PERB
California Public Employment Relations Board

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PERB Decision No. HO-U-1705-H

December 29, 2021

Re: *Teamsters Local 2010 v. Regents of the University of California*
Case No. SF-PE-5-H

Dear Parties:

No exceptions have been filed in the above-referenced matter pursuant to California Code of Regulations, title 8, section 32300. As provided in section 32305, the proposed decision of the Board agent is HEREBY DECLARED FINAL, effective December 29, 2021.

This decision is binding on the parties to this case. However, since the decision was not expressly adopted by the Board itself, it may not be cited in other cases as precedent.

Public Employment Relations Board

By

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STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

TEAMSTERS LOCAL 2010, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	UNFAIR PRACTICE CASE NO. SF-PE-5-H PROPOSED DECISION (December 8, 2021) **PERB Decision No. HO-U-1705-H** **December 29, 2021**

Appearances: Beeson, Tayer & Bodine by Kena Cador, attorney, for Teamsters Local 2010; Sloan Sakai Yeung & Wong LLP by Timothy Yeung, attorney, for Regents of the University of California.

Before Bernhard Rohrbacher, Administrative Law Judge.

INTRODUCTION

In this case, Charging Party Teamsters Local 2010 (Teamsters) alleges that Respondent Regents of the University of California (University) violated the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD), Government Code section 3550 et seq.,[1] when it posted a statement on its official website in response to a flyer that Teamsters had distributed as part of an organizing campaign. For the following reasons, a violation occurred.

PROCEDURAL HISTORY

On February 22, 2019, Teamsters filed an Unfair Practice Charge (Charge) in this matter. The Charge alleges that by posting on its website a statement in

[1] Below, all section references are to the Government Code unless stated otherwise.

response to a flyer promulgated by Teamsters, the University violated the prohibition on deterring or discouraging union membership in PEDD section 3550.[2]

On April 15, 2019, the University filed a Position Statement.

On May 21, 2019, Teamsters filed a Response to the Position Statement.

On September 9, 2019, PERB's Office of General Counsel (OGC) served a Notice of Deficient Allegations on Teamsters.[3] It warned that the University's statement arguably fell within the protection of the safe harbor of section 3571.3 of the Higher Education Employer-Employee Relations Act (HEERA) for non-coercive speech because the Teamsters' Charge did not proffer a contention that the content of the statement was explicitly or implicitly coercive.[4] Therefore, the OGC contended

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[2] 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."

PEDD section 3551 gives PERB jurisdiction over violations of the PEDD. PERB Regulation 32611, subdivision (b), makes it an unfair practice for a public employer to a violate of the PEDD. PERB regulations are codified in California Code of Regulations, title 8, section 31001 et seq.

[3] This Notice was not served on the University. Unless specified otherwise, all PERB documents were served on both parties.

[4] HEERA is codified a section 3560 et seq. Section 3571.3 provides:

> "The expression of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute, or be evidence

that the Charge as then-written failed to state a prima facie unfair practice under the PEDD. To avoid dismissal, Teamsters were afforded an opportunity to amend the Charge to cure the prima facie defect or request a withdrawal no later than September 19, 2019.

On October 2, 2019, the OGC issued a Notice of Dismissal. It stated that on September 19, 2019, the OGC had granted Teamsters' request for an extension of time to file an amended charge until September 23, 2019, but that PERB had not received either an amended charge or a request for withdrawal by that date. The OGC therefore dismissed the Charge for the reasons stated in Notice of Deficient Allegations.

On October 28, Teamsters appealed the dismissal of its Charge to the Board itself.

On March 3, 2020, the Board issued a Notice of Combined Oral Argument in which it granted requests for oral argument regarding cross exceptions in consolidated cases *American Federation of State, County & Municipal Employees, Local 3299 v. Regents of the University of California*, Case No. SF-CE-1188-H; *University Professional & Technical Employees—Communications Workers of America, Local 9119 v. Regents of the University of California*, Case No. SF-CE-1189-H; and *Teamsters Local 2010 v. Regents of the University of California*, Case

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> of, an unfair labor practice under any provision of this chapter, unless such expression contains a threat of reprisal, force, or promise of benefit; provided, however, that the employer shall not express a preference for one employee organization over another employee organization."

No. SF-CE-1192-H, the last case being factually related to the instant case. The Board also granted Teamsters' request to partially consolidate its appeal in the instant case with the aforementioned three cases for the limited purpose of holding a combined oral argument on overlapping issues. Accordingly, the Board directed a combined oral argument in these four cases and invited argument inter alia regarding the following questions: (1) "What statutory construction best describes the relationship (if any) between § 3550 in the PEDD and § 3571.3 in HEERA"; (2) "whether [the Board] should apply its longstanding interference standards in evaluating alleged violations of [PEDD] § 3500"; and (3) "if not, what standards the Board should apply, including any potential defenses."

A combined oral argument in the instant case and the three other cases listed above was held before the Board on July 23, 2020.

