STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OAKLAND UNIFIED SCHOOL DISTRICT, Charging Party, v. OAKLAND EDUCATION ASSOCIATION, Respondent.	Case No. SF-CO-864-E PERB Decision No. 2906 June 28, 2024

Appearances: Fagen, Friedman & Fulfrost by Roy A. Combs and Mary J. Breffle, Attorneys, for Oakland Unified School District; California Teachers Association by Mandy Hu, Staff Attorney, for Oakland Education Association.

Before Banks, Chair; Krantz and Nazarian, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB) on exceptions by Charging Party Oakland Unified School District to a proposed decision of an administrative law judge (ALJ). The complaint alleges that Respondent Oakland Education Association (OEA), which represents the District's certificated employees, held an unlawful pre-impasse strike and engaged in other conduct that violated OEA's duty to bargain in good faith under the Educational Employment Relations Act (EERA).[1]

OEA argues that its strike was lawful because the District violated EERA as alleged in a separate unfair practice charge (Case No. SF-CE-3481-E or the "school

[1] EERA is codified at Government Code section 3540 et seq. All further undesignated statutory references are to the Government Code.

closure charge"). In proceedings before the ALJ, both parties acknowledged that critical questions in this case would depend on the outcome of the school closure charge. They therefore agreed to litigate the school closure charge first and incorporate its record into the record of this case.

In *Oakland Unified School District* (2023) PERB Decision No. 2875 (*OUSD*), we resolved the school closure charge in OEA's favor. The District elected not to challenge that decision in the California Court of Appeal. Accordingly, it is now settled that the District violated EERA when it: (1) failed to afford OEA notice and an opportunity to bargain before implementing a change in a written District policy that had required a nine-month planning period before the District could implement a school closure decision;[2] and (2) began implementing a school closure decision without observing the nine-month planning period and without affording OEA adequate notice and opportunity to engage in good faith effects negotiations. (*Id*. at p. 22.)

After the Board resolved the school closure charge, the parties submitted post-hearing briefs in this case. The ALJ then issued a proposed decision upholding OEA's arguments and dismissing the complaint. The District timely excepted, OEA responded, and the District filed a reply. Having reviewed the record and the parties' arguments, we conclude that OEA did not violate EERA, and we therefore affirm the proposed decision.

[2] For the purposes of this decision, "school closures" include mergers, consolidations, and grade truncations.

FACTUAL AND PROCEDURAL BACKGROUND[3]

I. The Parties' Negotiations in 2018 and 2019

On June 30, 2017, the parties' 2014-2017 collective bargaining agreement (CBA) expired. In June 2018, the parties reached an initial impasse in their negotiations for a successor CBA. In fall 2018, the parties participated in post-impasse mediation, but they still could not reach an agreement. On January 31 and February 1, 2019, the parties participated in post-impasse factfinding. On February 15, 2019, the factfinding panel issued a report.

Meanwhile, in December 2018, the District stated publicly that it would have to consider school closures to save money to fund employee wage increases. OEA challenged that contention by e-mail dated December 21, 2018, asserting that closing schools is bad public policy and causes lost revenue from lower enrollment, which would offset any savings. In the same e-mail, OEA sought to bargain over what it called "the District's intention to close and/or consolidate public schools and exacerbate [its] financial duress."

In January 2019, the District's Board of Education voted to close one District school after the 2018-2019 school year. On January 28, 2019, OEA reiterated its request to bargain over school closure decisions. The District responded by asserting that it had no duty to bargain over closure decisions but was willing to bargain over the effects thereof. While the District offered February 5 or 6 as potential bargaining dates, the parties were at the time working with the factfinding panel on a report, and accordingly negotiations did not occur until later that month, during a strike OEA held

[3] This summary incorporates the findings in *OUSD*, *supra*, PERB Decision No. 2875, together with additional findings based on the record in this case.

from February 21 through March 1, 2019. During the strike, the parties held bargaining sessions as well as meetings that included elected officials and other community stakeholders. Both the bargaining sessions and the stakeholder meetings contributed to the parties' efforts to resolve the strike and reach a successor CBA.

On February 26, 2019, OEA proposed a moratorium on school closures. In response, the District reiterated that it would not negotiate over school closure decisions. Board of Education President Aimee Eng, who was not a member of the District's bargaining team and had no formal bargaining authority, attended multiple meetings where she helped develop a proposed framework on procedures for school closures. The District's bargaining team, however, rejected including any such proposal in the CBA. Eng was present when this was conveyed, and she committed to sponsor a Board of Education resolution establishing procedures the District would follow before deciding to close a school. Eng worked with OEA bargaining team members to draft a resolution for Eng to bring before the Board of Education. Eng told OEA that because she was merely one member of the Board of Education, there were limits to what she could promise. Eng did not purport to represent any other Board of Education members when she engaged in discussions with OEA. At the District's request, OEA confirmed that the CBA would not include new procedures on school closure decisions.

On March 1, 2019, the parties reached a tentative agreement for a successor CBA. After both parties ratified the new CBA, it became retroactively effective from July 1, 2018, through June 30, 2021.

II. The District's Nine-Month Notice Policy for School Closures

On March 20, 2019, the Board of Education approved the resolution Eng proposed. Specifically, it passed a resolution entitled "Improving Community Engagement for Proposed School Changes" (Resolution 1819-0178), which included the following new procedures related to school closures:

> "BE IT FURTHER RESOLVED, that no closure, merger, or consolidation would occur without inclusion of a planning period (no less than a school year or 9 months) between the vote to approve the action and its implementation, unless a recommendation has been brought forward by a team representing multiple stakeholders from the impacted school communities to accelerate the implementation; and
>
> "BE IT FURTHER RESOLVED, that prior to the Board's final decision, staff shall present to the Board a preliminary financial analysis of foreseeable impacts of the proposed changes on the district's budget, including student and staff projected attrition or growth, as well as projected costs associated with services, staffing and any facility improvement costs deemed necessary . . . ."

In September 2019, the Board of Education voted to merge four schools into two after the 2019-2020 school year. In implementing these mergers, the District complied with the nine-month notice requirement set forth in Resolution 1819-0178.

III. The Parties' Brief CBA Extension

The parties' 2018-2021 CBA expired on June 30, 2021. In November 2021, the parties reached a tentative agreement to modify the 2018-2021 CBA and extend it until October 31, 2022. While OEA promptly ratified the tentative agreement in November 2021, the Board of Education delayed for five months before preliminarily

approving it on March 23, 2022, and finally ratifying it on April 18, 2022. The parties executed the agreement on August 5, 2022.[4]

Around the time that the parties' brief CBA extension expired in October 2022, they began bargaining for a successor CBA. They completed those negotiations in May 2023.

