding that the District had violated EERA and had taken litigation positions that were without arguable merit and in bad faith. The ALJ found that the District unilaterally changed the calendar governing its faculty by:

> "(1) moving the start date for the Spring Semester from February to January, more than a month earlier than in previous years, to a time that overlapped with the previous Winter Intersession; (2) moving Spring break more than a month earlier, from April to March; (3) moving the end date for the Spring Semester by more than a month, from June to May; (4) moving the start date for the previous Summer Intersession by over a month, from June to May, with a correspondingly earlier end date to this term; (5) replacing the six-week Winter Intersession with a new, second Summer Intersession to occur after the first (i.e., previously existing) Summer Intersession."

The ALJ carefully considered the District's arguments, including its claim that it had no duty to bargain over allegedly "eliminating" the Winter Intersession and/or cancelling courses. The main problem with this argument was that it ignored the District made multiple fully negotiable changes, such as substantially replacing the Winter Intersession with a second Summer term. Thus, while the ALJ correctly concluded that "a decision to cancel intersession classes or an entire intersession is not subject to decisional bargaining," the ALJ also correctly found that the District in fact made a different decision—to replace the Winter Intersession with a second Summer Intersession, thereby moving it "from one part of the year to another." The ALJ, correctly referencing "well-settled PERB precedent," including *Pasadena II*, *supra*, PERB Decision No. 2444, found that the District had a duty to bargain over this decision.

The ALJ also rejected the District's argument that the Education Code affords it a management right to change its calendar without bargaining. In rejecting this argument, the ALJ explained, in part, that:

> "The District's reliance on Education Code section 87484 is misplaced. Subdivision (a) of that section provides: 'In the event a regular employee of a community college district has tenure as a full-time regular employee of the district, any assignment or employment of such employee in addition to his or her full-time regular assignment may be terminated by the governing board of the district at any time.' The District's argument appears to be that because it may *terminate* an employee working an overload assignment at any time, it may also change the hours of employment for all such assignments without engaging in decisional bargaining. However, this conclusion fails to comport with the statutory language, PERB precedent, and the conventions of logic. As explained above, it confuses the District's managerial prerogative of whether to provide an educational service or opportunity to work 'overload' or 'extra-contractual' assignments with the District's obligation to bargain over the wages, hours, and terms and conditions of employment of the persons performing those assignments."

Because the District did not comply with its bargaining duties, the ALJ found that it unlawfully changed its "hybrid academic/work calendar."[5] To remedy the District's violation, the proposed decision includes a remedial order ("the Order") that requires the District take the following actions, among others:

[5] Board precedent holds that an employer's duty to bargain relates to its employee work calendar, not student attendance dates, irrespective of whether student academic dates match up entirely with employee work dates. (*Antelope Valley Community College District* (2023) PERB Decision No. 2854, p. 4.) Here, the ALJ described the bargainable topic as "the negotiable aspects of the District's hybrid academic work calendar." Although this is an accurate application of the law when there is a single, integrated calendar, Board precedent typically does not refer to a "hybrid" calendar since students' dates may or may not match up exactly with employee work dates.

> "1. Upon request, meet and negotiate with [PCCFA] regarding the negotiable aspects of the District's hybrid academic/work calendar;
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> "2. Upon service of a final decision in this matter, for the next successive academic year rescind implementation of the three-year pilot project negotiated between Superintendent-President Erika Endrijonas and then Academic Senate President Matthey Henes, including the 2021-2022, 2022-2023, and 2023-2024 academic calendars, and restore the previous calendar format consisting of two primary terms (one Fall and on Spring Semester), and two intersessions of approximately six-weeks each (one winter beginning in early January, one summer beginning in late June); provided that if service of the final decision in this matter occurs on or after June 1 of an academic year, rescind the implementation of the 2021-2022, 2022-2023, and 2023-2024 calendar and restore the 2020-2021 calendar format described above for the second successive academic year after the date of service of the final decision in this matter;
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> "3. Make affected employees whole for any losses suffered as a result of the above-described unilateral changes and/or bypassing/direct dealing with employees, including interest at the rate of seven (7) percent per annum;
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> "4. Reimburse [PCCFA] reasonable legal expenses, including attorney's fees and costs in bringing and prosecuting this action, according to proof."

When neither party filed exceptions to the proposed decision, it became a final decision, designated as *Pasadena Area Community College District* (2023) PERB Decision No. HO-U-1762 (*Pasadena III*).

