



**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

ASSOCIATION OF CLOVIS EDUCATORS,
CTA/NEA,

Charging Party,

v.

CLOVIS UNIFIED SCHOOL DISTRICT,

Respondent.

Case Nos. SA-CE-3040-E
SA-CE-3047-E
SA-CE-3051-E

CLOVIS UNIFIED FACULTY SENATE,

Joined Party.

ASSOCIATION OF CLOVIS EDUCATORS,
CTA/NEA,

Charging Party,

v.

CLOVIS UNIFIED FACULTY SENATE;
CLOVIS TEACHERS ORGANIZATION,

Respondent.

Case No. SA-CO-655-E

Request for Reconsideration
PERB Decision No. 2904

PERB Decision No. 2904a

October 14, 2024

CLOVIS UNIFIED SCHOOL DISTRICT,

Joined Party.

Appearances: California Teachers Association by Megan Degeneffe, Staff Counsel, for Association of Clovis Educators, CTA/NEA; Fagan Friedman & Fulfroost by David A. Moreno, Lynn Beekman, Katy McCully Merrill, and Brandon A. Lallande, Attorneys, for Clovis Unified School District.

Before Banks, Chair; Krantz and Nazarian, Members.

DECISION

KRANTZ, Member: The above-captioned unfair practice cases are before the Public Employment Relations Board (PERB) on a request by Respondent Clovis Unified School District to reconsider our decision in *Clovis Unified School District* (2024) PERB Decision No. 2904 (*Clovis*). There, we noted that the District had not filed exceptions to the proposed decision of the administrative law judge (ALJ), thereby conceding the ALJ's findings and conclusions. (*Id.* at pp. 3, 34 & 57.) The ALJ's findings, as well as additional findings we reached, demonstrated that the District violated the Educational Employment Relations Act (EERA) and the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD) by, among other conduct: (1) dominating and interfering with the administration of the Clovis Unified Faculty Senate, an employee organization that is a joined party in all three charges against the District; (2) providing the Senate with preferential treatment and extensive, unequal support; and (3) encouraging employees to support the Senate while deterring or discouraging them from joining Charging Party Association of Clovis Educators (ACE) and from authorizing ACE to represent them. (*Id.* at pp. 36-48.)¹

The disputed questions in *Clovis, supra*, PERB Decision No. 2904 related to exceptions filed by ACE, which centered on the appropriate remedy for the District's violations, as well as certain claims against the Senate that the ALJ had rejected. As to the claims against the Senate, we partially reversed the ALJ. Based upon the violations the ALJ found and additional violations that we found, we concluded that the

¹ EERA is codified at Government Code section 3540 et seq., while the PEDD is codified at Government Code section 3550 et seq. Undesignated statutory references are to the Government Code.

Senate violated EERA by, among other conduct: (1) soliciting and/or accepting unlawful support from the District; (2) causing or attempting to cause the District to violate EERA; and (3) otherwise interfering with teachers' protected activity. (*Id.* at pp. 49-53.)²

We also augmented and adjusted the ALJ's proposed remedial order. First, we granted the "disestablishment" remedy that is standard in all cases involving employer domination of a labor organization, thereby directing the District and the Senate to disestablish all relationships with one another having to do with teachers' employment terms and conditions. (*Clovis, supra*, PERB Decision No. 2904, pp. 55-63.) Second, we affirmed the ALJ's decision to require a District representative to read aloud PERB's notice of findings and remedial order, but we made multiple adjustments to this spoken notice order, to avoid remedial disputes and better effectuate the purposes of EERA and the PEDD. (*Id.* at pp. 64-65.)

The District's reconsideration request claims we made prejudicial mistakes of fact and erred in our remedial order. As part of its request, the District asks us to consider new evidence that allegedly would alter our remedy, and which we should not expect the District to have presented earlier, even with the exercise of reasonable diligence. For the reasons explained below, we find no cause to disturb our conclusions in *Clovis, supra*, PERB Decision No. 2904.

² We use the term "teachers" as a shorthand to include teachers, mental health professionals, and other certificated educational employees at the District.

DISCUSSION

Requests for reconsideration are subject to the strict standard set forth in PERB Regulation 32410.³ Specifically:

“Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. The request for reconsideration shall be filed with the Board itself in the headquarters office and shall state with specificity the grounds claimed and, where applicable, shall specify the page of the record relied on. Service and proof of service of the request pursuant to Section 32140 are required. The grounds for requesting reconsideration are limited to claims that: (1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.”

(*Id.*, subd. (a).)

An error or omission in a remedial order can be a proper subject of reconsideration under the newly discovered evidence standard. (*County of Ventura* (2021) PERB Decision No. 2758a-M, p. 2 (*Ventura*).) However, this represents “a narrow avenue” allowing corrections to inadvertent errors, and it “does not allow

³ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

parties to reassert remedy arguments that we have already considered and rejected.” (*Id.* at pp. 2-3; see also *id.* at p. 3, fn. 2 [reconsideration request is proper where certification order included an incorrect classification, backpay order mistakenly began relief on day of termination rather than day of administrative leave, or PERB otherwise made an inadvertent remedial error].) Thus, whether a reconsideration request focuses on the Board’s remedy or any other aspect of a Board decision, a party may not use the reconsideration process “to register its disagreement with the Board’s legal analysis, to re-litigate issues that have already been decided, or simply to ask the Board to try again.” (*Id.* at p. 3 [internal quotation marks and citations omitted].)

Here, the District alleges that we made more than a dozen prejudicial factual errors, and it asks us to consider three newly submitted declarations. The District also disagrees with our legal analysis, seeking to relitigate decided issues, particularly as to remedy.

The District’s request is out of bounds to the extent it seeks to relitigate legal issues or application of law to facts, and it is procedurally invalid in other respects as well. One such flaw is that the District’s request raises issues that the District has long since waived. As noted above, the District did not file exceptions to the proposed decision. Nor did the Senate. They accordingly waived any challenge to the ALJ’s conclusions, including that the District’s violations were “extensive,” that the Senate “is literally dependent on the District’s support,” and that the District’s payments to the Senate were “antithetical to the socio-economic construct of EERA.”

The District now claims it did not agree with the ALJ’s conclusions but filed no exceptions because it did not object to the ALJ’s proposed remedy. This explanation

ignores that, pursuant to PERB Regulations and precedent, a party's failure to file exceptions on a given issue waives any future challenge to the ALJ's conclusion on that issue. (PERB Reg. 32300, subd. (e); *Trustees of the California State University* (2014) PERB Decision No. 2400-H, p. 4, fn. 3.) The District therefore does precisely what we have warned parties not to do—use reconsideration requests “to make up for shortcomings in their previous filings.” (*Alliance College-Ready Public Schools, et al.* (2018) PERB Decision No. 2545a, p. 5.)

The District's waiver is particularly clear in this instance, as the District and the Senate each had two distinct chances to file exceptions. They could have done so in the first instance following the proposed decision. (PERB Reg. 32300, subd. (a).) And later, a second opportunity arose. When ACE filed its exceptions, the District and the Senate each had the right to file cross-exceptions as to any issue. (PERB Reg. 32310, subd. (c).) Thus, even when the District knew full well that ACE was asking the Board to order disestablishment—and was basing its argument in part on the ALJ's conclusions that the District had engaged in extensive violations—the District and the Senate nonetheless filed no exceptions, which cemented their respective waivers.