IV. The District Actions at Issue in the School Closure Charge

On December 15, 2021, two Board of Education members introduced a proposed resolution directing the District's Superintendent "to present the Board at the soonest possible opportunity (e.g., a Special Board meeting) a list of school consolidations sufficient to achieve at least an estimated $8 million in ongoing savings." On January 12, 2022, the Board of Education adopted a final version of this resolution.[5] Unlike the earlier draft, the final resolution explicitly waived the nine-month requirement and other provisions of Resolution 1819-0178. Specifically, the final version directed the Superintendent to present the Board of Education with a list of school closures that could be reasonably implemented by Fall 2022 and/or Fall 2023, "notwithstanding" the requirements of Resolution No. 1819-0178.[6]

On January 31, the Superintendent presented the Board of Education with a proposed resolution listing schools slated for closure, merger, or grade truncation

[4] The outcome of this case does not turn on when the new CBA took effect. We therefore express no opinion whether it took effect when the District ratified it on April 18, 2022, when the parties signed it on August 5, 2022, or on a different date.

[5] All further dates refer to 2022 unless otherwise noted.

[6] Resolution 1819-0178 included an exception to the nine-month notice policy if stakeholders at a school propose a faster timeline, but no party claims that exception applied to the current facts. (*OUSD*, *supra*, PERB Decision No. 2875, p. 12, fn. 7.)

following different school years, including six schools to be impacted at the close of the 2021-2022 school year (i.e., June 2022), timing that was possible only because the District waived the nine-month requirement in Resolution 1819-0178.

The District did not provide OEA with notice or opportunity to bargain before the Board of Education took the above-noted actions. Nonetheless, on February 3 and 8, OEA demanded to bargain over the District's decision to waive Resolution 1819-0178, the District's school closure decisions, and the effects thereof. Also on February 8, the District denied any duty to bargain over its decisions or their effects, and the Board of Education held a meeting where it voted to implement an amended list of school closures, including closures scheduled for June, after the 2021-2022 school year.

Within days of the Board of Education's vote on February 8, the District began implementing the closures scheduled for June, including by notifying impacted staff that they would be transferred and working with impacted families to choose new schools. For families, the District's first communication was on February 9, when District Superintendent Kyla Johnson-Trammell notified the community of the upcoming closures. Two days later, on February 11, Johnson-Trammell sent families a further message, which "mapped out a timeline of next steps" and stated that the District's goal was to notify families of new school placements for the next school year by March 10—"the same notification date as all other families who are applying through the enrollment process to new schools for next year."

One of the schools slated for grade truncation after the 2021-2022 school year was La Escuelita Elementary School; the Board of Education decided to truncate grades 6-8 while leaving the lower grades. On February 11, the principal at La Escuelita held a meeting with La Escuelita middle school teachers, to discuss how

teachers "could help students and parents navigate the whole enrollment process." Parents of students in the truncated grades at La Escuelita were given an "Opportunity Ticket" to allow their children to be transferred to schools of their choice. The teachers then "took on helping parents do [the enrollment process]." Specifically, a District teacher at La Escuelita, Jennifer Brouhard, helped students with the enrollment process. On February 18, the District's human resource department wrote to Brouhard about the recent truncation of La Escuelita middle grades, offering to help Brouhard find another job.

On February 15, OEA filed the school closure charge. On February 18, PERB's Office of the General Counsel (OGC) granted OEA's request to process the charge on an expedited basis, and it therefore established a February 28 deadline for the District to respond. The District responded on its due date, denying any duty to bargain over abandoning the nine-month notice policy, its school closure decision, or the implementation or effects of either decision. The District's response did not claim that it had, as of that point, ever offered to bargain.

Also on February 28, the District e-mailed OEA, reasserting the District's claim that it had no duty to bargain and there were no bargainable effects of its decisions, while asking OEA to identify any effects the union believed were bargainable. Even if this could be construed as an offer to bargain, the District can no longer dispute that: (1) the District had already implemented its decision to abandon the nine-month notice policy and had begun implementing its school closure decision; and (2) it was therefore too late for good faith negotiations over effects and implementation of those decisions, including alternatives that might increase the amount of notice teachers would receive or otherwise lessen the impacts on teachers. (*OUSD*, *supra*, PERB Decision No. 2875,

pp. 9 & 22.) Thus, although the parties held discussions after February 28, these meetings did not afford OEA an opportunity for good faith effects negotiations, and OEA had no obligation to continue such discussions. (*Id*. at p. 22.)

V. OEA's Strike

On April 16, OEA's president e-mailed all bargaining unit members regarding an upcoming vote on whether to hold an unfair practice strike. This communication explicitly premised the strike vote on the union's opposition to school closures and its related charge, specifically the District's unilateral decision to abandon the rule requiring nine months' notice of school closures.

OEA held the strike vote from April 21-23. The question OEA posed to its members in this vote was: "Do you authorize the President to call a 1 day ULP[7] strike, if he deems necessary?" Approximately 75 percent of election participants voted affirmatively.

On April 23, the District wrote OEA that its plan to strike would be illegal and have an adverse impact on students, as well as on District finances.

On April 24, OEA sent its bargaining unit a newsletter announcing the strike vote result. The newsletter again explicitly tied the strike to the school closure charge.

On April 25, OEA provided the District with notice that it intended to strike for one day on April 29, in protest of the District's violations alleged in the school closure charge.

[7] "Unfair labor practice" or "ULP" is the term used to denote a violation of the National Labor Relations Act, 29 U.S.C. section 151 et seq. (NLRA). California public sector unions and employers often borrow the term "ULP" to refer to unfair practices.

On April 26, OEA's Facebook page advertised the April 29 strike, through posts such as the following:

> "Permanently closing neighborhood schools HARMS our students and families. And violating our labor rights sets a terrible precedent for further abusive actions by [the District]. So[,] on Friday[,] we're going on strike against Unfair Labor Practices!"

and,

> "Oakland Educators on a one day ULP strike this Friday against unethical and illegal permanent school closures."

On April 27, OEA's Facebook page again advertised the April 29 strike. One of its posts provided:

> "It's time for [the District] to listen to families, and to listen to educators. There's been hunger strikes, there's been marches, the ACLU has filed a complaint, and we have packed the school board meetings. IT IS TIME for [the District] to honor our agreement, stop these school closures, and meaningfully engage with [ ] our school communities."

Also on April 27, OEA issued a news release about the strike, which explained, in part:

> "The Oakland Unified School District (OUSD) has unilaterally set aside its 2019 agreement with OEA to engage with families when considering closing schools. OUSD has continued to ignore this part of the agreement, despite outcry from families to stop school closures and ACLU of Northern California filing a complaint with the CA Attorney General's office on behalf of the Justice for Students Coalition. Setting aside negotiated agreements with OEA is a very dangerous precedent and a flagrant ULP. OUSD also flatly refused to bargain the decision or the effects of its decision after OEA demanded to bargain."

On April 29, approximately 95 percent of OEA's membership participated in the strike. OEA's picket signs stated: "On Strike Against Unfair Labor Practices." On the day of the strike, OEA's president stated publicly that the reasons for the strike were OEA's concerns over "the impact of school closures on Black and Brown students and the District's refusal to bargain with [OEA] over impacts and effects."