IV. Compliance Proceedings

Pursuant to PERB Regulation 32980, subdivision (a), OGC assigned a Board agent to ensure that the District complied with the Order. The parties were able to

agree on all non-monetary compliance matters, including a new prospective work calendar and how to provide employees with notice of the Board's decision.

On September 5, 2023, the District submitted a position statement regarding the Order's requirement that the District "make affected employees whole for any losses suffered as a result of the above-described unilateral changes." The District primarily argued that neither full-time nor part-time faculty are eligible for make-whole relief because Education Code sections 87474, 87482.3, and 87665 provide no statutory right to teach during intersessions. As part of these arguments, the District argued that part-time faculty have no reasonable assurance of re-employment from one term to the next, and that intersession pay is akin to "overtime" pay. Based on these arguments, the District asserted that it does not owe faculty make-whole relief for replacing the Winter Intersession with a new, second Summer Intersession. In the alternative, the District urged that any make-whole calculation must consider fluctuations in student enrollment.

The next day, PCCFA submitted a position statement regarding damages. PCCFA argued that the District owes faculty make-whole relief whenever its violations cause losses, irrespective of whether the Education Code guarantees a faculty member an intersession assignment. PCCFA asserted that *Pasadena III*, *supra*, PERB Decision No. HO-U-1762, had already rejected the District's contrary arguments, and that in any event the District's arguments violated extensive PERB precedent. PCCFA also explained that because the parties had agreed on a Winter Intersession for the 2023-2024 academic year, the District owed damages only for the two prior years. To calculate damages, PCCFA took the following steps:

- PCCFA first summed the hours that faculty worked in Winter 2021 and Summer 2021—the last intersessions unaffected by the District's change—to calculate total 2021 intersession hours.
- PCCFA assumed that faculty would have worked the same number of intersession hours in each of the two successive years (2022 and 2023), absent the District's changes.
- Next, PCCFA calculated the total number of intersession hours that faculty worked in 2022, as well as the estimated intersession hours in 2023 (precise 2023 data was not yet available as of September 2023). For each of these two damages years, PCCFA's proposed method involved aggregating hours in the first Summer Intersession and the new second Summer Intersession. PCCFA found that total intersession hours were lower in 2022 than they were in 2021, and PCCFA estimated that 2023 intersession hours would also be lower than 2021 intersession hours.
- PCCFA subtracted the intersession hours in each of the two damages years from the larger number of intersession hours that faculty had worked in 2021, arriving at allegedly "lost" hours for 2022 and for 2023.
- Lastly, PCCFA calculated a unit-wide average hourly intersession pay rate for each year and multiplied that rate by the allegedly lost hours.

On November 30, 2023, the Board agent issued an Order to Show Cause (OSC) as to why PERB should not reject the District's arguments, accept PCCFA's

proposed methodology, and distribute backpay on pro rata basis to bargaining unit members who worked in Winter 2020 and/or Winter 2021.

On December 20, 2023, the District responded to the OSC, reasserting its prior arguments as to why it did not owe backpay to any faculty. The District also provided newly available data for the 2023 Summer Intersessions. This data showed that faculty worked more intersession hours in 2023 than PCCFA had initially estimated, but still less than in 2021.[6] Without waiving its other arguments, the District used this data to recalculate alleged damages using PCCFA's methodology. Moreover, again without waiving its other arguments, the District offered an alternative basis for estimating or checking damage calculations based on aggregate faculty wages from year-end W-2 statements. This data showed that faculty earned $1,443,763.62 less in 2022, compared to 2021. Finally, the District urged that PERB should offset any damages awarded to part-time faculty by any unemployment insurance benefits they may have received.[7]

On February 7, 2024, PCCFA replied to the District's response. PCCFA reiterated its earlier positions, updated its proposed calculations to incorporate 2023

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[6] The District later corrected its 2023 data. Even after these corrections, the data showed that faculty worked more intersession hours in 2023 than PCCFA had initially estimated, but still less than in 2021. Specific numbers for both 2022 and 2023 appear *post* at p. 15, fn. 8.

[7] While the District has urged that we offset damages with both unemployment benefits and income faculty earn during summer intersessions at the District, it has not sought to carry its burden to show that any faculty member failed to mitigate damages by seeking employment elsewhere. (See *Bellflower Unified School District* (2022) PERB Decision No. 2544a, p. 29 (*Bellflower*) [respondent that violated the law bears the burden of proving failure to mitigate damages].) The District has therefore waived any such argument.

data, argued that the District had misrepresented PERB precedent regarding overtime, and noted that neither PERB nor the National Labor Relations Board (NLRB) offset unemployment benefits against lost wages.

