STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OPERATING ENGINEERS LOCAL 3, AFL-CIO, Charging Party, v. CONSOLIDATED IRRIGATION DISTRICT, Respondent.	Case No. SA-CE-1231-M PERB Decision No. 2905-M June 24, 2024

Appearances: Gening Liao, Attorney, for Operating Engineers Local 3, AFL-CIO; Sagaser, Watkins & Wieland by Charles P. Hamamjian, Attorney, for Consolidated Irrigation District.

Before Banks, Chair; Paulson and Nazarian, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on both parties' exceptions to a proposed decision of an administrative law judge (ALJ). The complaint alleged that Respondent Consolidated Irrigation District violated the Meyers-Milias-Brown Act (MMBA) by interfering with the protected rights of employees and Charging Party Operating Engineers Local 3, AFL-CIO (OE3), dominating or interfering with OE3's administration, and failing and refusing to meet and confer in good faith with OE3.[1] As to the interference and unlawful domination allegations, the complaint specifically alleged two claims: (1) that

[1] The MMBA is codified at Government Code section 3500 et seq. Statutory references are to the Government Code unless otherwise specified.

District agents held at least one meeting with an OE3 member to discuss instructions for talking to other unit members about executing a decertification petition and promising unit members that they would receive a raise in exchange for decertifying OE3; and (2) that District employee Ricardo Cavazos, whether by actual, apparent, or ratified authority, or coercion, solicited signatures from OE3 members to support a petition to decertify OE3; informed unit members that they would receive a pay raise in exchange for their signatures in support of OE3's decertification; and submitted to PERB a petition in Case No. SA-DP-284-M, seeking to decertify OE3 as the exclusive representative of the unit. The complaint further alleged a violation of the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD).[2] After a formal hearing, the ALJ sustained the bad faith bargaining claim and dismissed the remaining allegations.

Both parties excepted to the factual findings and legal conclusions in the proposed decision. We have reviewed the entire record and considered the parties' arguments in light of applicable law. We affirm the proposed decision, as supplemented by the following discussion, and adjust the remedial order in consideration of OE3's exceptions.

FACTUAL AND PROCEDURAL BACKGROUND

The District is a public agency within the meaning of section 3501, subdivision (c) and PERB Regulation 32016, subdivision (a). OE3 is the exclusive representative, within the meaning of PERB Regulation 32016, subdivision (b), of District employees

[2] PEDD is codified at section 3550 et seq.

in the Water Irrigation Specialist (Irrigation Specialist) unit.[3] The unit includes the following classifications: running equipment, heavy equipment operators, ditch tenders, cement crew, welding crew, weed maintenance crew, spray crew, truck drivers, and mechanics.

As an irrigation district, the District is responsible for scheduling water service and providing irrigation water to farmers, maintaining ditches, and filling and storing water in ponds. The District employs approximately 15 to 18 Irrigation Specialists whom it assigns to work on any number of crews, including weed maintenance, cement, welding, and spray. Some Irrigation Specialists also operate heavy equipment such tractors, dozers, and water trucks, and others perform mechanic duties.

District Management

As of the formal hearing, Phil Desatoff was the District's General Manager and Michael Carbajal was Assistant General Manager. Walter Frost, Operations Manager and Water Master, handled scheduling, timecards, and employee discipline. Gary Ehoff, the Superintendent, reported to Frost and was responsible for assigning daily duties to Irrigation Specialists during morning meetings. Frost and Ehoff shared responsibility for conducting employees' annual performance reviews. Richard Lopez, the foreman, reported to Ehoff and filled in for him when he was unavailable to assign duties to Irrigation Specialists. Tanya Ruiz was the Controller.

[3] We discuss OE3's certification process *post*. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Ricardo Cavazos

Ricardo "Rick" Cavazos began working for the District in March 2008 in the classification of Irrigation Specialist. His duties included repairing and maintaining vehicles and equipment. Despite his title, former Irrigation Specialist Sarah Nelson considered Cavazos to be a supervisor or manager because he appeared to be accorded special privileges and authority by District management.[4] Cavazos did not attend the daily morning meetings, unlike all the other Irrigation Specialists, and instead stayed in the mechanic shop during the meetings. His assignments were different from other Irrigation Specialists in that he did not drive equipment, ditch tend, or cut weeds. Like Lopez, the foreman, Cavazos also had a company vehicle that he was able to drive home and use outside of work hours, whereas other Irrigation Specialists who drove company vehicles only did so at work, during work hours. And, like Ehoff and Frost, Cavazos lived in District housing on District property, between the office and the mechanic shop.[5] Cavazos did not pay rent to live in his District-owned home. No other Irrigation Specialists lived in District housing.

Nelson testified that when she was assigned to the spray crew with Irrigation Specialist Joe Ybarra, Cavazos occasionally drove to the field sites where she was

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[4] Nelson went on industrial disability leave on September 23, 2021, returned to work for a half day in November 2021, and ultimately resigned from District employment in June 2022 as the result of a permanent disability.

[5] In or around 2016, approximately eight years into Cavazos' employment with the District, Water Master Lupe Chavez retired. Prior to his retirement, Chavez resided in District housing. The District offered Chavez's former home to employees based on their seniority, several of whom declined before Cavazos ultimately accepted.

spraying to supervise her work, and told her where to spray and how to mix the chemicals. Ybarra testified that Cavazos was not their supervisor on the spray crew, and that Cavazos only ordered the necessary chemicals. The ALJ did not resolve this particular factual dispute. Because Nelson's testimony is more detailed and specific, we credit her account of these circumstances over that of Ybarra, and find that Cavazos at least occasionally supervised the spray crew.

However, Cavazos did not discipline other employees, set other employees' work schedules, participate in other employees' performance reviews, hire or fire employees, or attend management meetings.

OE3 Files a Request for Recognition

On August 18, 2021, OE3 filed a request for recognition with the District and proof of majority support with PERB's Office of the General Counsel (OGC). As part of the recognition process, OGC requested an initial employee list from the District.

September 15, 2021 Meeting

On September 15, 2021 around 2:00 or 3:00 p.m., Frost held a meeting at the District's mechanic shop with all Irrigation Specialists to discuss employee conduct and expectations. Ehoff was next to Frost during the meeting, while Lopez was on the other side of Ehoff. Cavazos sat at one side of the shop. The rest of the Irrigation Specialists sat in chairs placed for them in front of Frost. Frost distributed a document

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We reject the ALJ's findings that: (1) Ehoff began residing in District housing before his promotion to Superintendent, and that (2) former Irrigation Specialist Jim Davis and Equipment Operator Richard "Tiny" Westerling lived in District housing, because they are based solely on Cavazos' uncorroborated hearsay testimony. (PERB Reg. 32176; *County of Santa Clara* (2019) PERB Decision No. 2670-M, p. 21, fn. 23.) Consequently, we do not rely on those findings in our analysis.

titled “Appropriate Conduct” outlining expectations for workplace conduct and a “progressive discipline” policy. Examples of “inappropriate conduct which may be the basis for disciplinary action” listed in the document included “failure to follow parking and traffic regulations,” “refusing to follow a superior’s direction, or other disrespectful conduct toward a [*sic*] management,” and “making false or malicious statements about District employees or Board of Directors.” The document included lines for employee signature and date.