Those portions of the District's reconsideration request that rely on new evidence suffer from further significant flaws. Assuming for the sake of argument that the District's new evidence is relevant, the District has failed to establish PERB Regulation 32410's other four requirements for submitting new evidence in a reconsideration request. Indeed, though the District submitted a declaration stating in a conclusory manner that its new evidence meets each requirement, it failed to specify when the District discovered the new facts, how soon thereafter it sought to reopen

the record or otherwise bring the facts to the Board's attention, or why it could not have done so earlier. And it is clear from the nature of the assertedly new evidence that it was previously available, could have been discovered with the exercise of reasonable diligence, and was not submitted close to the time of discovery.⁴ Accordingly, we exclude from the record the District's proposed new evidence. Moreover, as discussed *post*, the new evidence would not change the outcome even if we accepted it.

Aside from the above-described global flaws in the District's reconsideration request, we also find, in the alternative, that its specific arguments lack merit. We proceed to explain each of these additional specific reasons for rejecting the District's arguments.

I. Alleged Prejudicial Factual Errors and New Evidence as to the District's Conduct

EERA section 3543.5, subdivision (d) makes it unlawful for an employer to “[d]ominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.” The District did not challenge the ALJ’s lengthy findings on liability; it belatedly attempts to do so now. As noted, the District has no right to seek reconsideration of any such findings. Instead, at

⁴ The District’s new declarations are particularly problematic given the extensive record the parties created by examining witnesses and introducing exhibits during a 33-day hearing. While a Board agent has authority to receive evidence by declaration if warranted (*City of Santa Clara* (2016) Decision No. 2476-M, pp. 9-10), we are mindful that witness evidence tends to be more dependable when it is subject to cross-examination. In this case, the declarations submitted highlight that problem in that they are self-serving, lacking in context, and otherwise conclusory.

most, it may seek reconsideration to the extent it alleges a prejudicial error of fact (or newly discovered evidence meeting the criteria in PERB Regulation 32410) regarding Board findings that exceeded those in the proposed decision. The District goes far beyond that limited right, in two ways: (1) it alleges mistakes as to violations the ALJ had found and to which the District filed no exceptions; and (2) it challenges findings without showing any prejudicial mistake of fact or new evidence meeting the criteria set forth in PERB Regulation 32410. In any event, none of the District's reconsideration arguments would be tenable even if they were procedurally proper. We explain.

A. Unlawful Support

The District's threshold claim is that the Board made prejudicial errors of fact by treating all of the District's unlawful support "as still existing," even though it claims by the time the hearing closed, "the only support and assistance which continued was the [Senate] stipends, release time to the [Senate] president, a classroom office for the [Senate] President, and a cell phone reimbursement." More specifically, the District identifies multiple types of support that it provided the Senate but eventually discontinued or offered equally to ACE. However, the District has failed to show a prejudicial error of fact, and its efforts to introduce new evidence are unavailing and would not alter our order.

The first category of support the District mentions is providing the Senate with a vehicle and related vehicle costs. The District highlights that it stopped providing such support at the end of the 2020-2021 school year. There is no prejudicial error of fact, however, as the District's current contention matches what the Board found. (See

Clovis, supra, PERB Decision No. 2904, p. 23 [“Beginning in about 2008 and continuing through 2020-2021, the District provided the Senate president with a District vehicle, maintenance, insurance, and gas. The District discontinued this practice in the 2021-2022 school year.”] (emphasis added).) And this finding aligns with the ALJ’s conclusion, to which no party excepted. The District’s argument is thus both procedurally and substantively frivolous. While the District’s other reconsideration arguments are also largely frivolous, we do not repeat this admonition for the sake of brevity.

Second, the District notes that it eventually stopped hosting the Senate’s website. The District neither indicates when it did this nor offers any record citation or new evidence that might suggest the probable timeframe. Most importantly, the District ignores that the Board was entirely accurate in characterizing this fact. (See *Clovis, supra*, PERB Decision No. 2904, p. 23 [“[T]he District maintains a website at www.cusd.com, and through the close of the hearing, the District’s website hosted the Senate’s web page (www.cusd.com/FacultySenate.aspx). To access the Senate’s web page from the District’s website, a user would click on the ‘Employee Representation’ tab. After the close of hearing, the District replaced the content of the Senate’s web page with a short message noting: ‘This page is currently not available.’”] (emphasis added).)

For its third alleged factual error, the District states that the Senate, ACE, and all other employee groups currently have equal access to staff email lists. The District ignores that the Board decision found this to be the case. (*Clovis, supra*, PERB Decision No. 2904, p. 24 [“After ACE requested such access in August 2021, the

District provided ACE comparable access.”] (emphasis added).) Furthermore, the Board’s finding matches the ALJ’s conclusion, to which no party excepted.

The fourth category of support the District addresses is Senate officers’ use of District laptops for Senate business. The District takes no issue with the Board’s factual findings, and those findings match the ALJ’s conclusion, to which the District filed no exception. Indeed, like the ALJ, we found that Senate officers used District-provided laptops for Senate business, which was one of the technology-related forms of support the District provided the Senate. The District instead asks us to supplement the record with a declaration alleging that the District has also assigned ACE’s president a District laptop. The District does not explain why its proposed new evidence was not available earlier, thereby failing to meet its burden to seek to reopen the record. In any event, the declaration we reject would be immaterial given that it does not allege ACE’s president uses a District laptop for ACE business, and senators’ use of District laptops was not a major part of the violations found.⁵

Fifth, the District submits new evidence and arguments regarding release time and stipends—the two categories of monetary support comprising the largest part of the District’s monetary support to the Senate. However, the District does not allege

⁵ The District’s reconsideration request is not the first time we have reviewed a request to reopen the record. As part of its exceptions to the proposed decision, ACE sought to reopen the record to include evidence about conduct by the District and the Senate after the hearing closed. The District opposed the motion and argued in the alternative that if we were inclined to reopen the record, then we should consider additional evidence as well—including evidence that overlaps with the new evidence it now asks us to consider in its reconsideration request. We denied ACE’s motion, as it would not have impacted the outcome, meaning there was no need to determine if ACE had established that it brought the evidence to our attention promptly after it knew or should have known of the evidence.

that the Board erred in finding that: (1) the District had been providing the Senate with release time since at least 2000; (2) the District's total monetary support to the Senate reduced from \$330,930 in 2020-2021 to \$280,052 in 2021-2022; and (3) release time and stipends were the biggest parts of these expenditures. Furthermore, by not filing exceptions to the proposed decision, the District has long since acceded to the ALJ's conclusion in December 2023 that release time continued in 2023.

While conceding these crucial facts, the District vaguely states as follows with respect to release time: "Since the hearing concluded in this matter, the circumstances related to the [Senate] President's receipt of release time have changed. The District has discontinued any release time for [Senate] members." As to stipends, the District provides a bit more information: "Stipends were last paid in December 2022; none were paid Spring 2023 or for the 2023-2024 school year. Stipends have been discontinued permanently." Notably, the District does not provide any of the information we would need to consider this motion to reopen the record, such as when the District knew or should have known about the new evidence as to stipends and release time. We therefore exclude the new evidence.

Even were we to consider new evidence showing that the District eventually discontinued paying stipends and release time, such evidence would not have the effect the District seeks. To begin, it would not show that the District acted promptly once ACE pointed out its unlawful conduct. Rather, the proposed new evidence would leave in place the undisputed record evidence that the District continued making such payments for a long period, while communicating to teachers that the support was lawful, that ACE was seeking to "shut down" the Senate by challenging the support,

and that the District would be staunchly defending against any efforts to discontinue the support.⁶

Moreover, for the reasons outlined in *Clovis, supra*, PERB Decision No. 2904, disestablishment would still be necessary even if the District had promptly stopped all illegal conduct when ACE announced its organizing drive, especially because the District's longstanding, significant monetary support to the Senate provided it with an expensive head start that no other organization could match. (*Id.* at pp. 58-63.) The Senate received hundreds of thousands of dollars per year from the District, and because the Senate had no other source of support, it was entirely dependent on the District, distinguishing it from a dues-supported union that also receives release time. (*Id.* at p. 43.) This fact alone amounts to domination, even ignoring the significant other indicia of domination. As *Clovis* explains, disestablishment is the standard remedy for domination violations, even when the domination has ended. (*Id.* at p. 62.) Indeed, disestablishment is far superior to ordering the employer to level the playing field by providing a competing organization with substantial monetary and in-kind support allowing it to build its organization to the same degree as the formerly dominated organization. (*Id.* at p. 59 ["To do so would simply replace one employer-dominated employee organization with another."].)