By letter dated October 16, 2020, the Board informed the parties that it was considering further consolidating the instant case with the three already consolidated cases also for purposes of its decision and invited any party opposed to consolidation to respond in writing within 10 days from service of the letter. The University responded on October 23, 2019 that it did not object to such consolidation. Teamsters responded on October 26, 2020 that they believed the instant case should not be consolidated with the three other cases for purposes of the Board's decision.

On March 1, 2021, the Board issued separate decisions in the three consolidated cases (*Regents of the University of California* (2021) PERB Decision No. 2755-H (*Regents I*)) and in the instant case (*Regents of the University of California* (2021) PERB Decision No. 2756-H (*Regents II*)). Although these decisions

will be discussed in the Conclusions of Law Section below, the following introductory summary is provided for context.

In *Regents I*, the Board answered the first question regarding which it had invited argument ("[w]hat statutory construction best describes the relationship (if any) between § 3550 in the PEDD and § 3571.3 in HEERA") by stating that "section 3550 is not limited by section 3571." (*Regents I*, *supra*, PERB Decision No. 2755-H, pp. 17, 29.) The Board answered the second question ("whether it should apply its longstanding interference standards in evaluating alleged violations of [PEDD] § 3500") in the negative. (*Id.* at p. 16; see *id*. at pp. 28-34.) The Board finally answered the second question ("what standards the Board should apply, including any potential defenses") by stating that "the test for whether conduct or communication deters or discourages employees in making the choices enumerated in section 3550 is objective" and that "[i]t 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." (*Id.* at pp. 17, 24.) Once the charging party has proven its prima facie case, "an employer may establish an affirmative defense via a legitimate business necessity that outweighs the tendency to deter or discourage." (*Id.* at p. 25.)

Applying these standards in the present case, the Board held in *Regents II* that "Teamsters' charge alleged a prima facie case that the University's [web-]posting deterred or discouraged public employees in violation of the PEDD." (*Regents II*, *supra*, PERB Decision No. 2756-H, p. 9.) It further held that "[t]o the extent the University alleges that its [web-]posting was necessary to respond to [the] Teamsters'

flyer, we consider that an affirmative defense," which the University raised in its Response to the Charge, and that "sufficient material factual disputes exist to warrant a hearing on the merits." (*Ibid*.) Accordingly, the Board reversed the dismissal of the Charge and remanded the matter to the OGC for issuance of a complaint. (*Id*. at p. 10.)

On March 15, 2021, the OGC issued a Complaint in this matter. The Complaint tracks the allegations in the Charge as summarized above and further alleges that by violating PEDD section 3550, the University committed an unfair practice under PERB Regulation 32611, subdivision (a).[5]

On April 5, 2021, the University filed an Answer to the Complaint. In its Answer, the University admits certain allegations in the Complaint, denies others, and raises several affirmative defenses, including that its conduct "was justified by operational and/or business necessity" and that it "was caused by circumstances beyond its control and no alternative course of action was available."

An informal settlement conference was conducted on May 12, 2021, but the parties were unable to resolve their dispute.

The case was thereafter assigned to this Administrative Law Judge (ALJ) to conduct a formal hearing. On May 15, 2021, the ALJ issued a Notice of Formal Hearing for August 3, 2021.

On July 23, 2021, a virtual pre-hearing conference was conducted via the WebEx platform.

[5] See *supra*, fn. 2.

On August 2, 2021, the day before the formal hearing was scheduled to take place, the parties for the first time jointly requested that the formal hearing be taken off calendar and the case be placed in abeyance until a decision issued in *Teamsters Local 2010 v. Regents of the University of California*, PERB Case No. SF-CE-1234-H, which was then and is now pending before another ALJ, "[t]o avoid having to litigate the same facts over again," given that "[a] portion of the communication at issue in this case is identical to the communication in SF-CE-1234-H."[6]

On the same day, this ALJ denied parties' joint abeyance request.

On August 3, 2021, a virtual formal hearing was conducted before the ALJ via the WebEx platform. The University presented one live witness, E. Kevin Young. Teamsters presented no live witness. However, the parties stipulated that the official transcript of the testimony given by Alexander Vermie at the formal hearing in PERB Case No. SF-CE-1234-H, where he had been presented by Teamsters as a life witness, could be used as if given at the formal hearing in the instant case.[7]

On October 15, 2021, the parties submitted simultaneous post-hearing briefs.

On October 6, 2021, the ALJ took official notice pursuant to PERB Regulation 32170, subdivision (h), of the parties' collective bargaining agreement (CBA) for the Clerical Unit then in effect as posted on the University's official website at https://ucnet.universityofcalifornia.edu/labor/bargaining-units/cx/contract.html, including Appendix A at https://ucnet.universityofcalifornia.edu/labor/bargaining-

[6] The request did not identify the portion of the communication at issue in both cases.

[7] See *infra*, text accompanying fn. 11.

units/cx/docs/cx_2017-2022_a_corporate-title-code-system-look-tcs.pdf, and the wage rates for the Clerical Unit listed at https://tcs.ucop.edu/tcs/jsp/nonAcademicTitlesSearch.htm, which can be accessed following the link provided in Appendix A.[8]

The matter was thereupon deemed submitted.