Witnesses gave varying testimony about what happened next. Nelson, a witness for OE3, testified that Frost raised the issue of OE3 during the meeting, stating a union would take away employees’ insurance and salaries and do “nothing good,” and employees would “lose everything.” Nelson further testified that Frost deemed Cavazos the “shop and yard foreman” and “he [Cavazos] can tell people what to do. He can give them job duties at any time that he sees fit.”

Several District witnesses offered conflicting accounts to that of Nelson. Ybarra testified that Frost did not identify Cavazos as a foreman or supervisor at the September 15 meeting. Rather, Frost told employees that if they came in early from working in the field, they should ask Cavazos for tasks. Irrigation Specialist Edward Gama gave similar testimony to Ybarra, testifying that he did not believe Frost referred to Cavazos as a foreman at the September 15 meeting. Gama stated that Frost told the employes they needed to stay busy until their shifts were over, and that if they needed something to do they could go to the mechanic shop and offer to help Cavazos or Gama himself. For his part, Cavazos testified that Frost told employees if they finished work early, they could throw out the garbage or clean up in the mechanic shop. According to Cavazos, Frost did not say anything about asking Cavazos for tasks or Cavazos assigning tasks to employees. The meeting lasted for about one hour.

The conflicting testimony requires a credibility determination. The ALJ credited the "specific and detailed" testimony of Ybarra, Gama, and Cavazos over that of Nelson on the grounds that Nelson's responses were "argumentative, abrasive." We credit the testimony of Ybarra, Gama, and Cavazos, albeit for different reasons than the ALJ, as we discuss *post* at pp. 17-19.

On the same day, following the meeting, Nelson and OE3 Business Representative Allen Dunbar exchanged text messages. At 3:03 p.m., Nelson wrote: "Holy shit that was the craziest work meeting I've ever been to. Yelling, cussing, lying. It was insane." Next, at 4:53 p.m., Nelson texted: "I forgot to tell you that [Frost] promoted [Cavazos] to shop and yard foreman. If we come in early or whatever [Cavazos] has been instructed that he can tell us what to do and give us jobs. That's a bad thing." Dunbar responded at 4:55 p.m., stating: "So is he a supervisor. A lead. Will he be in the union[?]" Nelson responded at 4:57 p.m.: "[Cavazos] won't be in the union. He's the one who called you trying to get info." Seconds later, Nelson texted: "Walt [Frost] called [Cavazos] yard and shop foreman."

<u>Cavazos Calls Dunbar</u>

Also on September 15, 2021, Cavazos called Dunbar, although at the time Cavazos refused to identify himself and stated only that he worked for the District. He asked Dunbar questions such as, "why do we need a union?" and "what can a union do for us?" and stated his belief that the employees did not need a union. Dunbar found Cavazos' tone aggressive and told him that if he would not identify himself, he would hang up; Cavazos refused, and Dunbar hung up. Dunbar subsequently deduced it was Cavazos based on text messages he received from Nelson and calls from other Irrigation Specialists who explained that Cavazos was telling employees that the two of them had spoken. Cavazos confirmed at hearing that he called Dunbar.

OE3's Certification

On October 6, 2021, the District filed an employee list with OGC that included Ruiz, Lopez, and Cavazos. On October 8, 2021, Dunbar e-mailed OGC stating that Ruiz, Lopez, and Cavazos should not be in the unit because Ruiz was a secretary, Lopez was a foreman, and Cavazos was recently promoted to yard foreman. Dunbar did not copy the District on his communication.

On November 21, 2021, the District informed OGC that it would not challenge the granting of the recognition petition. On November 22, 2021, OGC issued an administrative determination certifying OE3 as the exclusive representative of a unit of Irrigation Specialists.

The Parties Begin Bargaining

On December 13, 2021, Dunbar requested an employee list from Charles Hamamjian, the District's counsel and negotiator. Hamamjian e-mailed the list to Dunbar the next day. Ruiz was no longer on the list, but Lopez and Cavazos remained on it.

On December 15, 2021, OE3 and the District met for their first bargaining session. Dunbar, Senior Business Representative Mike Eggener, and Business Representative Darren Semore were present on behalf of OE3. Hamamjian and

Desatoff were present for the District. During the meeting, the parties discussed the employee list that Hamamjian sent to Dunbar the day before. At hearing, Dunbar testified that Desatoff asked to exclude Lopez from the employee list because he was management; Dunbar agreed and asked for Cavazos to be excluded as well. Per Dunbar's testimony, Hamamjian and Desatoff then caucused and thereafter agreed to remove both Lopez and Cavazos from the unit. Hamamjian testified at hearing that OE3 never requested to exclude Cavazos. The ALJ did not make a credibility determination to resolve the conflicting testimony. Based on supporting evidence—i.e., Dunbar's October 8 e-mail to OGC wherein he stated that Ruiz, Lopez, and Cavazos should be excluded from the unit, as well as Nelson's text messages stating that Cavazos would not be in the unit—we find that Dunbar asked Hamamjian on December 15 to exclude Cavazos from the employee list, and that the District agreed to the request, irrespective of whether the District actually effectuated the request.

On January 11 and 12, 2022, respectively, Hamamjian e-mailed wage summaries and wage scales for Irrigation Specialists to Dunbar. Both lists included Cavazos but not Lopez. The parties met for a second bargaining session on January 11, 2022. Dunbar testified that during that second session, he again objected to Cavazos' inclusion in the bargaining unit. For his part, Hamamjian testified that no such discussion occurred. The parties did not have any further discussions regarding unit employees, and Hamamjian e-mailed Dunbar two additional employees lists in February and March 2022, both including Cavazos. The ALJ did not make a credibility determination to resolve the conflicting testimony in this instance, either. For the same reason we found above that Dunbar requested Cavazos to be excluded from the unit at the parties' December 15, 2021 bargaining session, we also find that Dunbar requested so at the January 11, 2022 session.

In July or August 2022, OE3 passed a proposal regarding District housing, which would allow bargaining unit employees to rotate through the housing each year by seniority. The District rejected the proposal.

On September 29, 2022, Dunbar e-mailed Hamamjian, noting that the parties had not met in over a month. He stated that OE3 was "not trying to declare impasse but we need to get this going." Dunbar then offered a package proposal, stating that if they could agree to the various proposals OE3 passed, the parties would "only have a few small items left" such as the work week and distribution of overtime. He closed by stating, "[T]hese are big drops for me but I am trying to work with you. If not, you can declare Impasse. No threat but we need to get this moving."