On March 5, 2024, the Board agent issued the AD that is the subject of this appeal. The AD accepted PCCFA's methodology, finding that to determine "the amount of backpay compensation owed because of the reduction of hours," it would be "equitable to estimate the hours faculty would have worked if not for the District's elimination of the Winter Intersession offset by the hours added with the inclusion of the second Summer Intersession." The AD accordingly calculated lost hours of work by comparing total intersession hours in each of the two damages years (2022 and 2023) to intersession hours in 2021. The AD then multiplied the number of lost hours in each year by the average hourly rate for that year. Using this methodology, the AD concluded that combined pre-interest backpay for 2022 and 2023 was $4,004,094.95.

The AD also rejected the District's various arguments, reiterating the OSC's reasoning and adding more analysis. For instance, the AD correctly cited *Bellflower*, *supra*, PERB Decision No. 2544a, p. 31, for the principle that unemployment benefits are not interim earnings that offset damages. As another example, the AD correctly found that annual faculty wages are not a sound basis for determining losses specific to the District moving an intersession.

The District appealed, and PCCFA responded. As part of its opposition, PCCFA requested further litigation sanctions because the District has allegedly maintained positions that it had waived by failing to challenge the proposed decision.

DISCUSSION

I. Make-Whole Relief to Faculty

A. General Principles

The Legislature has vested PERB with broad authority to decide what remedies are necessary to effectuate the purposes of EERA and the other acts we enforce. (Gov. Code, §§ 3541.3, subd. (i); 3541.5, 1st par. & subd. (c); *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189.) PERB remedies must serve the dual purposes of compensating for the harm a violation causes and deterring further violations. (*County of San Joaquin v. Public Employment Relations Bd.* (2022) 82 Cal.App.5th 1053, 1068.) Moreover, a "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.) We therefore attempt to "recreate the conditions and relationships that would have been had there been no unfair labor practice, even when doing so necessarily entails some degree of uncertainty as to the precise relationships." (*City of Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 13.)

A charging party bears the burden of proving by a preponderance of the evidence that a violation materially caused harm. (*County of Santa Clara* (2024) PERB Decision No. 2900-M, p. 32 [judicial appeal pending on other grounds]; *Bellflower*, *supra*, PERB Decision No. 2544a, p. 26.) However, the charging party need not prove damages precisely. Rather, make-whole relief usually involves predictions and estimates, and thus an approximation may be sufficient to meet the charging party's

burden. (*Bellflower*, *supra*, at p. 26; *City of Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 14.) We resolve uncertainties against the wrongdoer. (*Bellflower*, *supra*, at p. 26; *Lodi Unified School District* (2020) PERB Decision No. 2723, p. 21, fn. 13; *City of Culver City* (2020) PERB Decision No. 2731-M, p. 26; *City of Pasadena*, *supra*, at p. 27.) Moreover, provided that an estimate has a rational basis and is not so excessive as to be punitive, it appropriately serves both a compensatory and deterrent function. (*Bellflower*, *supra*, at p. 26; *City of Pasadena*, *supra*, at p. 13.)

Compliance proceedings should typically not lead to protracted litigation. (*Bellflower*, *supra*, PERB Decision No. 2544a, p. 15.) For instance, during compliance proceedings in cases such as this one—where an unlawful unilateral change affected a sizable number of employees—obtaining individualized testimony or declarations from each impacted employee will rarely be a realistic or preferred means of estimating damages. But individualized testimony is more likely to be warranted if a small number of employees are individually owed an unusually large sum. (*Id*. at pp. 15, 64-130 & 136-137 [impacted employees testified during compliance proceedings in case where employer owed over $1,000,000 to 10 employees].)

B. Application to This Case

Although the District made multiple changes without satisfying its duty to bargain, PCCFA seeks make-whole relief based on only one such change: replacing the Winter Intersession with a second Summer Intersession in 2022 and 2023. Before addressing potential means to estimate damages resulting from that change, we note two non-exclusive examples of how the District's change could have caused a monetary loss. First, faculty could experience losses if they previously taught in the

Winter Intersession (and therefore likely would have done so again), but they have other work or personal obligations preventing them from teaching in the summer (or incur expenses, such as for childcare, when working in the summer). Second, the same is true for faculty who in the past taught during both the Winter Intersession and Summer Intersession, but whose work or personal obligations may prevent them from teaching two consecutive Summer Intersessions.