It is futile to order an organization such as the Senate—which is dependent on the District for funds—to reimburse the employer for the monetary and in-kind support

⁶ A District witness who testified in August 2022—almost 18 months after ACE announced its organizing drive and more than a year after ACE filed its first charge—testified that the District had not yet decided whether to stop providing stipends and release time during the 2022-2023 school year. As noted, the District had been making such payments repeatedly over the course of years.

it unlawfully received. The record does not reflect that the Senate had any independent source of funds that would allow it to do so. In this respect, we concur with the gist of ACE's brief responding to the District's reconsideration request, which noted that disestablishment is a modest remedy, as "it does not fully restore the *status quo ante*, inasmuch as the District's unlawfully-spent funds have not been recouped to be properly used for the benefit of students, rather than the District's hand-picked private employee organization."

Sixth, the District seeks to add new evidence that it eventually stopped providing the Senate president with office and/or classroom space and reimbursement for cell phone and food expenses. But as above, the District points to no error in what the Board found—nor is there one—and the District does not make a showing sufficient to supplement the record with new facts. In any event, office space and costs for cell phone and food were not a large part of the support the District provided.⁷

Relatedly, the District complains that "the Board prejudicially characterizes provisions the District made to [the Senate] such as water, snacks, cell phone, as evidence of 'one of the most extensive examples of domination' to appear before PERB. (Decision, p. 41.)." However, it is specious for the District to claim the Board found these payments were a significant part of the District's extensive violations. The Board found the opposite to be true, noting that they made up a small part of the

⁷ In contrast, as discussed *post*, we properly relied on the District's admission that it was moving the Senate president's office to a location within its Human Resources office to promote "accountability and support" for the Senate's president and executive board members. (*Clovis, supra*, PERB Decision No. 2904, p. 16.)

monetary support portions of the District's violations. (*Clovis, supra*, PERB Decision No. 2904, p. 22.)

Finally, the District argues there is no evidence that any employee group sought to compete with the Senate from the Board's 1984 decision in *Clovis Unified School District* (1984) PERB Decision No. 389, until 2021, when ACE announced its organizing campaign. However, this does not point to any prejudicial error of fact, as the Board noted that same absence of evidence. (*Clovis, supra*, PERB Decision No. 2904, p. 43.) The Board found that the District's hundreds of thousands of dollars of annual support to the Senate, the Senate's lack of any other source of funds, and the undisputed fact that the Senate was literally dependent on the District, combined to make the Senate an unlawfully dominated company union even in the absence of any competing organization. (*Ibid.*) Indeed, employer domination of a labor organization infringes on employee free choice—even in the absence of a competing organization—precisely because it tends to discourage and constrain employees from acting through representatives of their own choosing. (*Electromation, Inc.* (1992) 309 NLRB 990, 993-994.)

As of 1984, the District provided the Senate with minimal monetary support, such as release time only to attend discrete meetings. (*Clovis Unified School District, supra*, PERB Decision No. 389, adopting proposed decision at pp. 33, 63 & 71.) The Board found this minimal support was unlawful in that the District preferentially offered it to the Senate, but the Board explicitly did not decide whether the District could do so if there was no competing organization. (*Id.*, adopting proposed decision at p. 63.) But here, the District's support was much more substantial. Indeed, because it was so

substantial, and the Senate had no other funding, it amounted to domination even were we to ignore the other extensive evidence of domination.

Moreover, as noted above, the District continued its support for a long time after ACE began organizing and filed unfair practice charges challenging such support. And during this time the District and the Senate each attacked ACE for challenging the District's unlawful, unequal support, thereby setting up ACE to take the blame among employees for the District's eventual, tardy decision to discontinue such support. Although the remedy in a domination case does not turn on whether the dominated organization seeks to persuade employees not to join a competing organization, here the Senate did exactly that, after ACE began organizing.⁸

B. Encouraging Employees to Join One Organization Over Another

The District had a duty to remain strictly neutral between the Senate and ACE. (*Clovis, supra*, PERB Decision No. 2904, pp. 44-45.) The test is whether the employer's conduct tends to influence free choice or provide stimulus in one direction or the other. (*Id.* at p. 45.) The District filed no exceptions to the ALJ's findings that it violated this duty, thereby waiving any challenge to such findings. Thus, while the District claims we made prejudicial errors of fact, once again the first flaw in the District's arguments is that they seek to litigate waived issues.

⁸ The District claims there is insufficient evidence that the Senate used District resources to encourage support for the Senate over ACE. However, we reached a reasonable inference that the Senate had done so. (*Clovis, supra*, PERB Decision No. 2904, p. 46.) There is scarcely any other inference that would be reasonable, as the Senate's president, at a time when she was 100 percent released from teaching and instead paid by the District for her Senate work, actively criticized ACE, including for filing charges challenging the District's violations.

Even if the District's arguments were procedurally proper, they do not show any prejudicial error of fact. First, the District argues that we made erroneous findings on two District policies: (1) Policy 0100 and its exhibit, "Doc's Charge," which states that "professionals who work in our district are proud that we do not have collective bargaining"; and (2) Policy 4118, which provided the Senate privileged status as "the representative body for teachers of the District." The District argues that "shortly after ACE requested the District rescind portions of these policies, the District did so." Yet the District shows no error in our findings, much less a prejudicial one. The District amended Policy 4118 in October 2021, as noted in our decision. (*Clovis, supra*, PERB Decision No. 2904, p. 13 ["On October 6, 2021, four months after ACE filed its initial charge, the District Board revised Policy 4118, removing the Senate's privileged status as the sole representative of teachers"].) Our findings regarding Policy 0100 and Doc's Charge were equally accurate. We found that while the parties were litigating this case, "the District removed Doc's Charge as the exhibit to Policy 0100 and stopped distributing it to new employees at orientation and training. The District also removed Doc's Charge from its website." (*Id.* at p. 10) Later, we described the timing: "By the 2021-2022 school year, the District stopped providing Doc's Charge to new employees." (*Id.* at p. 48.)

Moreover, we noted that the District took only half measures with respect to Doc's Charge, as it "continued displaying Doc's Charge in the District boardroom, the superintendent's office, and other locations throughout the District." (*Clovis, supra*, PERB Decision No. 2904, pp. 10 & 48.) Furthermore, the District was not merely slow in pulling back from certain means by which it had always publicized Doc's Charge.

Even as the District considered whether to do so, it wrote to all District teachers attacking ACE for trying to stop the District from “[d]isplaying Doc’s Charge on the walls of learning spaces in the District” and promising to defend its continued posting. (*Id.* at p. 32.) This does not come close to the prompt, thorough, and diligent effort an employer must make if it hopes to erase the effects of its interference via an “honestly given retraction.” (*County of San Joaquin* (2021) PERB Decision No. 2761-M, p. 31.) Indeed, a retraction is irrelevant unless it is: (1) timely; (2) unambiguous; (3) specific in nature to the coercive conduct; (4) free from other illegal conduct; (5) adequately publicized to the affected employees; (6) not followed by other illegal conduct; and (7) accompanied by assurances the employer will not interfere with protected rights in the future. (*Ibid.*) The District’s partial, tardy action did not meet any of the above criteria, much less all of them.