The parties met for another bargaining session in November 2022. At that time, the District offered a three-percent wage increase upon finalization of the contract, and another three-percent wage increase on August 1, 2023.

On December 6, 2022, Dunbar e-mailed Hamamjian to check in. On December 8, Hamamjian e-mailed Dunbar in response: "As I stated to you in our last bargaining session, the District's current proposal is for a 3% wage increase to employees upon the agreement being finalized, and 3% wage increase on August 1, 2023." Dunbar responded to Hamamjian on the same day, asserting: "You were supposed to give me a counter proposal on my wage proposals that you missed last time we met. I gave you two wage proposals." On December 12, Dunbar again e-mailed Hamamjian, noting that it was Hamamjian's turn to respond.

On December 16, 2022, Dunbar sent Hamamjian another e-mail, remarking that he had not heard from Hamamjian that week. He asked Hamamjian to meet the following week, despite it being Christmas week, as they "must get this done." Dunbar offered additional proposals on wages and other subjects. On December 19, 2022, Hamamjian responded, noting that he had forwarded Dunbar's proposal to the District and that he would be discussing it with the District that week. Hamamjian stated that he would contact Dunbar after he had connected with the District.

Decertification Petition and Continuing Negotiations

At some point in December 2022, Irrigation Specialist Brian Slaven approached Carbajal in his office to ask for assistance with filing a decertification petition. Carbajal told Slaven that he could not help him with the petition as he was a manager and needed to remain separate from such a process. Slaven then left Carbajal's office.

Cavazos solicited signatures for the decertification petition before and after work while "in the yard," which he also referred to as his "backyard" because he lives on District property. The "yard" is where the mechanic shop is located, where District employees park equipment, and where the District stores certain tools, trucks, and chemicals. The mechanic shop is located near the entrance to the yard and the activity in the shop is visible from the office. Carbajal never observed Cavazos collecting signatures for the decertification petition.

On January 5, 2023, Cavazos, on behalf of a group of District employees, filed a petition with PERB seeking to decertify OE3 as the exclusive representative of the bargaining unit.[6] Cavazos filed an updated decertification petition on January 13. Carbajal was not aware of further decertification efforts until Cavazos filed the petition.

On January 10, Dunbar e-mailed Hamamjian asking for a counterproposal to OE3's last proposal from December 2022. Dunbar stated that it had been almost a month since the parties last met. On January 12, Hamamjian e-mailed Dunbar with two potential meeting dates and times. Hamamjian did not send a counterproposal or otherwise substantively respond to Dunbar.

On February 2, OGC informed the parties that since the District had not adopted local rules concerning employee representation petitions, PERB would conduct a representation proceeding under the MMBA pursuant to PERB Regulation 61000. The District posted the notice of decertification petition for the requisite period, and during that time no employee organization filed an intervention petition with PERB to represent the bargaining unit.

On February 27, OE3 advised OGC that it intended to file a blocking charge and requested a stay of the election.[7] Also on February 27, Dunbar e-mailed Hamamjian, again asking for a counterproposal in addition to an updated list of employees. Dunbar requested to meet on one of two dates in March. Hamamjian responded by e-mail on February 28, offering different dates in March and stating that

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[6] All dates hereafter are in 2023 unless otherwise specified.

[7] A charge alleging "unlawful conduct [that] would so affect the election process as to prevent the employees from exercising free choice" is commonly called a "blocking charge" because it prevents, or "blocks," an election until the charge is resolved. (*Gompers Preparatory Academy* (2020) PERB Order No. Ad-481, p. 3, fn. 3, quoting *City of Fremont* (2013) PERB Order No. Ad-403-M, p. 6, fn. 11.)

OE3's decertification petition appeared to mistake Ricardo Cavazos with Richard Lopez. Hamamjian stated, "Richard Lopez is the person we discussed is a lead and were not sure if he should be included in the bargaining unit or not. Based on the recent filing by your side, it seems that you Ricardo [*sic*] got mixed up with Richard [*sic*]." Based to this alleged mix-up, Hamamjian asked Dunbar to withdraw OE3's objection. Neither Hamamjian nor anyone else from the District included a counterproposal to OE3's December 2022 offer. Also on February 28, Dunbar wrote to Hamamjian, confirming a bargaining date and asserting that OE3 would not be withdrawing its objection as "there is no misunderstanding between Ricardo [Cavazos] and Richard [Lopez]." Hamamjian responded on March 2, stating "I will discuss any additional proposals with my side and see if we can get those to you before the upcoming session." Hamamjian did not pass any proposals before the next bargaining meeting.

On March 1, the District opposed OE3's request to stay the election.

On March 15, the parties met for a virtual bargaining session. The District presented the same offer it passed in December 2022 and did not counter OE3's December 2022 proposal. The meeting lasted less than five minutes. Hamamjian stated that the District did not believe it had to negotiate while the decertification petition remained pending. At the end of the meeting, the District stated that it was "uncomfortable" signing an MOU while the decertification petition and election were sorted out with PERB.

On April 20, OGC issued an administrative determination (AD) granting OE3's request to stay the election pending resolution of the charge. The District timely appealed the AD, and OE3 timely opposed, asking the Board to uphold the stay.[8]

On April 21 and again on April 24, Dunbar e-mailed Hamamjian proposing a date for another bargaining session and requesting an updated counterproposal. Hamamjian replied on April 24, stating that he could meet on April 26 and "[a]s for the proposal, I will try to provide you a summary of where I think we are on everything, but I don't know the last time I have gotten a proposal from you guys. As you know, the last proposal came from me at our recent bargaining session." Within minutes, Dunbar responded to Hamamjian, asserting that he had provided Hamamjian a proposal on December 13, 2022. Dunbar again asked for a counterproposal and stated that he would counter the District's proposal during their April 26 bargaining session.

The parties met for bargaining on April 26 and May 5. Both parties made movement during these meetings.

In early June, the parties reached a tentative agreement on a comprehensive memorandum of understanding (MOU) and OE3 ratified it. However, the MOU was not signed. On June 2, Dunbar wrote to Hamamjian, attempting to settle remaining aspects of the contract and informing him that they had already agreed to a drug policy in December 2022. He attached a copy of the marked-up MOU that his members had ratified. Dunbar asked when the District would be distributing the three-percent wage increase for the unit. On June 19, Hamamjian responded to Dunbar. He

[8] On August 14, the Board issued an order affirming and adopting the AD. (*Consolidated Irrigation District* (2023) PERB Order No. Ad-504.)

stated that the District would begin implementing the terms of the MOU in the next pay period, including the wage increase. Hamamjian further stated, “I believe there are still a few other issues to work out in this agreement that we have not yet resolved, and would like to set up a call to discuss this week.” Minutes later, Dunbar wrote to Hamamjian, stating that “[i]n the Union’s eyes, my members voted on the last documents I provided to you. Can you send me a list of items that you are talking about is [*sic*] outstanding.” He then asked Hamamjian to send a signed contract from the District’s team. Sometime thereafter, Hamamjian and Dunbar had a telephone conversation about the outstanding issues.