VI. The District's Charge Against OEA

On April 27, the District initiated this case and asked the Board to seek injunctive relief against OEA's planned one-day strike. The Board denied the District's injunctive relief request but expedited the case at all levels of PERB. On May 3, OGC issued a complaint which provided in relevant part:

> "3. In or around early February 2022, Charging Party decided to close certain school sites.
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> "4. On or about February 8, 2022, Respondent asked Charging Party to bargain over the reasonably foreseeable negotiable effects of Charging Party's decision to close certain school sites.
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> "5. On or about February 28, 2022 and ongoing, Charging Party expressed its willingness to Respondent to bargain over the reasonably foreseeable negotiable effects of Charging Party's decision to close certain school sites.
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> "6. On or about April 6, 2022, Charging Party asked Respondent for its availability to meet to bargain over the reasonably foreseeable negotiable effects of Charging Party's decision to close certain school sites.
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> "7. Respondent has failed to provide Charging Party with its availability to bargain over the reasonably foreseeable negotiable effects of Charging Party's decision to close certain school sites, and no such bargaining has occurred.

> "8. As of April 29, 2022, Charging Party had not implemented its decision to close certain school sites.
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> "9. In addition, as of April 29, 2022, Respondent and Charging Party had not completed the statutorily required impasse procedures, set forth at Government Code sections 3548 through 3548.3, regarding any bargaining dispute over the reasonably foreseeable negotiable effects of Charging Party's decision to close certain school sites.
>
> "10. On April 29, 2022, Respondent's unit members, acting pursuant to Respondent's prior strike notice, engaged in a one-day strike at Charging Party's facilities related to Charging Party's decision to close certain school sites.
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> "11. By the acts and conduct described in, but not limited to, paragraph 10, Respondent failed and refused to bargain in good faith in violation of Government Code section 3543.6(c).
>
> "12. By the acts and conduct described in, but not limited to, paragraph 10, Respondent failed and refused to participate in impasse procedures in good faith in violation of Government Code section 3543.6(d)."

The District moved to amend the complaint to add claims alleged in two separate charges the District filed against OEA regarding other strike activity, or alternatively to consolidate the cases. The ALJ denied that motion, and the District has not challenged this ruling. We therefore express no opinion on it.

OEA filed a pre-hearing motion seeking to bar the District from introducing evidence of educational harm to students, and/or other testimony or documents supporting a non-customary remedy the District indicated it might seek: an order requiring OEA-represented teachers to provide the District, and by extension its

students, with instructional time to make up for instructional services lost during the strike. The ALJ granted OEA's motion.

DISCUSSION

In resolving exceptions, the Board applies a de novo standard of review. (*Mt. San Jacinto Community College District* (2023) PERB Decision No. 2865, p. 17.) However, the Board need not address arguments that the proposed decision adequately addressed or arguments that would not affect the outcome. (*Ibid*.)

Here, although the ALJ adequately addressed most arguments the District raises in its exceptions, we nonetheless analyze the primary issues in dispute. Part I, *post*, addresses the District's challenge to PERB precedent concluding that EERA includes a statutory, qualified right to strike. Part II, *post*, analyzes the District's alternative argument that even if EERA includes a qualified right to strike, OEA's conduct here fell outside that right. Finally, in Part III, *post*, we discuss the District's contention that the ALJ erred in barring evidence of educational harm to students.

I. The Statutory, Qualified Right to Strike

EERA provides employees with "the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (§ 3543, subd. (a).) This language, which appears in each labor relations statute we enforce, confers a qualified, statutory right to strike, including "the right to strike in protest against unfair practices." (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 33 (*Fresno*).) In the District's first exception, it makes an assertion that falls outside the complaint allegations, arguing that there is no statutory basis for the right to strike in protest of an unfair practice. Although the District has waived this

argument by neither moving to add it to the complaint nor arguing that the unalleged violation doctrine applies, we address it nonetheless, as it is an important backdrop to an argument the District did not waive: its claim that OEA violated EERA by engaging in a pre-impasse strike.

PERB first found that EERA includes a qualified, statutory right to strike in *Modesto City Schools* (1983) PERB Decision No. 291 (*Modesto*), where the Board held that EERA section 3543 is a "plainer and more universally understood" phrasing of the NLRA's comparable right to engage in concerted activity. (*Modesto*, *supra*, at p. 62.) Accordingly, work stoppages "qualify as collective actions traditionally related to collective bargaining," meaning that EERA section 3543 authorizes work stoppages except as limited by other EERA provisions. (*Ibid*.) Soon thereafter, in *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564 (*County Sanitation*), the California Supreme Court relied on the MMBA and other authority to find that public employees have a "basic right to strike" unless doing so imminently and substantially threatens public health or safety. (*Id*. at pp. 586-587.)

Four years after *Modesto*, in *Compton Unified School District* (1987) PERB Order No. IR-50 (*Compton*), each Board panel member wrote separately regarding their respective statutory interpretations, and a plurality combined to overrule *Modesto*. (*Compton*, *supra*, at pp. 106 & 160, fn. 31 [lead opn. of Porter, M.]; *id*. at p. 164, fn. 3 [conc. opn. of Hesse, Chair]).] The lead opinion in *Compton* reached this result, in part, by concluding that *County Sanitation*, *supra*, 38 Cal.3d 564 had "an invalid premise" and was "unpersuasive." (*Id*. at pp. 115 & 122.) However, in *Fresno*, *supra*, PERB Decision No. 2418-M, the Board reinstated *Modesto*, overruling *Compton* and other Board precedent failing to recognize the statutory right to strike. (*Fresno*, *supra*, p. 33).

In the three decades between *Compton* and *Fresno*, two developments unfolded. First, the Legislature vested PERB with jurisdiction over labor relations at California cities, counties, and local agencies covered by the Meyers-Milias-Brown Act (MMBA), section 3500 et seq. Specifically, the Legislature transferred MMBA jurisdiction from the courts to PERB effective July 1, 2001. (§ 3509, subds. (a), (b) [as modified via Stats. 2000, ch. 901, § 8].)[8]

Second, the California Supreme Court decided *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597 (*San Jose v. OE3*), which cemented the Court's recognition of PERB's exclusive jurisdiction to interpret the labor relations statutes under its jurisdiction to determine which strikes are lawful and protected and which constitute statutory violations. This landmark decision traced the evolution of that recognition, noting that even in the initial decade after EERA's enactment, the Court had recognized that the Legislature vested PERB with exclusive jurisdiction over "'activities arguably protected or prohibited by' the governing labor law statutes," including strikes. (*Id*. at p. 604, citing *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 953 (*El Rancho*).) For that reason, when faced with allegedly unlawful teacher strikes, the Court repeatedly deferred to PERB and did not attempt to resolve issues surrounding the right to strike. (See *San Jose v. OE3*, *supra*, at p. 604 [discussing *El Rancho* and a preceding case, *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1] (*San Diego Teachers*).)

[8] Thereafter, the Legislature further amended the MMBA to bar PERB from awarding damages caused by any strike (or threatened strike) it found to be unlawful. (See § 3509, subd. (b) [as modified via Stats. 2011, ch. 539, § 1].)