The District does not suggest these findings were wrong. Moreover, they match the ALJ’s conclusions, to which the District filed no exceptions. This waiver is particularly noteworthy with respect to Policy 4118. Though the District claims we should have found that Policy 4118 never prohibited ACE from representing employees, the District did not except to the ALJ’s findings that this policy designated the Senate “as the representative body for the teachers[,] which means that any other union representative cannot represent a teacher,” and that “certificated employees were limited to the [Senate] as [their] sole representative. In other words, any other nonexclusive representative was unacceptable to the District.”

Even aside from its waiver, the District offers a weak argument that we erred in interpreting Policy 4118. The District cites self-serving testimony from a District

administrator, in response to leading questions, asserting that he never denied employees the opportunity to bring representatives of their choice to any meeting with him, nor directed another District administrator to do so. Even had the District filed exceptions asking us to credit this testimony, and even had we done so, it would not undercut the inference that Policy 4118 tended to cause a reasonable employee to believe that the Senate was the District's preferred representative. Thus, for instance, employees facing discipline would have been reasonable to believe that their best chance for leniency would have been to appear with a Senate representative, given its preferred status. This is yet another component of why the Senate was a classic company union.

Second, the District takes issue with our finding that it supported the Senate by including in its Climate Assessment, from 2017-2018 through 2020-2021, multiple questions asking teachers their views regarding the Senate and how it represented them. While the District points out that it discontinued those questions in 2021-2022, that is exactly what we found. (*Clovis, supra*, PERB Decision No. 2904, p. 19.) The District thus challenges no factual findings, but rather disputes what legal conclusions flow from the facts—a procedurally improper basis for a reconsideration motion. In any event, the fact that the District included questions on behalf of the Senate illustrated another respect in which the Senate and the District were integrally entangled and did not deal with one another at arm's length over a lengthy timeframe.

Third, the District challenges the Board's finding that even after ACE announced its organizing campaign on April 5, 2021, the District did not immediately include ACE in committee meetings or place ACE representatives on the employee

compensation committee (ECC) or other standing committees that recommend actions to the District Board. The District, citing instances in which ACE representatives attended meetings in the 2021-2022 school year or later, contends that it has refuted “the Board’s factually incorrect finding.” There is no prejudicial error of fact, however, as the District’s contention aligns with the Board’s finding that starting in the 2021-2022 school year, the District allowed ACE representatives to attend such meetings. (*Clovis, supra*, PERB Decision No. 2904, pp. 26 & 48.) This finding also matches the ALJ’s conclusion, to which no party excepted.⁹

The District notes that during the time when the Senate enjoyed privileged access to meetings, one or more employees who supported ACE attended certain committee meetings. As an initial matter, the District waived this argument by failing to except to the ALJ’s finding that the District was slow to afford ACE representation on its standing committees. Moreover, even if certain meeting attendees were secret or

⁹ In *Clovis, supra*, PERB Decision No. 2904, we found that prior to the 2021-2022 school year, Senate officers enjoyed access to: (1) Executive Cabinet meetings; (2) superintendent staff meetings; (3) area superintendent meetings; and (4) monthly school site meetings with principals. (*Id.* at p. 24.) The District asks us to consider a new declaration denying that Senate officers ever had access to one of these four categories of meetings—those of the Executive Cabinet. Although this declaration does not acknowledge or discuss the District’s November 2020 written statement that it would “arrange for a joint meeting” between the Executive Cabinet and the Senate Executive Board (*id.* at p. 17), and the declaration even if credited would not materially change our conclusion that Senate officers enjoyed preferred types of access, there are two important reasons we cannot accept the proffered new evidence. First, the ALJ found that the Senate “had regular access to the District administration not only individually, but through regularly scheduled meetings such as the Executive Cabinet meetings,” and the District and Senate waived any objection by failing to file any exceptions to the proposed decision. Furthermore, the District has failed to provide evidence that would establish PERB Regulation 32410’s requirements for submitting new evidence in a reconsideration request.

overt ACE supporters, they attended in their capacity as teachers—not as ACE representatives—which did not amount to equal access. The District has not shown a prejudicial error regarding the pace of its decision to afford ACE access to meetings.

In the same vein, the District asserts that it placed two teachers who supported ACE, Jason Roche and Jaime Arredondo, on a June 2021 panel to interview candidates for Learning Director at a high school. Thus, the District contends there was no basis to find that the District designated two Senate representatives, but no ACE representatives, to serve on the panel. (See *Clovis, supra*, PERB Decision No. 2904, p. 31, fn. 8.) The problems with this argument are by now familiar. First, the District waived it by failing to except to the ALJ's finding that the District invited Arredondo and a second employee, Seth Batty, as representatives of the Senate, and invited Roche in his capacity as an English teacher. Nor did the District except to the ALJ's conclusion that the District designated Senate representatives to the interview panel, but did not designate any ACE representatives to the panel. Likewise, the District did not except to the ALJ's conclusion that this unequal representation on the interview panel, compounded by an interview question that highlighted the Senate's "significant role" and rated applicants on how they would work with the Senate, violated EERA. Second, even had the District not waived its argument, the District did not appoint anyone to the interview panel in an ACE capacity. Indeed, the District acknowledges that the two individuals it identifies as ACE supporters "lacked 'ACE titles.'" The District fails to acknowledge or attempt to explain its own key document, drafted on District letterhead, which listed the panel members and their designations,

demonstrating the District's appointment of two Senate representatives and no ACE representatives. The District has not identified any prejudicial error of fact.¹⁰

Fourth, the District claims the Board made "a prejudicial factual assumption" that the District began efforts to address employee compensation and other concerns in response to learning about ACE's formation prior to its April 5 formal announcement. The District asserts there is no evidence that the District learned of ACE's formation prior to April 5. The District ignores that we made no such finding or assumption. Rather, we correctly paraphrased ACE's April 5 letter as claiming "that as the District had learned of their efforts to organize teachers over the preceding months, discussion of bonuses and other monetary improvements for teachers had begun." (*Clovis, supra*, PERB Decision No. 2904, p. 27.) Thus, *Clovis* recounted an assertion ACE made in its April 5 letter but reached no conclusion as to its merits.

Fifth, the District points out that on June 7, 2021, the District met with ACE regarding the improvements in employment terms that Superintendent O'Brien had outlined 10 days earlier in an e-mail dated May 27. However, our decision recounted the June 7 meeting. (*Clovis, supra*, PERB Decision No. 2904, p. 27, pp. 29-30.) The District's reconsideration request does not dispute our critical findings, including: (1) after ACE's April 5 announcement of its organizing campaign, District representatives continued to meet with the Senate about ECC recommendations on

¹⁰ There were further circumstances in which the District did not provide ACE equal representation after it announced its campaign on April 5, 2021. For instance, the District invited the Senate and other groups to discuss a learning recovery program on April 12, 2021, while excluding ACE. (*Clovis, supra*, PERB Decision No. 2904, p. 26.) Indeed, the ALJ so found based on the District Superintendent's admission, and no party excepted.

significant changes to salaries, benefits, and schedule; (2) in the same period, the District did not afford ACE any notice or the opportunity to participate until after the O'Brien's May 27 e-mail regarding significant salary, benefit, and schedule improvements; (3) the May 27 e-mail attributed these improvements to the Senate and other groups, but not to ACE; (4) on June 1, the District offered to meet with ACE; (5) on June 4, ACE responded with its meeting availability and requested all financial information supporting the recommendations that the District had previously shared with other groups; and (6) when the District met with ACE on June 7, "it was not only too late, but the District refused to provide ACE with the financial information provided to other employee groups and which were fundamental to developing the improvements listed in the District's May 27 e-mail. The District has never backed down from this refusal, despite ACE's repeated requests." (*Id.* at pp. 29-30 & 47.) These findings also track the ALJ's findings, to which no party excepted.