On July 13, Dunbar e-mailed Hamamjian, again requesting a copy of the signed final MOU from the District for Dunbar to countersign. Dunbar noted that the members received their three-percent wage increase the week prior, but he still did not have an executed MOU from the District. Hamamjian did not respond, and the District never sent OE3 a list of its outstanding issues. The MOU remains unsigned.

<u>Procedural History</u>

On March 14, OE3 filed an unfair practice charge against the District. On March 16, OE3 amended its charge. On March 27, the District filed a response to OE3’s amended charge.

On March 29, OGC issued a complaint. The District filed an answer to the complaint on April 13, denying the substantive allegations and asserting multiple affirmative defenses.

OGC held an informal settlement conference on April 18, but the parties did not resolve the matter.

On April 20, the District filed a motion to expedite. On April 28, OE3 filed a response and non-opposition to the motion. On May 15, the Board granted the District's motion.

The ALJ held an expedited virtual formal hearing on July 19, 20, and 21. The parties submitted post-hearing briefs on August 22 and the case was subsequently submitted for decision. The ALJ issued a proposed decision on September 26.

DISCUSSION

The Board reviews exceptions to a proposed decision under a de novo standard of review. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) Under this standard, we review the entire record and are free to make different factual findings and reach different legal conclusions than those in the proposed decision. (*City and County of San Francisco* (2021) PERB Decision No. 2757-M, p. 8.) However, the Board need not address issues that the proposed decision has adequately addressed or that would not impact the outcome. (*City of San Ramon*, *supra*, p. 5.)

OE3's exceptions center on factual findings relating to Cavazos' role at the District, with OE3 arguing that the ALJ erred by not finding the requisite facts to establish Cavazos was acting as a District agent when he solicited signatures in support of the decertification petition. By the same token, OE3 also excepts to the ALJ's dismissal of its interference, unlawful domination, and PEDD claims, all of which hinged on a finding of agency, as well as to the ALJ's proposed remedy. The District excepts to the bad faith bargaining violation and underlying factual findings, as well as to the proposed remedial order, i.e., extension of the certification bar. We address these exceptions below.

I. Hearsay

OE3's interference, unlawful domination, and PEDD claims depend in significant part on a factual finding regarding the September 15, 2021 meeting between District management and Irrigation Specialists. To reach OE3's exceptions, we must assess the nature of the testimonial evidence. Although the ALJ did not expressly refer to Nelson's testimony regarding the September 2021 meeting—i.e., Frost allegedly referring to Cavazos as the "shop and yard foreman" who had the authority to assign job duties to other Irrigation Specialists—as hearsay, her testimony cannot be used to support a factual finding absent non-hearsay evidence supporting the same finding.[9] (PERB Reg. 32176.)

Here, no hearsay exception applies. OE3 argues that Nelson's text message to Dunbar regarding Frost allegedly referring to Cavazos as a "shop and yard foreman" constitutes "contemporaneous evidence," which we interpret as an assertion that the message falls within the hearsay exception for contemporaneous declarations under Evidence Code section 1240.[10] We disagree. For this exception to apply, it is required

[9] While a witness' tone is not determinative of credibility, we believe it is important to initially note that we found no evidence in the record of Nelson's testimony reflecting an "argumentative" or "abrasive" tone—although we find examples in the testimonial record of what could be deemed argumentativeness from Cavazos—and insofar as the September 15, 2021 meeting is concerned, we construe Nelson's testimony to be more detailed than that of Ybarra, Gama, and Cavazos.

[10] Under that section, "[e]vidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) [p]urports to narrate, describe, or explain an act,

that "(1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." (*Melkonians v. Los Angeles County Civil Service Com.* (2009) 174 Cal.App.4th 1159, 1169 (*Melkonians*) [internal quotation marks omitted].) Even assuming that the September 2021 staff meeting was a sufficiently startling occurrence, Nelson's text message about Frost referring to Cavazos as "shop and yard foreman" is not spontaneous and unreflecting as she did not send it until at least two hours after the meeting ended. (See *Melkonians*, *supra*, 174 Cal.App.4th at p. 1169 ["spontaneous" means "actions undertaken without deliberation or reflection"]; *People v. Merriman* (2014) 60 Cal.4th 1, 64 [spontaneous utterance is one in which "the reflective faculties may be stilled"].) Because OE3 did not offer any non-hearsay evidence to corroborate Nelson's testimony regarding the September 2021 meeting, her testimony cannot support a finding that Frost referred to Cavazos as "shop and yard foreman."

We also decline OE3's invitation to draw an adverse inference against the District under Evidence Code section 413, which provides that "[i]n determining what inferences to draw from the evidence or facts in the case against a party, a trier of fact

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condition, or event perceived by the declarant; and (b) [w]as made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240, subds. (a), (b).)

may consider . . . the party's failure to explain or to deny by his testimony such evidence or facts in the case against him." OE3 argues that the Board should draw an adverse inference because the District failed to call Frost as a witness to testify regarding the statements Nelson attributed to him, and that failure "itself leads to the inference that his testimony would not have contradicted the other witnesses' accounts." (*Alliance Environmental Science and Technology High School et al.* (2020) PERB Decision No. 2717, p. 23; see *Regents of the University of California* (1987) PERB Decision No. 640-H, adopting proposed decision at pp. 88-90.) But by calling Gama, Ybarra, and Cavazos to testify, the District presented evidence within its control that directly controverted Nelson's account on a disputed material fact. Therefore, an adverse inference is not appropriate.

Moreover, we also acknowledge that "a hearing officer who has observed the testimony of witnesses under oath is better positioned than the Board itself to make credibility determinations based on observational factors, such as the demeanor, manner, or attitude of witness[es]." (*State of California (Department of Social Services)* (2019) PERB Decision No. 2624-S, p. 11.) For that reason, we defer to the ALJ's ultimate credibility determination regarding the specifics of the September 15, 2021 meeting, even if we disavow the language the ALJ used to characterize Nelson's demeanor.