Because this compliance matter involves hundreds of employees potentially impacted by the District's unilateral change, the parties and the Board agent properly sought an approach that did not involve individualized testimony or declarations from each employee. Unfortunately, however, as we proceed to explain, neither party proposed a rational means to estimate damages due to the District's violation.

PCCFA proposed a methodology to estimate damages based on a change that the complaint did not challenge: in both 2022 and 2023, the District offered fewer total intersession work hours than it did in 2021.[8] The Board agent nonetheless adopted PCCFA's methodology, and indeed the AD explicitly noted its approach sought to estimate "the amount of backpay compensation owed because of the reduction of hours." This was an error given that the ALJ did not find a duty to bargain over a reduction in intersession hours.

As noted above, out of the five changes the ALJ found unlawful, the one for which PCCFA seeks damages was replacing the Winter Intersession with a second Summer Intersession. Significantly, that change could have coincided with either an

[8] In 2021, faculty worked 111,555 total intersession hours. This total shrank to 81,602 hours in 2022 (a 26.9% decrease compared to 2021), before rising to 96,643 hours in 2023 (a 13.4% decrease compared to 2021).

increase or decrease in intersession hours, due to enrollment changes, funding, or other factors causing year-over-year variation in classes offered.[9]

Accordingly, we direct OGC to make reasonable efforts to more narrowly tailor its damages order to the District's violations, excluding to the extent feasible those resulting from the lower number of intersession classes offered, while recognizing that we resolve uncertainties against the wrongdoer. (See *City of Glendale* (2020) PERB Decision No. 2694-M, pp. 74-75 [where decision to eliminate mechanic classification was based upon both a lawful decision to reduce the amount of overall construction and an unlawful decision to subcontract and transfer remaining work, Board directed compliance officer to estimate harms caused by unlawful conduct].) We do not specify what approach the Board agent must use on remand. Instead, we afford the parties and the Board agent latitude to propose alternate methodologies. However, we use the following example to explain certain guiding principles.

To create an initial list of employees who, more likely than not, would have taught during the Winter Intersession in 2022 and/or 2023, it is logical to focus on faculty who taught during the Winter Intersession in 2021. The Board agent may also

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[9] There is also year-over-year variation in classes offered in the fall and spring. In fact, while the District offered fewer intersession classes in the two years after 2021, it simultaneously increased offerings in the fall and spring semesters. The record does not reflect whether there is a causal link between those trends. The AD noted these trends and reached an inference that we do not adopt. Specifically, the AD noted the increase in fall and spring classes and stated that this suggests the District would have kept intersession hours at least constant, absent its shift from a Winter Intersession to a second Summer Intersession. We read the record more cautiously and do not believe it allows us to determine what impact (if any) the increase in fall and spring courses might have on intersession course offerings. We therefore find no evidence—inferential or otherwise—that the reduction in intersession hours in 2022 and 2023 resulted from the calendar changes that the ALJ found to be unlawful.

wish to apply additional screens to this list, such as removing employes who have not taught for the District at any point since 2021.

At that point, the Board agent's task is to arrive at a rationally supported methodology that, on average, estimates harm resulting from unlawful conduct rather than from the lower number of intersession classes in 2022 and 2023. To do so, the Board agent may wish to adopt a formula that accounts for the fact that, irrespective of the District's violation, faculty would on average have experienced an approximately 26.9 percent decrease in intersession hours in 2022 and an approximately 13.4 percent decrease in intersession hours in 2023, compared to 2021. (See *ante* at p. 15, fn. 8.) Thus, one option is to order payment to faculty who more likely than not would have taught a Winter Intersession in 2022 and/or 2023 and for whom at least one of the below formulas yields a positive result:

2022 Damages:

[(0.731 x 2021 intersession hours) - (2022 intersession hours)] x [2022 hourly rate]

2023 Damages:

[(0.866 x 2021 intersession hours) - (2023 intersession hours)] x [2023 hourly rate]

No approach is perfect. Estimating average make-whole relief, while a common PERB compliance method in cases involving a sizable number of employees, will tend to provide less than full compensation to those who lost one or more entire courses due to the District's violation, while potentially overestimating damages to others. But the above approach illustrates one rational methodology. First, it uses income from the summer to offset losses from the District moving the Winter Intersession. Second, it addresses the only tenable argument the District has raised on appeal: that a

community college has no duty to bargain before deciding to offer fewer intersession courses. (See *Pasadena I*, *supra*, PERB Decision No. 2218, adopting proposed decision at pp. 4-6 [no duty to bargain over canceling courses, though union has right to bargain over effects].) Moreover, it provides no backpay in those instances where the above formula results in a negative number in 2022 and/or 2023, since a negative result means the individual's losses that year were no more than expected (on average) given that fewer intersession hours were available.[10]

The District's other arguments on appeal are not tenable. First, to the extent the District maintains it "canceled" the Winter Intersession, the ALJ correctly found that the District replaced that intersession with a second Summer Intersession, while failing to comply with its bargaining duty. Moreover, the District waived any challenge to that conclusion when it declined to file exceptions to the proposed decision.