Continuing to recount the Court's precedent in this area, *San Jose v. OE3* noted that after *El Rancho*, the next strike case in which the Supreme Court granted review involved MMBA employees who were at that time not yet subject to PERB jurisdiction. (*San Jose v. OE3*, *supra*, 49 Cal.4th at p. 605, citing *County Sanitation*, *supra*, 38 Cal.3d 564.) The *County Sanitation* Court, faced with deciding whether a strike was unlawful under the common law, noted that the MMBA was ambiguous as to the nature or extent of its strike protections or prohibitions. (*County Sanitation*, at p. 573.) While the Court did not attempt to resolve that ambiguity, it reviewed the MMBA as part of broadly considering constitutional, statutory, and common law principles, and it endorsed public employee strikes as generally legal unless it is "clearly demonstrated" that a strike by certain "essential" employees would create "a substantial and imminent threat to the health or safety of the public." (*Id*. at p. 586.) Indeed, just as *Modesto* found it critical that EERA grants the right to participate in union activities, *County Sanitation* found that the MMBA's comparable guarantee (see § 3502) was one basis for finding a qualified right to strike. (*Id*. at pp. 571-572.) Moreover, the Court noted that the right to strike is fundamental to a union's functioning and existence. (*Id*. at p. 589.) The Court also noted that while EERA and the MMBA explicitly withhold from public employees the broad, unqualified right to strike held by private sector employees, withholding an unqualified right to strike is consistent with the qualified right to strike that public sector employees in fact hold. (*Id*. at p. 573, citing EERA, § 3549 [clarifying that Labor Code, § 923 does not apply] and MMBA, § 3510, subd. (b) [same].)

County Sanitation, *supra*, 38 Cal.3d 564 constituted one basis for the Board's conclusion in *Fresno*, *supra*, PERB Decision No, 2418-M that the statutory right to "participate" in union activities includes a qualified right to strike. Furthermore, to the

extent the MMBA and EERA are susceptible to more than one interpretation, we must interpret these statutes to effectuate their central purpose of improving labor relations. (*San Jose v. OE3*, *supra*, 49 Cal.4th at p. 604; §§ 3500, 3509, 3540, & 3541.5.) And *County Sanitation* is clear that strikes play a significant role in effectuating the purposes of California's labor relations statutes: "In the absence of some means of equalizing the parties' respective bargaining positions, such as a credible strike threat, both sides are less likely to bargain in good faith; this in turn leads to unsatisfactory and acrimonious labor relations and ironically to more and longer strikes. Equally as important, the possibility of a strike often provides the best impetus for parties to reach an agreement at the bargaining table, because *both* parties lose if a strike actually comes to pass. Thus[,] by providing a clear incentive for resolving disputes, a credible strike threat may serve to avert, rather than to encourage, work stoppages." (*County Sanitation*, *supra*, 38 Cal.3d at p. 583, footnote omitted.)

San Jose v. OE3, *supra*, 49 Cal.4th 597 also supports the statutory right to strike in other ways. As already noted, by the time the Court decided *San Jose v. OE3*, the Legislature had transferred MMBA jurisdiction to PERB. (*Id*. at p. 605.) The Court therefore found that PERB's duty to determine strike protections and prohibitions under the MMBA is comparable to its duty under EERA, while rejecting the employer's argument that the right to strike and limitations on that right are purely common law principles. First, the Court held: "The City contends that because the right of public employees to strike is founded in the common law, the statute vesting initial jurisdiction in PERB for claims of unfair practices under the [MMBA] is inapplicable to public employee strikes. We disagree . . . to accept the City's argument would be at odds with the body of public employment labor law as it has developed in California." (*Ibid*.)

Indeed, the Court found that when the Legislature vested PERB with jurisdiction over the MMBA, it did so knowing of precedent establishing employees' qualified right to strike, and it intended to include this doctrine as part of PERB's jurisdiction "over activities 'arguably protected or prohibited.'" (*Id*. at p. 606 [citation omitted].) Thus, while no MMBA provision explicitly declares that certain strikes are protected or prohibited, the Court noted that the same is true under EERA and that the Court's landmark precedents under EERA—*San Diego Teachers* and *El Rancho*—would be wrongly decided if "express statutory protection or prohibition of public employee strikes is a requirement of PERB's jurisdiction over those strikes." (*Id*. at pp. 606-607.)

Relying in part on *Modesto*, *County Sanitation*, and *San Jose v. OE3*, the *Fresno* Board concluded that the broad statutory right to participate in union activities and the statutory limitation requiring unions to bargain in good faith together form a strong basis for deciding which strikes are statutorily protected and which are statutorily prohibited. (*Fresno*, *supra*, PERB Decision No. 2418-M at pp. 26-33.) Specifically, as noted, the right to strike is an integral part of the statutory right to participate in union activities, while the limitations on that right are based on a union's duty to bargain and participate in impasse procedures in good faith. (*Ibid*.) The Board thus partially overruled *Compton* and indirectly overruled, in part, four decisions that relied on *Compton* and thereby failed to properly account for the statutory right to strike: *Fremont Unified School District* (1990) PERB Order No. IR-54 (*Fremont II*); *Vallejo City Unified School District* (1993) PERB Decision No. 1015, adopting dismissal letter at pp. 2-4; *Regents of the University of California* (2010) PERB Decision No. 2094-H, pp. 29-30 (*Regents I*), and *City of San Jose* (2010) PERB Decision No. 2141-M, p. 13.

Since *Fresno*, *supra*, PERB Decision No. 2418-M, the Board has consistently held that California law's protection of the right to participate in union activities provides unions and employees with a statutory, qualified right to strike. (See, e.g., *City and County of San Francisco* (2023) PERB Decision No. 2867-M, pp. 25-27 [judicial appeal pending]; *County of San Joaquin* (2021) PERB Decision No. 2761-M, p. 29; *Regents of the University of California* (2019) PERB Order No. IR-62-H, pp. 8-10 (*Regents II*); *Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 14; *City and County of San Francisco* (2017) PERB Decision No. 2536-M, pp. 18 & 54.)

Recent appellate precedent similarly leaves no doubt that the right to strike is statutorily protected. In *County of San Joaquin v. Public Employment Relations Bd.* (2022) 82 Cal.App.5th 1053, the court found a county interfered with and discriminated against rights protected under the MMBA when it discouraged employees from engaging in "future protected activity," viz., "future strikes." (*Id*. at p. 1072.) Among other acts, the employer made post-strike shift assignments based on who had struck and who had not struck, which "both interfered with and discriminated against protected activity." (*Id*. at p. 1081.) This harmed employees' "protected rights" because "it discouraged future striking activity." (*Ibid*.) Moreover, the employer also discriminated against protected strike activity when it treated employees "differently after the strike." (*Id*. at p. 1088.) Each of these conclusions relies heavily on the premise that the MMBA protects strikes even in the absence of a specific mention of that right.