II. Interference[11]

To establish a prima facie interference case, a charging party must show that an employer's conduct tends to or does result in some harm to protected union and/or employee rights. (*City of San Diego* (2020) PERB Decision No. 2747-M, p. 36 (*San Diego*).) A charging party need not establish that the employer acted because of an unlawful motive. (*Claremont Unified School District* (2019) PERB Decision No. 2654, p. 20.) If a charging party establishes a prima facie case, the burden shifts to the employer. (*San Diego*, *supra*, PERB Decision No. 2747-M, p. 36.) The degree of harm dictates the employer's burden. (*Ibid*.) If the harm is "inherently destructive" of protected rights, the employer must show that the interference results from circumstances beyond its control and that no alternative course of action was available. (*Ibid*.) For conduct that is not inherently destructive, the respondent may attempt to justify its actions based on operational necessity. (*Ibid*.) In such cases, PERB balances the asserted business need against the tendency to harm protected rights; if the tendency to harm outweighs the necessity, PERB finds a violation. (*Ibid*.) Within the category of actions or rules that are not inherently destructive, the stronger

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[11] OE3 did not except to the ALJ's dismissal of its allegation that the District interfered with protected rights by holding at least one meeting in December 2022 with Slaven to discuss instructions for talking to other unit members about executing a decertification petition and making promises that unit members would receive raises in exchange for decertifying OE3. Nor did OE3 except to the dismissal of its claim that the District, acting through Cavazos, interfered with employee rights by promising pay raises in exchange for unit employees' signatures on the decertification petition. Accordingly, these findings are not before the Board but remain final and binding on the parties. (*Trustees of the California State University (San Marcos)* (2020) PERB Decision No. 2738-H, p. 2, fn. 2; *County of Orange* (2018) PERB Decision No. 2611-M, p. 2, fn. 2.)

the tendency to harm, the greater is the respondent's burden to show its business need was important and that it narrowly tailored its actions or rules to attain that purpose while limiting harm to protected rights as much as possible. (*Id*. at pp. 36-37, fn. 19.)

OE3 argues that the District unlawfully interfered with employee protected rights when Cavazos solicited signatures from unit members in support of the decertification petition and filed the petition with PERB. This claim is predicated on a finding that Cavazos acted with actual or apparent authority, or that the District ratified his actions, all of which OE3 asserts occurred here.

"Agency is employed to impose liability on the charged party for the unlawful acts of its employees or representatives even when the principal is not at fault and takes no active part in the action." (*City of San Diego* (2015) PERB Decision No. 2464-M, adopting proposed decision at p. 39, affd. *sub nom. Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898; *Alliance Marc & Eva Stern Math & Science High School et al.* (2021) PERB Decision No. 2795, p. 44 (*Alliance*) [judicial appeal pending].) "Although labor boards adhere to common law principles of agency, they routinely apply these principles with reference to the broad, remedial purposes of the statutes they administer, rather than by strict application of concepts governing an employer's responsibility to third parties for the acts of its employees." (*City of San Diego*, *supra*, p. 15; *Trustees of the California State University* (2014) PERB Decision No. 2384-H, p. 40; *International Ass'n of Machinists, Tool and Die Makers Lodge No. 35 v. National Labor Relations Board* (1940) 311 U.S. 72, 88.)

The party asserting an agency relationship bears the burden of proving it. (*Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 780.) Agency may be established by showing: (1) the purported agent had actual authority to act on behalf of the employer; (2) the purported agent had apparent authority to act on behalf of the employer; or (3) the employer ratified the purported agent's conduct. (*City of San Diego*, *supra*, PERB Decision No. 2464-M, adopting proposed decision at pp. 38-39.)

Like the ALJ, we find that Cavazos did not act as an agent of the District under any of the three theories.

A. Actual Agency

Actual agency exists "when the agent is really employed by the principal." (Civ. Code, § 2299.) "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." (*Id.*, § 2316.) Because an actual agent is employed by the principal, the primary inquiry in assessing actual authority is whether the agent was acting within the scope of his or her authority. (*City of San Diego*, *supra*, PERB Decision No. 2464-M, p. 15; *Inglewood Unified School District* (1990) PERB Decision No. 792, p. 19; *Vista Verde Farms v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307, 312.)

We find that OE3 failed to establish Cavazos acted with actual authority when he solicited signatures in support of the decertification petition. As we found *ante* regarding the September 15, 2021 meeting, Frost did not refer to Cavazos as a "shop and yard foreman" or provide him with the authority to assign job duties to other Irrigation Specialists. There is no other evidence in the record that the District conferred actual authority upon Cavazos to act on the District's behalf or allowed Cavazos to believe that he possessed such authority.

B. Apparent Agency

Apparent authority is "such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (Civ. Code, § 2317.) "PERB and the courts have held that apparent authority to act on behalf of the employer may be found where the manifestations of the employer create a reasonable basis for employees to believe that the employer has authorized the alleged agent to perform the act in question." (*Santa Ana Unified School District* (2013) PERB Decision No. 2332, pp. 9-10, quoting *West Contra Costa County Healthcare District* (2011) PERB Decision No. 2164-M, p. 7.) The inquiry is best framed as whether under the circumstances a reasonable employee would believe the alleged agent "was reflecting company policy and speaking and acting for management." (*Compton Unified School District* (2003) PERB Decision No. 1518, p. 5, fn. 3 (*Compton*), quoting *Great American Products* (1993) 312 NLRB 962, 963.) This is an objective inquiry. (*City of San Diego*, *supra*, PERB Decision No. 2464-M, p. 18; *Chula Vista Elementary School District* (2004) PERB Decision No. 1647, pp. 8-9 (*Chula Vista*).)

Examining the facts in totality, we find that Cavazos did not act with apparent authority in collecting signatures for the decertification petition. While certain facts indeed suggest that Cavazos received preferential treatment from the District—e.g., he was the only Irrigation Specialist to reside in fully subsidized housing on District property, to retain a company vehicle for work and personal use, and to absent himself from daily morning meetings with impunity—we must consider them against the facts that Frost never referred to Cavazos as a “shop and yard foreman” during the September 15, 2021 meeting or otherwise, and that Cavazos did not have any supervisory authority aside from occasionally overseeing the spray crew. In short, OE3’s factual showing does not establish that Cavazos’ actions to decertify OE3 were a reflection of District policy and on behalf of District management. And while Cavazos solicited signatures for the decertification petition on the yard, where someone from District management potentially could have seen his activity, we find that this too fails to create a reasonable basis for employees to believe that Cavazos was circulating the decertification petition at the District’s behest, namely because Cavazos collected signatures during non-work times. Consequently, even if his activity was visible from the office, a reasonable employee would not believe that Cavazos’ decertification efforts were undertaken with the District’s endorsement.

C. Ratification

OE3 also argues that Cavazos was a District agent because the District ratified Cavazos’ efforts to decertify OE3. To find that a principal ratified the acts of another, thereby establishing agency after the fact, it must be shown that the principal knew or was on constructive notice of the agent’s conduct and failed to disavow that conduct. (Civ. Code, § 2310; *Alliance*, *supra*, PERB Decision No. 2795, pp. 51-52; *Chula Vista*, *supra*, PERB Decision No. 1647, p. 8; *Compton*, *supra*, PERB Decision No. 1518, p. 5.)[12]

[12] OE3 cites to several non-PERB decisions (a National Labor Relations Board (NLRB) decision, a decision of the Agricultural Labor Relations Board, and an NLRB ALJ decision) for the proposition that an employer can ratify an agent’s conduct “through special treatment, providing benefits above and beyond those available to [ ]

Again, examining the facts in totality, we find that OE3 did not meet its evidentiary burden to prove the District ratified Cavazos' actions. Cavazos solicited signatures on the District yard, in the open, before and after work, where he could have been seen by management. However, as we have already explained, OE3 did not demonstrate that any District managers knew that Cavazos was collecting signatures in the yard. Carbajal, the only District manager to testify at hearing, never observed Cavazos soliciting signatures for the decertification petition. Moreover, OE3 failed to show that any District managers had constructive notice of Cavazos' involvement in the decertification petition by virtue of the mechanic shop and yard being located within view from the office. The prospect that "a manager could have seen" Cavazos soliciting signatures in the yard, as OE3 argues, without more, did not serve as constructive notice to the District. (See Black's Law Dict. (11th ed. 2019) [defining "constructive notice" as notice presumed by law to have been acquired by a person and thus imputed to that person"].)