Next, the District points out that faculty do not have a statutory right to teach any intersession course, and part-time faculty need not be rehired from term to term. Those are valid assertions, but they have limited relevance to ascertaining damages for the violations found. The central damages inquiry is to determine which faculty more likely than not lost the opportunity to teach during Winter Intersession in 2022 and/or 2023—because of the District's unlawful conduct—and more likely than not lost pay after accounting for the factors discussed above. Where these conditions are satisfied, it does not matter whether faculty had a statutory right to teach during an intersession, or whether management had a statutory right to refrain from rehiring

[10] If an employee's potential loss was more than offset in one of the two years (i.e., the formula for that year yields a negative number), that amount does not offset losses (if any) in the other year. (*Bellflower*, *supra*, PERB Decision No. 2544a, p. 33.)

part-time faculty from term to term. In other words, theoretical rights have at most limited relevance when our task is to estimate losses that employees more likely than not would have avoided had the status quo remained the same.

We have already noted that we resolve uncertainties against the wrongdoer. We certainly do not use theoretical rights to benefit the wrongdoer, especially when the record well documents how many intersession hours the District actually offered in 2022 and 2023, and the District obviously needed faculty to teach these classes, meaning there is no cause to speculate that it could have terminated certain employees or refrained from offering them classes.[11]

Moreover, the District waived most aspects of the above arguments. For instance, the ALJ considered the District's argument "that because it may *terminate* an employee working an overload assignment at any time, it may also change the hours of employment for all such assignments without engaging in decisional bargaining." The ALJ rejected this argument, finding that it did not "comport with the statutory language, PERB precedent, and the conventions of logic." By failing to file exceptions to the proposed decision, the District waived its right to challenge the ALJ's conclusions.

The District also ignores *Pittsburg Unified School District* (2022) PERB Decision No. 2833. There, the employer argued that its process for assigning summer session

[11] Nor can the District seek to offset the harm certain faculty have incurred by pointing to other faculty who benefited from the District's unlawful conduct. Rather, PERB orders a wrongdoer to make whole impacted employees while holding harmless innocent actors who benefited. (*State of California (Correctional Health Care Services)* (2021) PERB Decision No. 2760-S, p. 42; *County of Kern* (2018) PERB Decision No. 2615-M, pp. 11-12.)

adult education classes was outside the scope of bargaining because the summer teachers at its adult school were temporary employees under Education Code section 44929.25, who were not statutorily entitled to any minimum assignment. (*Id*. at p. 8.) The Board concluded that because EERA applies to both temporary and permanent employees, "rehiring, reelection, and/or course assignment processes for temporary teachers fall within the scope of representation, as do temporary teachers' work hours." (*Ibid*.) Accordingly, the ALJ was correct in finding that the District's duty to bargain encompasses calendar changes for both permanent and temporary faculty.

Finally, the District asserts that make-whole relief is not appropriate because intersessions involve "overload" assignments that are akin to overtime, and, the District claims, PERB does not include lost overtime in make-whole calculations. We reject this argument for three reasons. First, as with most of its other arguments, the District waived this argument. In this case, the District did so by failing to except to the ALJ's conclusion that whether work assignments are "part of the 'primary' calendar terms or are 'overload' assignments, they are still 'hours of work,' and their timing or distribution throughout the year falls within the statutorily-enumerated subject 'hours of work.'"

Second, a make-whole remedy must expunge the consequences of a violation. Here, the salient violation was replacing the Winter Intersession with a second Summer Intersession. Because the District's change with respect to intersession assignments violated EERA, an appropriate remedy cannot ignore such assignments.