However, the right to strike is qualified. *Modesto*, *supra*, PERB Decision No. 291, noted that the right is qualified only to the extent that it is inconsistent with another EERA provision—the duty to bargain in good faith. (*Id*. at pp. 62-63.) Specifically, a strike is a bad faith pressure tactic to the extent that it: (1) imminently and substantially

threatens the public health or safety (*County Sanitation*, *supra*, 38 Cal.3d 564; *County of San Mateo* (2019) PERB Order No. IR-60-M, pp. 6-9; *Sacramento County Superior Court* (2015) PERB Order No. IR-59-C, pp. 2-4); (2) uses tactics in which employees retain the benefits of working and striking at the same time (*Regents II*, *supra*, PERB Order No. IR-62-H, pp. 6-10; *Sweetwater Union High School District* (2014) PERB Order No. IR-58, p. 16, fn. 11 (*Sweetwater*));[9] (3) constitutes a unilateral change in the status quo as set forth in an operative no-strike agreement (*San Francisco County Superior Court & Region 2 Court Interpreter Employment Relations Com.* (2018) PERB Decision No. 2609-I, pp. 7-10 [discussing allegation that union deviated from contractual no-strike clause when employees honored picket lines of another union]; *City of San Jose* (2013) PERB Decision No. 2341-M, pp. 34-36 [strike over reopener bargaining does not normally violate no-strike clause]); or (4) constitutes bad faith bargaining because it is a pre-impasse attempt to bring economic pressure on an employer to make concessions in collective bargaining, as explained *post* at pages 23-33.

[9] *Regents II*, *supra*, PERB Order No. IR-62-H clarified that repeated strikes by the same employees are protected if: (1) the strikes, in material part, have separate causes such as striking for economic gains, in solidarity with other employee groups, or to protest one or more separate unfair practices; and/or (2) the time between strikes and the amount of notice given do not indicate that employees are retaining the benefits of working and striking at the same time. (*Id*. at pp. 6-10.) *Regents II* also held that while California's labor laws do not require strike notice (*id.* at p. 9), such notice can be relevant to claims of unlawful intermittent striking (*ibid*.). Moreover, unusually short notice may mean more employees are essential to public safety if the employer loses the opportunity to contract for replacements or take other precatory actions. Finally, in one case the Board held that a surprise teachers' strike could leave students unsupervised, and the Board therefore directed OGC to seek an injunction requiring the union to provide 60 hours' strike notice. (*San Ramon Valley Unified School District* (1984) PERB Order No. IR-46, pp. 15-16 (*San Ramon*).)

Here, the complaint does not allege that OEA's strike imminently and substantially threatened public health or safety, had the design and effect of employees attempting to retain the benefits of working and striking at the same time, or unilaterally changed the status quo by deviating from an operative no-strike clause.[10] Rather, the District alleges that OEA engaged in a pre-impasse strike while failing to bargain effects in good faith, as discussed below.

II. OEA's Alleged Bad Faith Conduct

The complaint alleges that OEA violated its bargaining duty both in the months surrounding the April 29 strike (including by failing to provide the District with its availability to bargain effects) and via the strike itself. We address each allegation.

A. OEA's Alleged Failure to Bargain in Good Faith Over Effects

The complaint alleges that after OEA sought to bargain over effects of the District's school closure decision, the union failed to engage in such negotiations in good faith. This allegation is now untenable as a matter of law because it is no longer subject to dispute, based on *OUSD*, *supra*, PERB Decision No. 2875, that the District's violations relieved OEA of any duty to bargain. (*Id*. at p. 19.)

The reasons why OEA had no duty to bargain are by now familiar. Specifically, the District failed "to provide notice and opportunity to bargain in good faith over its decision to waive the nine-month requirement." (*OUSD*, *supra*, PERB Decision

[10] Although the District's charge alleged a CBA was in effect at the time of the April 29 strike, the charge made no mention of any no-strike clause or alleged unilateral change. Nor does the complaint allege that OEA unilaterally changed the status quo. Accordingly, we express no opinion whether the parties had a CBA in effect on April 29 or whether the District could have proven that OEA unlawfully deviated from any no-strike clause allegedly in effect on that date.

No. 2875, p. 18.) The District "adopted this change without notice on January 12 and, still without providing OEA notice and an opportunity to bargain, implemented the change as early as January 31." (*Id*. at pp. 18-19.) "That change fast-tracked the process to such a degree that the District had to begin implementation almost immediately, when OEA had previously relied on the fact that the nine-month requirement provided time to discuss alternatives." (*Id*. at p. 19.) In sum, the District failed to provide adequate notice and opportunity to engage in good faith effects negotiations before implementing its decisions to change the nine-month notice requirement in Resolution 1819-0178 and to close schools and truncate grades after the 2021-2022 school year. (*Id*. at p. 22.) OEA therefore had no duty to pursue negotiations. (*Id*. at pp. 19-22.) Indeed, such negotiations would be futile as a matter of law. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 24 [bargaining "from a hole" is futile, and purpose of litigating an unfair practice charge is to restore the status quo so that "bargaining may proceed on a level playing field"].)[11]

Because OEA could not violate a bargaining duty that it did not have, the District cannot establish that OEA violated EERA by allegedly failing to provide the District with its availability to bargain effects or otherwise failing to engage in such negotiations in good faith.

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[11] *OUSD*, *supra*, PERB Decision No. 2875 further established that the District: (1) never asserted a business necessity defense (*id*. at p. 15, fn. 10); (2) failed to prove its waiver and laches defenses (*id*. at pp. 22-25); and (3) did not comply with the principle allowing an employer to implement a decision before completing effects negotiations if it provides adequate notice and bargains in good faith before and after an implementation date that is based on an immutable deadline or important managerial interest that would effectively undermine the employer's right to make the decision (*id*. at pp. 20-22).

B. OEA's Alleged Pre-Impasse Strike

1. The Rebuttable Presumption Against Pre-Impasse Strikes

As already noted, a union's duty to bargain in good faith qualifies its right to strike. The District relies on one of these qualifications: if a union engages in a pre-impasse strike, viz., a strike while the parties have not yet reached an impasse (or have reached an initial impasse but have not yet exhausted required impasse resolution procedures), there is "a rebuttable presumption that the union has breached its duty to bargain in good faith." (*County of Trinity* (2016) PERB Decision No. 2480-M, p. 3 (*Trinity*).) The presumption applies only when a strike is pre-impasse. (*Ibid*.) The most common circumstance in which a strike is not pre-impasse is that the parties have already reached an impasse and completed any required post-impasse procedures. Alternatively, if the employer cannot identify any negotiation for which the union has a duty to bargain, the strike is definitionally not "pre-impasse."