D. Conclusion

Because OE3 did not state sufficient facts to establish that Cavazos acted with actual or apparent authority in soliciting signatures for the decertification petition, or

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coworkers, or allowing use of employer property to engage in the activities in dispute – in this case, soliciting signatures for the decertification petition on [District] property." To the extent these decisions have any persuasive value, they are distinguishable on their facts. The closest decision is *Screen Print Corp*. (1965) 151 NLRB 1266. There, a bargaining unit employee circulated a decertification petition on the factory floor and used the employer's intercom to disparage the incumbent union during work hours, without discipline. As we explain below, the difference in the case before us is that Cavazos circulated his decertification petition during off-duty hours without the knowledge of management.

that the District ratified Cavazos' decertification efforts, we affirm the ALJ's dismissal of the interference allegations.

III. Unlawful Domination

In assessing whether an employer has dominated an employee organization or interfered with its formation or administration, PERB looks to whether the employer's conduct tends to interfere with the organization's ability to maintain an arm's length relationship with the employer. (*Clovis Unified School District* (2021) PERB Decision No. IR-63, p. 18 (*Clovis*).) In such cases, PERB considers the level of the employer's involvement in the organization's internal affairs. (*Id*. at p. 19.) To establish a claim of unlawful domination, a charging party need not show the employer's conduct actually impacted employee free choice, nor that the employer intended to dominate an organization, interfere with its internal affairs, or infringe on an organization's ability to maintain an arm's length relationship with the employer. (*Id.* at p. 18; *City of Arcadia* (2019) PERB Decision No. 2648-M, pp. 24-25 (*Arcadia*); *West Contra Costa County Healthcare District*, *supra*, PERB Decision No. 2164-M, p. 6.)

OE3 argues that the District unlawfully dominated or interfered with OE3's administration when Cavazos solicited signatures for the decertification petition. Like the interference claim, these allegations are only actionable if Cavazos was acting as the District's agent when soliciting bargaining unit member signatures for the petition. Because OE3 did not establish agency, its claim that the District, acting through Cavazos, interfered with OE3's ability to maintain an arm's length relationship with the District, also fails. Therefore, we affirm the ALJ's dismissal of the unlawful domination allegations.

IV. PEDD

The PEDD, section 3550, provides:

> "A public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization. This is declaratory of existing law."

The test for whether conduct or communication deters or discourages employees in making the choices enumerated in section 3550 is objective. (*Regents of the University of California* (2021) PERB Decision No. 2755-H, p. 24 (*Regents*).) It is the charging party's burden to show that the conduct or communication tends to influence employee free choice, not that the conduct actually did influence employee choice. (*Ibid*.) PERB will look first to the conduct or communication itself in determining whether it tends to influence employee free choice. (*Ibid.*) But context matters in even the objective assessment. (*Ibid.*) Therefore, we also will examine the context surrounding the conduct or communication when determining whether such conduct is reasonably likely to deter or discourage employee choices on union matters. (*Ibid.*)

OE3 argues that the District violated the PEDD when Cavazos solicited signatures for the decertification petition. As with the unlawful domination allegations, the PEDD claim is only actionable if Cavazos was acting as a "public employer," i.e., the District's agent, when soliciting bargaining unit member signatures for the petition. Because OE3 did not establish agency, its claim that the District deterred or discouraged public employees or applicants to be public employees from becoming or remaining members of OE3, from authorizing representation by OE3, or from authorizing due or fee deductions to OE3, must be dismissed.

V. Bad Faith Bargaining

In determining whether a party has violated its duty to meet and confer in good faith, PERB uses a "per se" test or a "totality of conduct" analysis, depending on the specific conduct involved. (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 34.) Per se violations generally involve conduct that violates statutory rights or procedural bargaining norms. (*Id*. at pp. 34-35.) In contrast, the totality of conduct test applies to allegations of bad faith bargaining conduct that do not constitute a per se refusal to bargain. (*Id*. at p. 35.)[13]

Under the totality test, a party is permitted to maintain a "hard bargaining" position on one or more issues, if the entire course of its bargaining conduct, both at the table and away from it, manifests good faith efforts toward reaching an overall agreement. (*City of San Ramon*, *supra*, PERB Decision No. 2571-M, pp. 7-8.) The ultimate question is whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*Id*. at p. 7.)[14] A single indicator of bad

[13] The phrases "totality of the circumstances" and "totality of conduct" are interchangeable, and either phrase describes the operative test. (*County of Sacramento* (2020) PERB Decision No. 2745-M, p. 9, fn. 8.) While PERB frequently refers to bad faith bargaining under this test as "surface bargaining," that label does not limit the scope of the relevant factors to only those involving superficial bargaining conduct. (*Ibid*.)

[14] PERB also considers whether the charging party engaged in bad faith conduct to a degree that mitigates the respondent's bad faith conduct, if any. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 52.)

faith, if egregious, can be a sufficient basis for finding that a party has failed to bargain in good faith. (*City of San Jose* (2013) PERB Decision No. 2341-M, p. 19.) However, PERB generally considers multiple factors, including bad faith indicia such as: (1) failing to respond to proposals in a timely manner (*State of California (Department of Personnel Administration)* (1989) PERB Decision No. 739-S, pp. 4-5); (2) dilatory or evasive tactics, canceling meetings, failing to prepare adequately for negotiations, or failing to take one's bargaining obligation seriously (*Children of Promise Preparatory Academy* (2018) PERB Decision No. 2558, p. 26; *Oakland Unified School District* (1983) PERB Decision No. 326, pp. 33-34); and (3) any other conduct that tends to frustrate negotiations without adequate reason.

Conduct sufficient to amount to one or more separate, contemporaneous unfair practices also indicates bad faith under the totality test. (*City of San Jose*, *supra*, PERB Decision No. 2341-M, pp. 21 & 43.) This includes both labor law violations away from the bargaining table and acts that could amount to a per se violation of the duty to bargain (*City of Davis* (2018) PERB Decision No. 2582-M, pp. 9, 11-13), such as refusing to bargain outright over one or more bargainable topics or effects (*City of Glendale* (2020) PERB Decision No. 2694-M, pp. 67-70; *City and County of San Francisco* (2023) PERB Decision No. 2858-M, pp. 12-13 (*CCSF*)).