Lastly, the District addresses its e-mail to teachers dated August 27, 2021. As an initial matter, the District waived its arguments by failing to file exceptions challenging the ALJ's conclusions. The ALJ found that the District sent its e-mail "in defense of the current status quo between the District and the Faculty Senate, and in defense of Doc's Charge." The ALJ further found that the e-mail "specifically contended that ACE's request for a Superior Court injunction threatened the existence of the Faculty Senate. While the District was indeed free to defend itself . . . this announcement went beyond that. It announced to all staff . . . that the District was going to fight to maintain giving the Faculty Senate preferential treatment and status. Such an announcement only exacerbated the current situation and encouraged

employees to join the Faculty Senate over ACE and tended to influence employee free choice and provide stimulus in one direction or the other as it communicated that the Faculty Senate will be defended by the District.” The ALJ thus rejected the District’s affirmative defense, concluding that the announcement served no business necessity. The District did not except to these findings, and they therefore became binding on the District.

Even had the District filed exceptions, the District’s arguments regarding its August 27 e-mail would not succeed. The District claims the Board erred in characterizing the e-mail as indicating that “stipends and release time were lawful and would continue,” “defending [the District’s] support of the Senate,” and “castigating ACE for trying to enforce the law.” (*Clovis, supra*, PERB Decision No. 2904, pp. 41 & 44.) But that is a fair reading of the e-mail given that it specifically noted ACE was challenging the District’s provision of stipends and release time, stated the District’s intention to preserve “the status quo,” and indicated that the District would oppose ACE’s efforts to “shut down” the Senate. The e-mail therefore cast ACE as bent on shutting down the Senate, deflected blame away from violations by the District and the Senate, and clearly indicated an intent to continue stipends and release time while defending them. Indeed, that is what happened: the District now admits that it continued stipends for 16 more months thereafter and that it continued release time even longer than that, providing release time until an unknown date in 2023.

The District also disputes the Board’s legal conclusion that the August 27 e-mail “chilled ACE’s protected activity” and was further evidence of employer domination. (*Clovis, supra*, PERB Decision No. 2904, pp. 41 & 48.) Even if this legal argument

were appropriate for reconsideration, and even if the District had not waived it by failing to file exceptions, the District's argument would still be untenable. The e-mail obviously supported the Senate, thereby violating the District's duty of strict neutrality. Such conduct contributed to our finding of domination. (*Clovis, supra*, p. 36 [unlawful support, preferencing one organization over another, and domination "reinforce one another"].) Moreover, conduct that violates the duty of strict neutrality is, as a matter of law, activity that discourages support for one group while encouraging support for another. (*Clovis Unified School District* (2021) PERB Order No. IR-63, pp. 28-29.) On this basis, the District's conduct discouraged support for ACE, chilling protected activities by employees, non-employee ACE representatives, members, and/or supporters. Significantly, PERB precedent looks to a tendency to chill protected activity, without any need to show specific employees who were chilled. (See, e.g., *City of San Diego* (2020) PERB Decision No. 2747-M, p. 43 [holding that news of a manager's interfering remark tends to spread].)

Relatedly, the District argues that an employer statement of its views falls within a legal safe harbor if "the communication does not on its face carry the threat of reprisal or force, or promise of benefit." This argument is again improper in a reconsideration request and in any event waived, and it is wrong for two more reasons. First, the District's statement of the safe harbor principle omits that it does not apply to an employer that encourages support for one organization over another. (*City of San Diego, supra*, PERB Decision No. 2747-M, p. 40 [employer statement of views is unlawful if it "conveys a threat of reprisal or force, a promise of benefit or a preference for one employee organization over another"] (emphasis added).) And the

safe harbor principle does not apply to claims under the PEDD. (*Regents of the University of California* (2021) PERB Decision No. 2755-H, pp. 28-34.)

C. Interference with Senate Affairs Adding to Evidence of Domination

Conduct that violates EERA section 3543.5, subdivision (d) rises to the level of domination when it results in less than an arm's length relationship between the employer and the labor organization, such that it appears to be a "company union" relationship. (*Clovis, supra*, PERB Decision No. 2904, pp. 36-41.) Unlawful support, encouraging employees to support one organization over another, and interference in internal affairs may, but need not, be part of such a showing. (*Ibid.*; see, e.g., *Redwoods Community College District* (1987) PERB Decision No. 650, adopting proposed decision at p. 65 (*Redwoods*) ["The [employer's] assistance in conducting elections, and in providing photocopying, stationery, mail service, release time, meeting rooms and even money points to domination, as well. Indeed, one gets the definite impression that, but for this considerable amount of support at almost every level of operation, [the employee council] could not generate internally the necessary machinery to operate"].)

We have already noted that the District's unlawful support to the Senate was sufficient to establish domination even absent the District's extensive other conduct making its relationship with the Senate not at arm's length. And as explained above, we found further evidence of domination in the District's conduct tending to encourage employees to support the Senate over ACE. But there was also other substantial evidence of domination, and the District fares no better in asking us to reconsider our findings as to such other conduct.

As detailed in *Clovis, supra*, PERB Decision No. 2904, one of the multiple bases for finding domination was that “the District has reviewed employee complaints and conducted investigations filed by and against senators and Senate officers in those capacities.” (*Id.* at p. 39.) The District does not challenge these factual findings, instead disputing their legal significance. This is not a valid basis for reconsideration, and the District waived this argument by failing to except to the ALJ’s finding that: “The District considers it to be responsible for responding to complaints against District employees, which includes Faculty Senate Officers/Senators in their capacities as Faculty Senate Officers/Senators.” The ALJ, noting that “the District reviewed employee complaints between Faculty Senate Officers/Senators” found this was part of the District’s extensive, unlawful interference with the Senate’s internal affairs. Yet the District took no exceptions to the ALJ’s factual or legal conclusions.

In the alternative, even were we to consider the District’s reconsideration request on this issue, we would reject it. The District admits that it “investigate[d] and responded[ed]” to employee complaints against Senate officers but contends this does not show interference and domination because the District merely “documented the outcome” and “offered recommendations, not directives.” If that were factually true, it would still show interference in internal affairs. But the record shows more than offering recommendations. For instance, in the District’s responses to Kristin Heimerdinger’s two complaints regarding the Senate, the District stated that it “places high expectations” on Senate officers, and they failed to meet these expectations. And the District noted that, as a result, it had addressed its expectations with Senate officers. Moreover, the District promised that the Senate would establish policies and

procedures regarding attendance at Senate meetings. The Board's findings in this regard are consistent with the ALJ's findings, to which no party excepted.¹¹

The District suggests a counterexample in which it allegedly offered recommendations rather than directives. Specifically, the District points to its response to Stacey Schiro's complaint about whether a recent election for Senate vice president had been fair (and about the Senate president's communications with teachers, as well as the need for Senate bylaw revisions). The District asserts that the author of the District's response, Deputy Superintendent Norm Anderson, believed the Senate must make its own decisions. Far from showing a prejudicial error of fact, however, this example supports our original finding. The best evidence is Anderson's written response to the complaint, which we quoted in *Clovis, supra*, PERB Decision No. 2904. (*Id.* at pp. 16-17.) The District ignores that in this response, it reached more than a dozen conclusions, including the District's decision to move the Senate president's office to a location within the District's human resources office, as well as the District's promises that: (1) "Clear expectations for prompt responses from the [Senate] President to those with inquiries will be communicated. An expectation of a