When the presumption applies, it "is rebuttable by proof that the strike was provoked by the employer's unfair practices and that the employee organization in fact negotiated and/or participated in impasse procedures in good faith." (*Trinity*, *supra*, PERB Decision No. 2480-M, p. 3, fn. 3.) Thus, there "is no question that a strike provoked by an employer's unfair labor practices is protected at any time it occurs during the negotiating process." (*Regents II*, *supra*, PERB Order No. IR-62-H, p. 8; *Fresno*, *supra*, PERB Decision No. 2418-M, p. 28.)[12]

[12] We do not hold that every protected strike necessarily has as its motive either pressuring an employer to make concessions in collective bargaining or protesting an alleged unfair practice. (See, e.g., *City and County of San Francisco*, *supra*, PERB Decision No. 2536-M, pp. 54-55 (conc. opn. of Banks, M.) [grievance strikes may be protected]; see also *National Labor Relations Bd. v. Washington Aluminum Co.* (1962)

A union seeking to rebut the presumption against pre-impasse strikes faces two main obstacles. First, if the employer successfully defends against the unfair practice charges against it, then the presumption stands. (*Sweetwater*, *supra*, PERB Order No. IR-58, p. 9.) Second, to establish that a proven unfair practice "provoked" a strike, the union must show that the employer's conduct was one material or substantial cause of the strike. (*Regents II*, *supra*, PERB Order No. IR-62-H, p. 3 [inquiry is whether strike was "in part precipitated or provoked by a public employer's alleged unfair conduct"]; *San Ramon*, *supra*, PERB Order No. IR-46, pp. 10-11 [strike activity must be motivated "at least in part" by unfair practices]; accord *Hood River Distillers, Inc.* (2023) 372 NLRB No. 126, p. 31; *Golden Stevedoring Co.* (2001) 335 NLRB 410, 411.)[13]

2. Factors Relevant to Assessing a Strike's Motivation

Determining whether an unfair practice at least partially motivated a strike requires reviewing the totality of circumstances. (*Rio Hondo Community College District* (1983) PERB Decision No. 292, p. 23 (*Rio Hondo*).) The most important category of evidence comprises the content of a union's strike announcement or notice, picket

370 U.S. 9, 14-15 [strike over poor conditions]; *Union Electric Co.* (1975) 219 NLRB 1081, 1082 [strikes protesting suspensions].)

[13] In a common fact pattern, a union calls a strike after filing an unfair practice charge alleging that, during collective bargaining, the employer failed to bargain in good faith. In these circumstances, the motivation to obtain a new contract with favorable terms and the motivation to pressure the employer to cease bargaining in bad faith are distinct but related motivations, and each may be a substantial cause of the strike. (See, e.g., *San Ramon*, *supra*, PERB Order No. IR-46, pp. 4-11.)

signs, leaflets, press releases, social media posts, and other messaging, as well as witness testimony explaining the strike's context and purposes. (*Ibid*.)[14]

A strike's timing relative to the employer's alleged violation can also be relevant. (*Rio Hondo*, *supra*, PERB Decision No. 292, p. 23.) However, close temporal proximity is not necessary to rebut the presumption against a pre-impasse strike; it is more important to consider whether the alleged violation remains unresolved at the time of the strike, because frustration may build the longer an unfair practice remains unresolved. (Zerger, et al. (2d ed. 2023) Cal. Public Sector Labor Relations, § 11.04[2]; see also *R & H Coal Co.* (1992) 309 NLRB 28, 28-29 [union adequately explained reason for long delay before strike, and key fact was that violation remained unresolved].)

Two additional factors noted in *Rio Hondo*, *supra*, PERB Decision No. 292 are "union expression of opposition to the unfair practice prior to the strike" and "the nature and seriousness of the unfair practice." (*Id*. at p. 23.) These factors typically become relevant if they are lacking, such as if the union failed to file an unfair practice charge or the employer claims the union is striking over a mere technical violation that has no material impact on protected rights, employment terms, or negotiations.

Rio Hondo, *supra*, PERB Decision No. 292 is also one of four decisions from the 1980s suggesting that PERB considers whether a pre-impasse strike was a "last resort." (*Id*. at pp. 22 & 29.) The Board first used the phrase in *Fremont Unified School District*

[14] Although strike vote messaging can be one relevant strand of a union's overall communications (*Rio Hondo*, *supra*, PERB Decision No. 292, p. 23), such messaging is more relevant if it specifically identifies the basis for a strike (as in this case) rather than merely seeking general authorization to call a strike later, if warranted.

(1980) PERB Decision No. 136 (*Fremont I*), wherein the Board found that a union lawfully struck before completing impasse procedures to pressure the employer to "negotiate in good faith as required by law," and that these circumstances were sufficient to make the strike a "last resort." (*Id*. at pp. 27 & 29.) Thus, in this first mention, "last resort" meant little more than that a union was legitimately striking to protest illegal conduct. While the union in *Fremont I* met its burden, the union in *Rio Hondo* did not, as it had failed to file a charge over the primary acts it claimed as provocation, and it submitted no evidence whatsoever that its strike was related to the charges it did file. (*Rio Hondo*, *supra*, at pp. 24 & 29.)

The next case in which the Board used the phrase "last resort" was *Sacramento City Unified School District* (1987) PERB Order No. IR-49 (*Sacramento*). The Board faulted the respondent union for filing a charge only on the same day it struck (*id*. at pp. 6-7) and stated that the union "has not availed itself of all Board procedures which might redress its dispute" (*id*. at p. 7). Accordingly, while the decision at least stood for the proposition that the union should have filed a charge before striking, in dicta the Board hinted at a broader interpretation: that an unfair practice might only rebut the presumption against pre-impasse strikes if a union first litigated its unfair practice case to completion. And *Sacramento* also hinted at a sea change in the Board's approach to strikes in general, foreshadowing its forthcoming *Compton* decision (issued the next month), by explicitly saving for another day "whether this Board will no longer find any strikes in response to an unfair practice to be protected." (*Sacramento*, *supra*, PERB Order No. IR-49, p. 7.)

In *Santa Maria Joint Union High School District* (1989) PERB Order No. IR-53 (*Santa Maria*), the Board issued its fourth and final decision purporting to state that a

pre-impasse strike must be a "last resort," still without clarifying the phrase's meaning. The Board faulted the respondent union for striking only one day after filing its charge. (*Id*. at pp. 2-3 & 5.) But other than suggesting that the union should have filed its charge earlier, the Board did not indicate whether any other steps were necessary for the strike to be a "last resort."

Thus, none of the four Board decisions using the phrase "last resort" indicated how far in advance of a pre-impasse strike the union should file its charge. And, while *Sacramento*'s dicta suggested a union might need to litigate its charge to an advanced stage, none of the four decisions so held. Whereas the Board found it relevant when a union filed its charge on the same day it struck (*Sacramento*, *supra*, PERB Order No. IR-49, pp. 6-7) or one day in advance (*Santa Maria*, *supra*, PERB Order No. IR-53, pp. 2-3), in *Fremont I*, *supra*, PERB Decision No. 136, the Board held that a union had no duty to litigate its case before striking. (*Id*. at pp. 26-29 [union rebutted the presumption against pre-impasse strikes when it struck one month after employer's regressive bargaining]; see also *id*. at p. 33 [conc. opn. of Gluck, Chair] ["While it is true that the Association could have proceeded solely in pursuit of its unfair practice charges, I do not consider the sacrifice of employee and organizational rights during such a prolonged process, with the obvious attendant advantages to a recalcitrant employer, to be a legitimate requirement for this Board to impose"].)