The District excepts to the ALJ's finding of a bad faith bargaining violation. Not only do we affirm the ALJ's conclusion, we additionally find two per se violations of the District's duty to negotiate in good faith: the District's flat refusal to bargain from January through March 2023 and Hamamjian's March 15, 2023 statement that the District did not have a duty to negotiate with OE3 during the pendency of the decertification petition. Both of these are also indicators of bad faith under the totality test.[15] The facts are plain. Cavazos filed the decertification petition on January 5, 2023. Between January 2023 and March 2023, Dunbar twice requested a counterproposal to OE3's December 2022 proposal from Hamamjian. While Hamamjian responded to Dunbar both times, in neither instance did he send Dunbar the requested counterproposals, otherwise provide substantive responses to OE3's proposal, or explain the District's position as to why it was not doing so. When the parties finally returned to the table on March 15, 2023, the District passed the same proposal it offered in November and December 2022 and still failed to counter OE3's December 2022 proposal. The meeting was over in minutes as the District stated it did not believe it had a duty to negotiate while the decertification petition was pending, a position that was clearly incorrect and unlawful. (See *Pittsburg Unified School District* (1983) PERB Decision No. 318, pp. 22-23 [filing of a decertification petition does not suspend an employer's duty to bargain in good faith].)

The District argues that it did not engage in bad faith bargaining and at most, engaged in hard bargaining by maintaining its proposals. We disagree. Unlike lawful hard bargaining, the District's conduct here—repeatedly reoffering the same wage proposal from November 2022 without explanation and refusing to put forth counterproposals from January through March 2023—exhibited bad faith adherence to

[15] The ALJ did not address the District's refusal to execute the MOU in June and July 2021 as an indicator of bad faith and OE3 did not except to the ALJ's failure to make such a finding. We therefore decline to address the District's refusal to execute the MOU in this decision, although that does not preclude OE3 from arguing the refusal as an unfair practice violation in another case.

an inflexible position. (*City of San Ramon*, *supra*, PERB Decision No. 2571-M, p. 8 ["if a party's inflexible position is fairly maintained and rationally supported, such facts do not amount to bad faith, absent other evidence"]; *County of Tulare* (2015) PERB Decision No. 2461-M, pp. 8-9 & adopting proposed decision at p. 9 [hard bargaining permissible where proposal is supported by rational arguments that were communicated to the other party].)

The District also defends its March 15, 2023 proposal on the grounds that the parties "only had a few subjects of bargaining which remained unresolved" and the proposal was nearly identical to the final MOU between the parties. The suggested inference from this argument is that the District's proposal and conduct were reasonable. We are unmoved. The parties' later ability to reach a final agreement does not absolve the District of its steadfast refusal to bargain from January through March 2023. (*County of Sonoma* (2023) PERB Decision No. 2772a-M, pp. 11-12.) As the ALJ pointed out, an employer's correction of unlawful conduct affects the proper remedy but does not necessarily shield the employer from liability. (*CCSF*, *supra*, PERB Decision No. 2858-M, pp. 2, 13.) We also reject the District's argument that OE3 could have accepted or countered the District's March 15, 2023 proposal, as that was the third time it offered the same proposal, all while failing to counter OE3's December 2022 proposal.

For these reasons, we affirm the ALJ's conclusion that the District failed and refused to bargain in good faith with OE3 for an initial contract.

VI. Remedy

The Legislature has vested PERB with broad authority to decide what remedies are necessary to effectuate the purposes and policies of the MMBA and the other acts we enforce. (§ 3509, subd. (b); *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.) An appropriate remedy therefore should make whole all injured persons or organizations for the full amount of their losses and should withhold from the wrongdoer the fruits of its violation. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13.) In addition to serving restorative and compensatory functions, a Board-ordered remedy should also deter future misconduct, so long as the order is not a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. (*City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 3 (*Palo Alto*); *City of San Diego*, *supra*, PERB Decision No. 2464-M, pp. 40-42; *City of Pasadena*, *supra*, pp. 12-13.)

The typical remedy in bad faith bargaining cases includes an order to cease and desist from the unlawful conduct and bargain with the charging party upon demand, both of which we order here. (*City of San Ramon*, *supra*, PERB Decision

No. 2571-M, p. 17; *Children of Promise Preparatory Academy*, *supra*, PERB Decision No. 2558, p. 35.)

In addition to the customary remedies for bad faith bargaining, it may be proper to extend the certification bar and dismiss a decertification petition altogether based on proven unfair practices in cases involving initial contract negotiations. (*St. HOPE Public Schools* (2024) PERB Order No. Ad-511, pp. 8, 10, fn. 11 (*St. HOPE*).) As we outlined in *St. HOPE*, there are normally three potential bases for dismissal if a charging party has prevailed in its blocking charges in whole or in part, as OE3 did here: (1) the proven conduct materially tainted solicitation of employee support or employees' decision to sign the petition, such that there is a legitimate question whether the petition would have reached the requisite threshold absent unfair practices; (2) the conduct occurred while an emerging union was negotiating for a first contract after recognition, certification, or successorship, thereby warranting retroactive extension of the certification or recognition bar; or (3) the conduct has a continuing prospective tendency to harm employee free choice that PERB's remedies are unlikely to fully address, even in conjunction with the passage of time and any other relevant factors. (*Id.* at pp. 10-11.)

Here, the ALJ ordered extension of the certification bar to at least 12 months from the commencement of good faith bargaining, subject to extension if the District is found to have engaged in additional unfair practices. We concur with this remedy.

We also recognize that the District's illegal conduct occurred while OE3 was negotiating for a first contract. These circumstances call for heightened protection stemming from our experiential understanding that "it is particularly difficult to restore a newly recognized or certified union's standing with its members after early unlawful conduct" and thus "absent unusual circumstances it is proper to extend the recognition bar or certification bar and dismiss the petition altogether based on proven unfair practices during first contract negotiations." (*St. HOPE*, *supra*, PERB Order No. Ad-511, pp. 10, fn. 11; see *Gompers Preparatory Academy*, *supra*, PERB Order No. Ad-481, pp. 5-6 & cases cited therein ["an employer's bad faith bargaining conduct during negotiations for an initial contract typically has a more deleterious effect on employee support for the nascent union than it would in a well-established collective bargaining relationship because such conduct sends the message that 'employees [will] see no change in their working lives from having a collective-bargaining representative'"]; *Children of Promise Preparatory Academy* (2015) PERB Order No. Ad-428, adopting administrative determination at pp. 18-26; *Central Basin Municipal Water District* (2021) PERB Order No. Ad-486-M, p. 12, fn. 6.) Dismissal of the decertification petition would accordingly be appropriate. However, in light of the particular procedural posture of this case, viz., the Group of Employees that filed the decertification petition did not appear in this matter, we do not order dismissal herein but note that any party can file a motion with OGC to dismiss the decertification petition in Case No. SA-DP-284-M.[16]