¹¹ The District claims that at the time that Heimerdinger filed her second complaint, it did not know that "Heimerdinger was apparently already involved in ACE activities behind the scenes, which in retrospect raises a serious question about whether [it] is manufactured evidence." We reject this argument on both procedural and substantive grounds. The District does not ask us to supplement the record with new evidence supporting its argument or explain why its proposed new evidence was not available earlier. In any event, the District admits that it was following its internal policy in investigating and resolving employee complaints against the Senate, meaning there is no serious dispute that the evidence related to both of Heimerdinger's complaints did nothing more than lay bare a significant aspect of the District's domination and interference in internal affairs.

response within 24 hours should be reasonable”; (2) “Prior to the next round of elections, [the Senate] Executive Board will work in conjunction with the Human Resources Department to create a standard operating procedure for elections at the site and district level”; and (3) “Area Superintendents and site Principals will be thoroughly informed of the current concerns and plans of action. They will work diligently in their site [Senate] meetings and Area [Senate] meetings to address any concerns and insights.” (*Ibid.*)

Even were we inclined to go beyond the content of the District’s response and consider Anderson’s intent in writing it, this would not help the District. Anderson testified that the Senate was “sort of self-governing as much as they could until there were troublesome times.” Thus, even in a litigation posture, the furthest the District’s own witness was willing to testify was that in non-troublesome times the Senate was “sort of” self-governing, “as much as they could.” And in the same answer, Anderson testified that such attempts at partial self-governance gave way when trouble emerged, and he further acknowledged that he was testifying about such a troubled time.

The District also takes issue with our finding that “the Senate repeatedly invited the District to become enmeshed in Senate internal elections, and the District accepted this invitation each time.” (*Clovis, supra*, PERB Decision No. 2904, p. 39.) The District acknowledges multiple types of support it provided in running Senate elections, including that Associate Superintendent of Human Resources Barry Jager and Director of Educational Technology Chris Edmondson assisted the Senate in running four elections in the 2020-2021 school year. In seeking to downplay the

significance of such support, the District has identified no prejudicial error of fact, but rather takes issue with the Board's legal conclusion on such evidence. This is not a proper basis for reconsideration and involves another issue the District waived by failing to file exceptions challenging the ALJ's conclusions.¹²

While we do not excuse these procedural errors, in any event the District entirely misses the mark in its hoped-for application of law to facts. One problem is that in its 33-page reconsideration brief, the District does not mention or discuss any precedent prohibiting an employer from playing any role in a labor organization's elections. (See, e.g., *Poway Unified School District* (2015) PERB Decision No. 2441, adopting proposed decision at p. 45; *Redwoods*, *supra*, PERB Decision No. 650, adopting proposed decision at p. 65.)

Furthermore, the District focuses on the Senate's April 2021 election, when Jager provided technical support (as we noted in *Clovis*, *supra*, PERB Decision No. 2904, p. 18), but the District sidesteps Jager's more significant involvement in the Senate elections held during October 2020 and February-March 2021. The District does not challenge our factual findings that in the October 2020 election, Jager facilitated the use of District personnel and software to conduct the election, sent an e-mail attaching a link allowing senators to vote, placed the District's approval on the process by thanking senators for their participation "with this very important process," and then took on the role of tabulating and announcing the election results. (*Id.* at

¹² While the ALJ characterized Jager's role in one election (held in October 2020) as "more perfunctory than substantive," the District ignores that the ALJ found the District's overall conduct vis-a-vis Senate elections to be an example of the District's extensive involvement in the Senate's internal affairs.

pp. 15-16.) Nor does the District challenge our findings that the District ran every part of the February-March 2021 Senate elections—beginning with Jager’s “e-mail announcing and describing the nomination process, the timeline, and the election procedures, while assuring senators that voting ‘will be completed with support from Technology and Human Resources to ensure a fair and transparent election process’”—all the way through receiving the nominations and lastly tabulating and announcing the election results. (*Id.* at pp. 17-18.)

The District next contends that we erred in finding that “Senate elected officers are subject to the District’s Professional Conduct clause.” (*Clovis, supra*, PERB Decision No. 2904, p. 14.) Yet, that is exactly what the Senate’s bylaws provide. This finding also matches the ALJ’s findings, to which no party excepted.

With respect to our observation that the District had “significant involvement in important internal Senate affairs, including Senate elections, efforts to revise Senate bylaws, and misconduct complaints against Senate officers” (*Clovis, supra*, PERB Decision No. 2904, p. 14), we have already addressed the District’s extensive involvement in Senate elections and in resolving complaints against Senate officers. Regarding the other example in the above-noted observation, the District took a strong position on the need for bylaw revisions and on the revision process that should ensue. Specifically, in responding to Schiro’s complaint, the District wrote that:

“• A thorough revision of the FS Bylaws should occur. This should be led by the FS Vice-President, per the existing bylaws. The process for this should be fully transparent and include members from all Areas and teaching levels of the District. If all Areas and levels are not represented, then district administration can help recruit members. In addition,

the FS will have the full support of our Human Resources Department and legal resources to assist, as needed . . .”

(*Clovis, supra*, p. 16.)

The District notes that bylaw revisions had not occurred as of the close of the record, and there was no evidence that the District took any action regarding revisions beyond what it said in response to Schiro’s complaint. Indeed, that is what we found as well, noting that as of the close of the record, the 2008 Senate bylaws were unchanged. (*Clovis, supra*, PERB Decision No. 2904, p. 13.) Thus, the District’s conduct with respect to bylaw revisions (as noted in the above-quoted passage from its response to Schiro’s complaint) was certainly milder than its involvement in Senate elections and in complaints against Senate officers. But not every aspect of the District’s conduct must be severe for us to conclude that the Senate appeared to be a company union. The District’s statement about the need for bylaw revisions—including details as to the consultative process that should occur—adds to the overall evidence, and it does not remotely allow the District to discount its more significant involvement in Senate elections and complaints against Senate officers.

The District claims that there is “no evidence” supporting our conclusion that the District moved the Senate president’s office to the District’s administration building, in the human resources department, to improve collaboration between the Senate and District human resources staff. But the District admitted that fact in writing. Its response to Schiro’s complaint, made close in time to the decision to move the Senate president’s office, stated as follows:

“• The position of the FS President, and the important support this person provides, would be better served by centrally locating the President in the Human Resources

office at the District Office East building that will enable more accountability and support for the position and other Executive Board members with release time.”

(*Clovis, supra*, PERB Decision No. 2904, p. 16.) Moreover, our finding was in accord with the ALJ’s findings, to which the District acceded when it failed to file exceptions.

The District asserts that we accepted unsupported allegations in finding that “District organizational charts show the Senate president reporting to the District superintendent.” (*Clovis, supra*, PERB Decision No. 2904, p. 24.) This claim is puzzling, as the District’s organizational charts from multiple school years show the Senate president reporting to the District superintendent, which also matches the ALJ’s conclusion, to which no party excepted.

The District points to other charts that did not show such a reporting relationship, and the District also cites Schiro’s testimony denying that the superintendent was her supervisor. However, even had the District timely filed exceptions on these points rather than waiving its argument, there are multiple factors that would cause us not to disregard the charts showing the Senate president as being under the District superintendent. For instance, the District’s budget showed all its monetary support to the Senate under an accounting category labeled “0400 Superintendent.” (*Clovis, supra*, PERB Decision No. 2904, p. 20.) And there is other supporting evidence that helps to explain why the District created organizational charts showing the Senate president as under the superintendent. For example, we found that Associate Superintendent Jager “advised the Senate on myriad internal Senate issues.” (*Id.* at p. 25.) While the District disagrees with this phrasing, its reconsideration request admits that Jager “answer[ed] questions presented to him” by

Senate leaders and that he responded to “questions from [Senate] Executive Board members requesting assistance.” The record demonstrates that Jager and Senate officials discussed internal election issues, bylaws, and the application of Roberts Rules of Order to Senate meetings, and more generally Jager’s availability to serve as a “sounding board” for internal Senate issues. On these points, too, the District waived any argument to the contrary by not excepting to the ALJ’s corresponding conclusions.