Third, even assuming that intersessions are akin to overtime, the District is wrong in its categorical assertion that "PERB has historically refused to include

compensation for overtime from the calculation for a 'make whole' remedy." To the contrary, PERB orders payment of overtime as part of backpay when the charging party establishes that a violation more likely than not caused a loss of overtime opportunities. (*Antelope Valley Community College District* (2018) PERB Decision No. 2618, pp. 25-26 [ordering backpay for lost overtime]; *County of Riverside* (2018) PERB Decision No. 2591a-M, p. 2 [same]; *San Jacinto Unified School District* (1994) PERB Decision No. 1078, p. 4 [overtime awarded based on extrapolating from overtime worked over previous three years]; cf. *Long Beach Community College District* (2009) PERB Decision No. 2002, p. 18 [backpay did not include daily overtime because the impacted employees had voluntarily agreed to work four ten-hour shifts, and thus were not eligible for daily overtime under the parties' contract].)

For the foregoing reasons, only one of the District's arguments materially impacts compliance with the Order's provision for make-whole relief: the fact that the violations found do not include offering fewer intersession hours in 2022 and 2023. Based on that argument, we reverse the AD and remand to the Board agent for further proceedings consistent with this decision.

II. PCCFA's Request for Further Litigation Sanctions

PCCFA requests that the Board impose further litigation sanctions against the District, beyond those that the ALJ already ordered, for attempting to relitigate issues that the Board resolved against it in *Pasadena II*, *supra*, PERB Decision No. 2444, and/or arguments that are no longer subject to dispute since the District declined to file exceptions to the proposed decision. A party to a PERB matter seeking litigation expenses based upon its attorney fees and costs in that matter must normally prove

that its opponent maintained a claim, defense, or motion, or engaged in another action or tactic, that was without arguable merit and pursued in bad faith. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 11.) The District has undeniably raised arguments already resolved in *Pasadena II*, *supra*, PERB Decision No. 2444, as well as arguments that are no longer subject to dispute since the District declined to file exceptions to the proposed decision. However, because the District integrated these arguments with non-frivolous ones and convinced us to reverse the AD, we do not find the District's conduct in litigating compliance issues meets the sanctions standard.

ORDER

The administrative determination issued on March 5, 2024 is REVERSED. This matter is REMANDED to the Office of the General Counsel (OGC) with the following instructions.[12]

[12] A decision of the Board itself regarding alleged unfair practices will qualify as a "final decision or order of the board in an unfair practice case" pursuant to Government Code section 3542, subdivision (b), if the decision dismisses all allegations or if the only process that remains to be finished is ensuring compliance with a remedial order. Respondents in most unfair practice cases therefore can consider whether to file an appellate writ before they must comply with a remedial order the Board issues. Occasionally, a respondent has the right to appeal two different Board decisions in the same case—an initial appeal regarding the Board's main decision and then, after that appeal ends and PERB compliance proceedings take place, a second appeal limited to any new Board decision regarding compliance. But our order today is interlocutory, as it addresses just one question and remands for further proceedings on multiple compliance issues. Therefore, it is not yet appealable under Government Code section 3542, subdivision (b), and the period in which a party may file a writ on compliance issues would begin only after any final compliance order issued by the Board itself. (See *State of California (California Correctional Health Care Services*) (2024) PERB Decision No. 2888-S, p. 38, fn. 17 [decision reversing and remanding for further litigation is not a final decision subject to appeal].)

The Board agent shall receive further evidence and argument as needed and issue a revised determination consistent with this decision. The revised determination shall resolve all outstanding make-whole and litigation sanctions issues and include a comprehensive order detailing each step that Pasadena Area Community College District must take to perfect its compliance. The Board agent's administrative determination should specify, among other relevant details: (1) the names of current and former employees owed backpay or other make-whole relief, together with the pre-interest amounts they are owed; (2) the pre-interest amount of litigation sanctions the District owes to Pasadena City College Faculty Association; (3) deadlines for all required payments, expressed as a number of days after the decision is no longer subject to appeal; (4) the methodology the parties must follow for calculating and paying daily compound interest up to the date of the District's payments, pursuant to *El Centro Regional Medical Center* (2024) PERB Decision No. 2890-M, p. 22, fn. 12 & p. 25; and (5) all required processes for distributing payments to faculty, including diligent efforts to locate (and provide all required payments to) current and former employees owed make-whole relief, or their heirs, estates, assignees, or representatives, as well as diligent efforts to report and deliver any uncashed checks (and/or payments due to former employees who cannot be located) to the California Controller's Office pursuant to its unclaimed property procedures.[13]

Members Paulson and Nazarian joined in this Decision.

[13] OGC has discretion to use the Controller's Office process in any compliance proceeding potentially involving unclaimed property.