OE3 also requests that the Board expand the ALJ's proposed make-whole remedy to include the reimbursement of bargaining costs and litigation expenses,

[16] Today's decision does not affect the stay order in Case No. SA-DP-284-M, which remains in place. (*Consolidated Irrigation District*, *supra*, PERB Order No. Ad 504-M.)

pursuant to *CCSF*, *supra*, PERB Decision No. 2858-M. For a charging party to obtain an award based on some or all of the costs of bargaining or otherwise representing employees, it need only show by a preponderance of the evidence that the offending party's conduct caused a harm and that it is reasonably feasible to estimate the financial impact. (*Id.* at pp. 15-16; *Alliance Judy Ivie Burton Technology Academy High et al*. (2022) PERB Decision No. 2809, pp. 14, 31-32; *County of Santa Clara* (2021) PERB Decision No. 2799-M, p. 28, fn. 14; *Regents*, *supra*, PERB Decision No. 2755-H, p. 56; *Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 15; *City and County of San Francisco* (2020) PERB Decision No. 2691-M, p. 51, fn. 32; *Palo Alto*, *supra*, PERB Decision No. 2664-M, p. 8, fn. 6.) After PERB awards bargaining costs, if subsequent disputes over the award's value extend to such a degree that counsel for the prevailing party must perform work beyond drafting a first set of declarations and supporting briefing, then any further, reasonable time spent effectuating the award of fees and costs may be compensable irrespective of whether the opposing party acts frivolously in litigating the award's value. (*CCSF*, *supra*, pp. 16-17.)

It is proper to award bargaining costs to OE3 based on the District's unlawful failure to negotiate with OE3 for at least three months. In compliance proceedings, OE3 has the burden of proving these damages and any other bargaining or representation costs, resource diversion, or waste of resources that it claims resulted in material part from the District's violation. (*County of Santa Clara* (2024) PERB Decision No. 2900-M, p. 28 (*Santa Clara*); *CCSF*, *supra*, PERB Decision No. 2858-M, p. 17.)

As for OE3's request for reimbursement of attorney fees or other litigation expenses, PERB usually follows the "American Rule," pursuant to which a successful party normally has no claim to fee shifting. (*Santa Clara*, *supra*, PERB Decision No. 2900-M, p. 28.) Rather, a party in a PERB case seeking to recover attorney fees and costs for litigation work done in relation to the same case must normally show that the claim, defense, motion, or other action or tactic was "without arguable merit" and pursued in "bad faith." (*Ibid*; *Palo Alto*, *supra*, PERB Decision No. 2664-M, p. 7, citing *Lake Elsinore Unified School District* (2018) PERB Order No. Ad-446a, p. 5; *CCSF*, *supra*, PERB Decision No. 2858-M, p. 15; *Sacramento City Unified School District*, *supra*, PERB Decision No. 2749, p. 11.) Attorney fees under this standard thus function as a type of litigation sanction, as distinguished from when a party seeks to be made whole for legal expenses it reasonably incurred in a separate proceeding to remedy, lessen or stave off the impacts of the other party's unfair practice, which is subject to a different and lesser standard. (*Palomar Health* (2024) PERB Decision No. 2895-M, p. 63 (*Palomar*) [judicial appeal pending]; *Santa Clara*, *supra*, PERB Decision No. 2900-M, pp. 28, 35.)

We decline to order attorney fees and litigation expenses in this matter. The District eventually dropped its argument regarding its bargaining obligations during a pending decertification petition and did not repeat them on exceptions to the Board, thereby precluding a finding of the requisite bad faith. (*Palomar*, *supra*, PERB Decision No. 2895-M, p. 67.)

ORDER

Based upon the foregoing and the entire record in this case, the Public Employment Relations Board (PERB) finds that the Consolidated Irrigation District (District) violated the Meyers-Milias-Brown Act, Government Code section 3500 et. seq. (MMBA) by failing or refusing to meet and confer in good faith with Operating Engineers Local 3, AFL-CIO (OE3).

Pursuant to MMBA section 3509, subdivision (b), it is hereby ORDERED that the District, its governing body, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing or refusing to meet and confer in good faith with OE3.

2. Interfering with the rights of bargaining unit employees to be represented by OE3.

3. Denying OE3 the right to represent bargaining unit employees.

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

1. Upon request, bargain with OE3 as the exclusive representative, and if an agreement is reached, reduce it to writing and sign it. On commencement of bargaining, OE3's status as the exclusive collective bargaining representative of the Water Irrigation Specialist bargaining unit shall be extended for a minimum of 12 months thereafter, as if the initial year of the certification has not expired.

2. Make OE3 whole for extra bargaining costs that the District's MMBA violations caused in substantial part.

3. Augment any amounts due under this Order by providing interest accrued to the date of payment at an annual rate of seven percent, compounded daily.

4. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations where the District posts notices to employees represented by OE3, copies of the Notice attached hereto as an Appendix. An authorized agent of the District must sign the Notice, indicating that the District will comply with the terms of this Order. The District shall maintain the posting for a period of 30 consecutive workdays. The District shall take reasonable steps to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. In addition to physically posting this Notice, the District shall communicate it by electronic message, intranet, internet site, and other electronic means the District uses to communicate with employees represented by OE3.[17]

5. Notify OGC of the actions the District has taken to follow this Order by providing written reports as directed by OGC and concurrently serving such reports on OE3.

Chair Banks and Member Nazarian joined in this Decision.

[17] Either party may ask PERB's Office of the General Counsel (OGC) to alter or extend the posting period, require further notice methods, or otherwise supplement or adjust this Order to ensure adequate notice. Upon receipt of such a request, OGC shall solicit input from all parties and, if warranted, provide amended instructions to ensure adequate notice.

APPENDIX

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

After a hearing in Unfair Practice Case No. SA-CE-1231-M, *Operating Engineers Local 3, AFL-CIO v. Consolidated Irrigation District*, in which all parties had the right to participate, the Public Employment Relations Board found that the Consolidated Irrigation District violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. by failing or refusing to bargain in good faith with Operating Engineers Local 3, AFL-CIO (OE3.)

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

A. CEASE AND DESIST FROM:

1. Failing or refusing to meet and confer in good faith with OE3.

2. Interfering with the rights of bargaining unit employees to be represented by OE3.

3. Denying OE3 the right to represent bargaining unit employees.

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

1. Upon request, bargain with OE3 as the exclusive representative, and if an agreement is reached, reduce it to writing and sign it. On commencement of bargaining, OE3's status as the exclusive collective bargaining representative of the Water Irrigation Specialist bargaining unit shall be extended for a minimum of 12 months thereafter, as if the initial year of the certification has not expired.

2. Make OE3 whole for extra bargaining costs that the District's MMBA violations caused in substantial part.

3. Augment any amounts due by providing interest accrued to the date of payment at an annual rate of seven percent, compounded daily.

Dated: _____________________ Consolidated Irrigation District

By: _________________________________
Authorized Agent

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