The District’s reconsideration request repeats its earlier admissions that it reviewed and corrected draft Senate meeting minutes. The District explains that it did so to ensure the accuracy of information provided by District administrators. That is, indeed, exactly what we found. (See *Clovis, supra*, PERB Decision No. 2904, p. 24 [“Senate leaders share drafts of their meeting minutes with District administrators. Indeed, before the Senate distributes such minutes to teachers, the District makes corrections regarding District statements as well as regarding policies and laws.”].) This finding also tracks the ALJ’s conclusion, to which no party excepted. Although the District believes it is prejudicial to rely on the fact that the Senate shared all parts of its draft minutes (not just those involving information the District provided the Senate), we disagree. If the Senate wished to check certain facts with the District, there were ways for it to do so without sending the District its entire draft minutes. For instance, it could have sent only a draft excerpt related to information the District provided.

The District’s reconsideration request comments as follows: “To the extent that the facts in the Decision refer to the District as responsible and/or directly involved in directing or assisting in the content of any [Senate] communications to teachers, including, but not limited to: written correspondence, announcements, written

statements, [Senate] Weekly Wrap-Ups, emails, or website announcements (see Decision, pp. 27-32) any such suggestion is factually incorrect and prejudicial to the District.” But we did not suggest that the District was responsible for the content of the Senate’s communications. Rather, we explained that: (1) in the months after ACE’s April 5 announcement of its organizing campaign, the District and the Senate each took pains to publicize to teachers their mutual, unlawful understanding of the Senate’s favored position; and (2) these communications from the Senate and the District each tended to interfere with employee free choice.¹³

Along the same lines, the District takes issue with our observation that the Senate’s violations of EERA were “synergistic” with the District’s violations. (*Clovis, supra*, PERB Decision No. 2904, p. 52.) Our findings vis-à-vis the Senate, briefly, were that it falsely held itself out as teachers’ sole representative and took the same tack as the District by criticizing ACE for working to take away Senate stipends and Senate officers’ release time. (*Id.* at pp. 49-53.) Contrary to the District’s claim of factual inaccuracy, we did not attribute the Senate’s statements to the District, nor did we find the District liable for them. Rather, we observed there was a reinforcing effect between the District’s violations and those of the Senate. Each entity conveyed a similar false and unlawful message to teachers: the Senate is the teachers’ sole

¹³ We also noted that the Senate did not oppose disestablishment or, indeed, file any document in response to ACE’s exceptions, thereby waiving its position and reaffirming its dependence on the District by relying on the District to argue against disestablishment. (*Clovis, supra*, PERB Decision No. 2904, p. 57.) The same pattern has recurred in the reconsideration context, where the Senate has again failed to submit any filing of its own.

representative unless and until teachers vote otherwise, and ACE is disrupting the status quo and threatening the Senate's financial support.

Lastly, the District contends our decision was "highly prejudicial" because we allegedly inferred that the District had a "nefarious intent" when it signed a 2014 Memorandum of Understanding (MOU) with the Senate. The MOU purported to create a "collectively bargained alternative ratio" of students to teacher in the early grades, which was higher than the default of 24:1 that would otherwise be required for the District to obtain class-size reduction funds from the state, and the District relied on it to maintain an average class size in its early grades that exceeded 24 students, while still receiving the aforementioned funds. We made no mention of "nefarious intent," and noted that intent is irrelevant to employer domination. (*Clovis, supra*, PERB Decision No. 2904, p. 36.)

Moreover, the District's reconsideration request concedes multiple points about the MOU, which support our finding that it was additional evidence lending the Senate the appearance of a company union. First, the District admits that "the MOU was not actually collectively bargained," even though "it was reflected as such" in that its terms specifically stated it was creating a collectively bargained alternative ratio, and the District relied on it for that purpose. The District further admits that if "the District did not have the MOU and failed to meet the 24 to 1 ratio, there would have been a significant financial penalty on the District. The District was under the impression that if this MOU was in place, it would not have to worry about class size audits and possible penalties." These admissions evidence employer domination, as the Senate signed off on a purported collectively bargained alternative ratio that was not, in fact,

collectively bargained. Indeed, we found it telling that this MOU, signed to allow the District to obtain class size reduction money while maintaining higher class sizes, was the only MOU between the District and the Senate. (*Clovis, supra*, PERB Decision No. 2904, p. 40.) While non-employer-dominated labor organizations across California engage in true collective bargaining over class size among other terms and conditions of employment, typically with teachers' preference for lower class sizes in mind, the Senate signed off on a single MOU without engaging in collective bargaining, because it benefitted the District financially. In sum, this reconsideration argument is substantively meritless in that the District admits the very facts underlying our conclusion. It is also procedurally improper in a reconsideration request because it challenges our legal analysis, and it belatedly challenges a conclusion the ALJ reached that became binding when neither party excepted to it.

II. The District's Reconsideration Request as to Remedy

As noted above, one reason the District's reconsideration request is procedurally improper is the District uses it to challenge how the Board applied the law to the facts, as well as to argue points of law that the District previously argued (or could have argued but instead waived). These flaws are especially apparent in the District's challenge to the Board's choice of remedy. While an error or omission in a remedial order can be a proper subject of reconsideration, this represents "a narrow avenue" allowing corrections to inadvertent errors and "does not allow parties to reassert remedy arguments that we have already considered and rejected." (*Ventura, supra*, PERB Decision No. 2758a-M, pp. 2-3.)

Even were we to assume for the sake of argument that the District's challenge to our remedy were procedurally proper, it would nonetheless be unmeritorious. As explained in *Clovis, supra*, PERB Decision No. 2904, the Legislature has vested PERB with broad authority to decide what remedies are necessary to effectuate the purposes and policies of EERA and the PEDD. (*Id.* at p. 53.) Here, the District's reconsideration request does not challenge this principle. Instead, the District first asks us to reconsider our spoken notice order and then asks us to reconsider our disestablishment order. We address each issue in turn.

A. Spoken Notice

As explained in *Clovis, supra*, PERB Decision No. 2904, spoken notice is appropriate if customary notice methods, in combination with other remedies, are insufficient. (*Id.* at p. 65.) The ALJ found spoken notice was proper, and the District took no exceptions. ACE, however, excepted to certain details of the ALJ's spoken notice order, which required three events at which a District representative would read PERB's notice, within 30 days after the order becomes final (irrespective of whether that occurs during summer break, winter break, or the fall or spring semesters), unless "otherwise scheduled by mutual agreement." The proposed decision further indicated that the three events could be in person and/or by videoconference, "or in any other manner designed to reach the greatest number of certificated employees."

We adjusted this order for multiple reasons, including to reduce the likelihood that the parties would bring appeals to us over the District's compliance with the order, and to tailor it to efficiently reach the greatest number of teachers given the reality of teaching schedules. Indeed, because the District operates more than 50 schools, the

proposed decision erred if it allowed the District to hold three in-person events with no remote options. Although one could alternately interpret the ALJ's proposed order to require remote options—since three in-person events would not reach the greatest number of teachers—that ambiguity made further appeals likely. And the ALJ's order allowed the District to choose who would read the notice, thereby potentially delegating the role to a low-level employee. Also, it is unknown when our order will no longer be subject to appeal, and there is a chance that the 30-day period after this decision becomes final may fall wholly or partially during a summer or winter break. In certain circumstances, the District may be able to control the timing given its ability to file and/or withdraw appeals. We comprehensively addressed these myriad issues by directing the District to create a video showing the superintendent reading the notice, and to play the video at regularly scheduled meetings of teachers at each school, during the school year. (*Clovis, supra*, PERB Decision No. 2904, pp. 64-65.)