In any event, since the 1980s, the Board has not used the phrase "last resort" in describing what a union must show to rebut the presumption against pre-impasse strikes. Rather, the modern Board has held that the presumption against pre-impasse strikes "is rebuttable by proof that the strike was provoked by the employer's unfair practices and that the employee organization in fact negotiated and/or participated in

impasse procedures in good faith." (*Trinity*, *supra*, PERB Decision No. 2480-M, p. 3, fn. 3; see also *Sweetwater*, *supra*, PERB Order No. IR-58, p. 9;[15] *Fresno*, *supra*, PERB Decision No. 2418-M, p. 28; *Regents I*, *supra*, PERB Decision No. 2094-H, p. 32.) Significantly, a "last resort" requirement would be inconsistent with the modern Board's observation that there "is no question that a strike provoked by an employer's unfair labor practices is protected at any time it occurs during the negotiating process." (*Regents II*, *supra*, PERB Order No. IR-62-H, p. 8; *Fresno*, *supra*, PERB Decision No. 2418-M, p. 28.)

The phrase "last resort" has nonetheless continued to cause confusion within the labor-management community and in cases in front of Board agents. Indeed, such confusion is evident in this case. The proposed decision stated that a union seeking to rebut the presumption against pre-impasse strikes must prove that the employer committed an unfair practice, that such conduct provoked the strike, and that the union struck as a "last resort." To support this standard, the ALJ cited *Regents I*, *supra*, PERB Decision No. 2094-H, p. 32, *Santa Maria*, *supra*, PERB Order No. IR-53, and *Rio Hondo*, *supra*, PERB Decision No. 292. The District's exceptions take issue with this standard, noting that neither *Regents I* nor other recent Board precedent make any mention of the phrase "last resort" and suggesting that the ALJ erroneously conflated the Board's "earlier standard" with its "more recently articulated standard." Similarly, the

[15] In *Sweetwater*, *supra*, PERB Order No. IR-58, the Board used the phrase "last resort" twice, but not to describe a required showing to rebut the presumption against pre-impasse strikes. Rather, the Board used the phrase to summarize an unsuccessful argument the employer made (*id*. at p. 6) and to note that a post-impasse economic strike is a weapon of last resort, akin to an employer's lockout or imposition of its final offer (*id*. at p. 16; but see *County of San Joaquin*, *supra*, PERB Decision No. 2761-M, p. 28 [California public employers cannot lockout employees]).

District's reply brief supporting its exceptions again notes that modern Board precedent does not use the phrase "last resort," and the District further asserts that even with respect to PERB's 1980s precedent, it is "baseless" to claim such decisions established, as a separate, required element, that a pre-impasse strike must have been a "last resort."

The District is right that Board precedent does not require that a pre-impasse strike must be a "last resort." Had the Board ever enforced such a principle, it would have undercut the purposes of the laws we enforce by requiring prolonged "sacrifice of employee and organizational rights" with "attendant advantages to a recalcitrant employer." (*Fremont I*, *supra*, PERB Decision No. 136, p. 33 [conc. opn. of Gluck, Chair].) As noted above, the Board did not, in fact, enforce such a principle—even in the 1980s. And since then, the Board stopped purporting to include it as a relevant factor, much less a requirement. We therefore overrule the following decisions to the extent they indicated that a pre-impasse strike must be a "last resort": *Santa Maria*, *supra*, PERB Order No. IR-53; *Sacramento*, *supra*, PERB Order No. IR-49; *Rio Hondo*, *supra*, PERB Decision No. 292; and *Fremont I*, *supra*, PERB Decision No. 136.

In sum, to assess provocation, we continue the Board's modern approach in which we consider all relevant evidence. As noted above, the factors we consider include a union's contemporaneous statements, messaging, and materials, witness testimony, the strike's timing, the violation's nature and seriousness, and whether the union opposed the violation. The latter two factors lead us to consider whether the violation was substantive or a mere technicality, and whether the union filed a charge (the typical way for a union to express opposition to an alleged unfair practice), but there is no requirement that a union strike only as a "last resort."

3. Application to OEA's April 29 Strike

There are two reasons why we reject the District's contention that OEA engaged in an unlawful pre-impasse strike. As illustrated in the below discussion, these two bases are related to one another, since each represents a reason for finding that the strike did not amount to bad faith bargaining.

First, as noted *ante* at page 23, a strike is not "pre-impasse" if the employer cannot identify any negotiation for which the union has a duty to bargain. Here, the parties were not engaged in CBA negotiations when OEA struck. Rather, the District claims the strike was pre-impasse relative to effects negotiations. But as explained above, OEA had no duty to bargain effects given that the District had already implemented its decision to abandon the nine-month notice period and had begun implementing its school closure decision. The District proposes a legal rule that would reward unclean hands, claiming that even though it violated EERA by failing to provide notice and an opportunity to bargain before it unlawfully implemented its decision to abandon the nine-month notice policy, it thereafter agreed to bargain and can thus invoke the presumption against pre-impasse strikes. We reject this interpretation. It makes no sense to require OEA to hold off on a strike until it reached an impasse given that the District's violation made good faith bargaining impossible and OEA therefore had no duty to bargain at all in the wake of the District's violation. Since the presumption against pre-impasse strikes is rooted in the duty to bargain, the presumption has no application here.

In the alternative, even accepting the District's interpretation solely for the sake of argument, we would still find that OEA carried its burden in rebutting the presumption against pre-impasse strikes. There is no longer any dispute that the

District committed unfair practices as found in *OUSD*, *supra*, PERB Decision No. 2875. Moreover, this is a quintessential case in which a union had two closely related motives in striking: to protest the District's action in closing schools and to protest the District's unfair practices on the same topic. Indeed, absent that unfair practice, OEA would have had the opportunity to convince the District, in good faith effects negotiations during the nine-month notice period, to consider alternatives before implementation. Because the unfair practice and the underlying issue of school closures are so closely related, it is natural and proper for OEA to have mentioned both in its communications.

While there is no requirement that a union prove every relevant factor in order to establish that a ULP materially caused a strike, here every factor points toward finding that the District's conduct was a material cause of OEA's strike. Most importantly, the union's materials and messaging repeatedly mentioned the District's unlawful conduct. (See *ante* at pp. 9-11.) Moreover, it is inconsequential that OEA's messaging placed the union's own gloss on the unfair practices, which at that point were allegations rather than findings. For instance, OEA described the nine-month notice provision as being an "agreement" between OEA and the District. This is unsurprising given that the parties negotiated over the language that Eng brought before the Board of Education, and it is only somewhat different from the conclusions in *OUSD*, *supra*, PERB Decision No. 2875, where we held that the nine-month notice requirement was a policy rather than a bilateral agreement, but the District nonetheless violated its duty to bargain before abandoning it. (*Id*. at pp. 12-13.) As another example, OEA sometimes referred to the amount of required notice as one year rather than nine months, basing its characterization on the length of a school

year. With respect to both examples, we refrain from formalistic reasoning which would lead union materials to be vague, attorney-vetted statements intended to capture any violation it might prove. (Cf. *National Labor Relations Bd. v. City Disposal Systems, Inc.* (1984) 465 U.S. 822, 840 [declining to create "a trap for the unwary" by requiring laypeople to use precise language to trigger labor relations rights].) We therefore find that OEA's messaging strongly supports finding its strike to have been an unfair practice strike, even though the Board's ultimate findings differed from OEA's initial framing.