The District argues that the Board's remedial order "would serve to minimize, undermine, publicly shame, humiliate, and/or punish" its current superintendent, that the order compels her "to read a verbatim statement of guilt for matters she was not involved in and based on findings with which she disagrees," and that "[c]ompelling a specific individual to read the Appendix verbatim is coercive and raises First Amendment issues." While the District does not flesh out its constitutional argument, it is not a proper basis for reconsideration and is contrary to precedent. (See, e.g., *Barke v. Banks* (9th Cir. 2022) 25 F.4th 714, 719 [public officials' statements in their official capacities do not implicate individual constitutional rights].) To the extent the District asks us to consider new evidence—the fact that the District changed

superintendents a year ago—the District did not timely seek to reopen the record when it knew that fact, nor would taking note of that fact change our order. Choosing the superintendent to read the notice does not reflect any finding of bad intent on the superintendent’s part, as intent is irrelevant to the violations found. (*Clovis, supra*, PERB Decision No. 2904, p. 36.) Rather, the superintendent is the District official whose participation in the spoken notice will have the greatest tendency to convince listeners that the District will, in fact, comply with the law going forward.

We do not agree that the person responsible for fulfilling the spoken notice order will suffer humiliation, and the District does not explain why a lower-level District employee, rather than the District’s highest official, should be the one to suffer such hypothetical humiliation. To the extent the District relies on the fact that its current superintendent was merely an associate superintendent when ACE filed this charge and the ALJ held the formal hearing, the District fails to demonstrate that having new leadership undertake a fresh start is fundamentally inconsistent with having its new leader responsible for fulfilling the spoken notice order. Indeed, the opposite appears more likely. The superintendent’s spoken notice will clarify that the District will no longer become enmeshed with or prop up any employee organization, circulate communications that violate its duty of strict neutrality, preferentially deploy public funds and in-kind support to an employer-dominated organization, or otherwise interfere with employee free choice.

The District also points out that the Board’s only other spoken notice order did not specify video recording or a particular speaker. (*Mt. San Jacinto Community College District* (2023) PERB Decision No. 2865, p. 43.) However, that case involved

a smaller employer with fewer sites, and the violation was retaliation against two faculty members. We specifically noted that we would “stop short in these circumstances from ordering a particular reader,” though we directed that the charging party union should have the right to decide whether spoken notice should occur within 60 days of the order becoming final or at the start of the next semester, and we directed the District to “ensure the widest possible attendance.” (*Id.* at pp. 43 & 45.) Here, in contrast, the District is larger with far more sites, and the violations are more longstanding and wide reaching. These circumstances warrant a video recording by the District’s superintendent.¹⁴

B. Disestablishment

As explained in *Clovis, supra*, PERB Decision No. 2904, disestablishment is the appropriate remedy if a school district dominated a nonexclusive representative. (*Id.* at pp. 55-57.) The District does not take issue with this principle. Instead, it focuses on the Board’s alternative ground for ordering disestablishment—the fact that the

¹⁴ While we consider decisions of the National Labor Relations Board (NLRB) only for their persuasive value, NLRB precedent supports specifying exactly how an employer must provide notice of a decision against it. (See, e.g., *HTH Corporation* (2014) 361 NLRB 709, 713-716 [specifying the high level executives, supervisors, and managers who must attend spoken notice readings, with sign-in sheets required; and further requiring that notice of NLRB’s findings and separate explanation of rights be electronically posted and physically posted at worksite for three years, mailed to all employees, supervisors, and managers, published twice weekly for eight weeks in two local publications chosen by the NLRB, and provided to all new employees, supervisors, and managers within 7 days of hiring, for three years]; *United States Service Industries* (1995) 319 NLRB 231, 232 [requiring that notice must be translated to Spanish, and specifying that operations manager must read the notice or be present while NLRB agent reads it, “because the record indicates that the employees view him as the personification of the Company.”])

District's other violations were egregious, recurrent, and persistent. (*Id.* at p. 4.) While we have already addressed the main problems with the District's argument (see *ante* at pp. 12-13 and *Clovis, supra*, pp. 57-63), we note additional aspects of the District's reconsideration request that we have not yet discussed.

The District argues that we improperly assumed the District would not comply with a cease-and-desist order, and that there is no evidence that the Board's 1984 remedial order was ineffective. However, we did not presume that the District would fail to comply with any order. Rather, we noted that disestablishment is necessary even when domination has ended. (*Id.* at pp. 58 & 62.)

Nor is there any doubt that the District is a repeat violator. In its 1984 decision in *Clovis Unified School District, supra*, PERB Decision No. 389, the Board found the District failed to remain neutral as between competing organizations seeking to represent teachers, in part by preferentially providing the Senate with "typing and distribution of minutes, the gift of stationery and the provision of released time to attend meetings." (*Id.*, adopting proposed decision at pp. 63 & 71.) Almost four decades later, in contrast, the support the District provided the Senate, while withholding from ACE, amounted to \$280,052 in 2021-2022 alone, even ignoring in-kind support. Thus, after decades of dominating the Senate, when the District once again faced competing employee organizations, its unequal support was exponentially larger than it was in the early 1980s.

Other facts also show recurrence. For instance, the Board's 1984 decision details how the District credited the Senate with eliminating a "much-disliked workday." (*Clovis Unified School District, supra*, PERB Decision No. 389, p. 20 & adopting

proposed decision at p. 71.) Forty years later, the District credited the Senate with improvements while attacking ACE for seeking an injunction “to stop the District from providing such support to our teachers,” including stipends for senators, release time for Senate officers, and other forms of support. (*Clovis, supra*, PERB Decision No. 2904, p. 32.)

While aspects of the District’s violations in this case differ from the violations found in the Board’s 1984 decision, it is still accurate to characterize the District as a repeat violator. And there is a central through-line running through both the repeat violations and those which are new: in each instance, the violations supported the Senate over a competitor affiliate of the California Teachers Association.

The District argues that our disestablishment order bars employees from supporting any alternative to ACE. Not so. The order specifically and equally protects free organizing by any alternative organization that is not the Senate or its alter ego or alias. Among other options, this includes Independent Clovis Unified Educators (ICUE), the organization that anti-ACE employees formed when they abandoned their plan to create an alias to the Senate. (*Clovis, supra*, PERB Decision No. 2904, pp. 33, 59 & 62) Indeed, the Board’s order affords ICUE the same expanded period as ACE for collecting proof of support. (*Id.* at pp. 63-64 & 69.)

Finally, the District claims disestablishment infringes on its employees’ associational rights. As with its constitutional argument regarding spoken notice, the District fails to cite supporting authority for this argument, which PERB has long since rejected. (*Redwoods, supra*, PERB Decision No. 650, p. 67). Moreover, the District has no standing to raise such a claim, and it is not a proper basis for reconsideration.

For all the reasons set forth in this decision and in *Clovis, supra*, PERB Decision No. 2904, disestablishment is the proper remedy.

ORDER

Respondent Clovis Unified School District's request for reconsideration of the Public Employment Relations Board's decision in *Clovis Unified School District* (2024) PERB Decision No. 2904 is DENIED.

Chair Banks and Member Nazarian joined in this Decision.