Other factors support the same conclusion. For instance, the strike occurred soon after the District's violations, but not so soon that OEA had failed to express its opposition by filing a charge. These factors are in tension with one another, which is one reason that timing is not necessarily a determinative factor (see *ante* at page 25). Thus, while a union can rebut the presumption against pre-impasse strikes even without demonstrating close temporal proximity between the violation and the strike, the sequencing OEA demonstrated in this case adds to the overwhelming evidence in OEA's favor: the District violated EERA in January and early February, OEA filed its charge on February 15, and OEA struck just over two months later, on April 29.

Finally, we affirm the ALJ's conclusion that the nature and seriousness of the unfair practices were more than sufficient to suggest that OEA was striking for the dual goals of protesting the District's unfair practices and its related school closure decisions. Indeed, as discussed at length in *OUSD*, *supra*, PERB Decision No. 2875, OEA spent considerable resources working with Eng on the school closure notice language that she successfully pushed through at the Board of Education, only to see the Board of Education abandon the policy without notice less than two years later.

(*Id*. at pp. 4-7.) Accordingly, while there is so far no PERB precedent indicating what type of unfair practice may be fully proven but too trivial to support a pre-impasse strike, the violation here does not come anywhere close to that line.

For these reasons, even assuming for the sake of argument that the presumption against pre-impasse strikes applied here, OEA rebutted the presumption by showing that it engaged in a lawful unfair practice strike.

III. The ALJ's Ruling on Evidence of Educational Harm

The District's exceptions challenge the ALJ's decision to bar the District from introducing evidence supporting its proposed remedy requiring OEA-represented teachers to provide the District with instructional time to make up for services lost during the strike. When the ALJ issued this ruling, the District claimed the evidence was relevant to remedy—an issue that is now moot since the District has not established liability. However, the District now alternately claims we should overturn the ALJ's evidentiary ruling because the evidence it wished to present was also relevant to liability.

In asserting that the evidence the ALJ excluded was relevant to liability, the District relies primarily on *Compton*, *supra*, PERB Order No. IR-50, a case featuring the most alleged disruption to education of any case to ever come before the Board. Specifically, a teachers' union allegedly struck ten times over the course of four months; the school district had experienced four fires of suspicious origin, one of which caused significant damage; two security guards were injured attempting to secure a school district site; and, most importantly, the significant number of intermittent strikes over a long period had caused the average student absenteeism to quadruple to 40 percent *on non-strike days*. (*Id*. at pp. 4-6.)

In arguing that educational harm is relevant to liability as well as remedy, the District cites a portion of Chair Hesse's concurring opinion in *Compton*, *supra*, PERB Order No. IR-50. To contextualize the District's argument, it is first critical to recognize that *Compton* was an injunctive relief order. In that procedural posture, the Board analyzes whether there is "reasonable cause" to believe an unfair practice has been or will be committed, and, if so, whether injunctive relief is "just and proper." (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 895-896.) For each prong of the injunctive relief standard, Chair Hesse's *Compton* concurrence found it critical that teacher strikes had caused a "total breakdown" in both: "(1) basic education for students and (2) negotiations free from coercive tactics that hold hostage that education." (*Compton*, *supra*, p. 167 [stating the total breakdown standard] & pp. 167-170 [discussing the "reasonable cause" and "just and proper" prongs].)

As noted above, *Fresno*, *supra*, PERB Decision No. 2418-M overruled the splintered opinions of Chair Hesse and Member Porter in *Compton*, *supra*, PERB Order No. IR-50, to the extent they interpreted EERA not to protect a qualified right to strike. Since *Fresno*, the "total breakdown" standard remains relevant only to the "just and proper" inquiry in resolving an injunctive relief request by an EERA employer, and it is no longer part of determining "reasonable cause." *Regents II*, *supra*, PERB Order No. IR-62-H illustrated this limited continuing role for the total breakdown standard. (Compare *Regents II*, *supra*, PERB Order No. IR-62-H, p. 7, fn. 4 & p. 11 [discussing total breakdown standard as relevant to the Board's "just and proper" inquiry] with *id*. at pp. 6-10 [explaining the Board's "reasonable cause" inquiry without reference to the total breakdown standard].)

Indeed, the Board's evolution toward this approach was evident even before *Fresno*, *supra*, PERB Decision No. 2418-M and *Regents II*, *supra*, PERB Order No. IR-62-H. For instance, in *Sweetwater*, *supra*, PERB Order No. IR-58, the Board cited the total breakdown standard only as relevant to the Board's "just and proper" analysis. (*Id*. at pp. 21-23.) Even decades earlier, in *Fremont II*, *supra*, PERB Order No. IR-54, the Board had begun interpreting the total breakdown standard as relevant to a "just and proper" inquiry, but not to "reasonable cause." In *Fremont II*, the union allegedly struck three times over six weeks and threatened a fourth strike for the same purpose as the first three—putting economic pressure on the employer to accede to the union's contract demands. (*Id*. at pp. 2-4.) The union gave advance notice of each strike, but in two instances the amount of notice was only two days, and the union promised only that it would give "appropriate legal notice." (*Id*. at pp. 2-3.) Student attendance dropped by 50 to 70 percent on strike days but rebounded to near normal on non-strike days. (*Id*. at p. 4.) These allegations of intermittent striking were sufficient to show "reasonable cause" of a violation, but insufficient to allege a total breakdown in education, meaning that the employer had not satisfied the "just and proper" standard. (*Id*. at pp. 14-15.)

With this background, there are multiple, independent bases for affirming the ALJ's evidentiary decision. First, as noted already, the District's response to OEA's motion to exclude evidence argued only that evidence of educational harm was relevant to remedy; the District never argued there was a "total breakdown," and it therefore waived that argument. Second, the total breakdown standard that the District raised for the first time on appeal is relevant only to determining whether it is just and proper to seek injunctive relief limiting an educational strike, after the employer has

already satisfied the reasonable cause standard. Here, however, there is no injunctive relief request before us. Finally, even were there a "just and proper" inquiry before us, the facts here are categorically different from the allegations showing a total breakdown in education in *Compton*, *supra*, PERB Order No. IR-50.[16]

CONCLUSION

Under EERA, there is a qualified right to strike. The District did not allege that OEA unilaterally changed the status quo by deviating from an operative no-strike clause, and we express no opinion on that question. Instead, the central question in this case related to the rebuttable presumption against pre-impasse strikes. For the reasons explained above, the facts here did not trigger that presumption. In the alternative, OEA rebutted any such presumption because the District's unfair practices materially caused OEA's strike. Moreover, these conclusions would remain the same irrespective of the ALJ's decision to exclude evidence of educational harm. Accordingly, we do not disturb the ALJ's decision to dismiss the District's charge.

ORDER

The complaint and unfair practice charge in Case No. SF-CO-864-E are DISMISSED.

Chair Banks and Member Nazarian joined in this Decision.

[16] At the hearing on OEA's motion to exclude evidence, the District made an offer of proof regarding its excluded evidence. Even accepting the District's offer of proof as true, the record would still fall well short of satisfying the total breakdown standard.