FINDINGS OF FACT

I. The Parties

Teamsters are an employee organization within the meaning of HEERA section 3562, subdivision (f)(1).

The University is an employer within the meaning of HEERA section 3562, subdivision (g).

II. The Teamsters' Flyer

In Fall 2018, Teamsters, who at the time already represented the Clerical Unit at the University, were engaged in an effort to organize the University's then-unrepresented Administrative Professionals. As part of that effort, Teamsters distributed a flyer (Flyer) that stated under the heading "Live Better • Work Union" that, based on a "Comparison of Unrepresented Worker[s] and Local 2010 Member[s]," "Teamsters" employees had received or would receive "Triple the Raises at UC" from 2010-11 until 2021-22 than "Non-Represented" employees, to wit, "Teamsters: 33.09%" versus "Non-Represented: 10.94%." The Flyer further stated under the heading "THE RUN DOWN [¶] Administrative Professionals" that, in a side-

[8] Notice of the ALJ's intent to take official notice of these documents was provided to the parties, each of which informed the ALJ that they had no objection to take such notice. See also *infra*, fns. 15, 16.

by-side comparison of "Union Vs Non-Union," "Union" employees benefitted from "Guaranteed Raises," "Contract & Protections," "Bargaining & Ratification by Members," "Grievance Procedure," and "Union Representation," whereas "Non-Union" employees received "Raises when Management Feels Like It," had "No Protections at Work," "No Voice," and "No Rights," and were "[Their] Your Own." (Some formatting omitted.)[9]

III. The University's Web-Posting

In the response to the Teamsters' Flyer, the University posted a statement on its official "Labor News" website (Web-Posting).[10] It read in full as follows:

> "**UCnet: Facts about pay raises and employment protections for policy-covered staff**
>
> "*Monday, November 26, 2018*
>
> "The Teamsters union, which represents UC clerical employees, recently distributed a flyer to Administrative Professionals about pay increases and employment rights for policy-overed (non-unionized) employees. The information below is being provided to ensure you have accurate information on these topics.
>
> "**Pay increases**
>
> "The union's flyer suggests that Teamsters-represented workers receive pay increases that are three-times higher than policy-covered staff. The following chart shows the pay increases that policy-covered staff and union-

[9] The Flyer is attached to this Proposed Decision as Appendix A.

[10] There is no evidence that would support the claim in Teamsters' post-hearing brief that the University also otherwise "distributed" this statement.

represented clerical employees have received in recent years:

“Year	Systemwide salary program for policy-covered staff*	Across-the-board pay increases for unionized clerical staff*
“2007-08	4%	0%
“2008-09	0%	0%
“2009-10	0%	0%
“2010-11	0%	0%
“2011-12	3%	3%
“2012-13	0%	3%
“2013-14	3%	3%
“2014-15	3%	3%
“2015-16	3%	2%
“2016-17	3%	3%
“2017-18	3%	3%
“2018-19	3%	3%

“*Does not include merit or equity increases for policy-covered employees, or step increases for eligible unionized employees.

“**Employee rights and protections**

“The union’s flyer also makes several inaccurate claims about policy-covered employees’ rights and protections. Here are the facts:

“Topic	**Teamsters Claim**	**Fact**
“Pay [I]ncreases	‘Raises when management feels like it’	UC has a demonstrated commitment to paying market wages and providing regular pay raises to policy-covered employees. People are at the heart of UC’s excellence and fairly compensating employees is a top UC policy.
“**Employee Protections**	‘No protections at work’	UC has numerous policies to ensure equitable treatment and to protect employees’ rights.
“**Grievances**	‘No rights’	There are numerous policies, procedures and personnel to ensure that employees’ concerns and complaints are taken seriously and addressed.
“**Employee Advocacy**	‘You’re on your own’	Various personnel and programs exist to support and advocate for employees, including HR and ombuds office, employee assistance programs, and local staff assemblies and interest groups.”

(Bold in original. Some formatting omitted.)

IV. Teamsters' View on the University's Web-Posting

Alexander Vermie testified in PERB Case No. SF-CE-1234-H[11] that he has been a Research Analyst for Teamsters since February 2018. He was asked in April 2019 to "look into" the wage chart in the University's Web-Posting comparing the pay increases for "policy covered"[i.e., unrepresented] staff" with those for "unionized clerical staff." During that review, Vermie identified three ways in which he believed the wage chart in the Web-Posting was "misleading."

The first way in which Vermie found the wage chart misleading was that "the question is framed around a comparison between Teamsters represented clerical staff and raises for the policy-covered or non-represented staff; however, the wage chart includes multiple years"—specifically, "fiscal years . . . 2007-08, 2008-09, and 2009-10"—"where Teamsters Local 2010 was not the representative for the . . . the unionized clerical staff." The University does not dispute the latter fact.[12]

The second way in which Vermie found the wage chart misleading was that "looking at the asterisk note at the bottom of the chart, it states that the raise totals for the unrepresented staff does not include merit increases; however, my review of UC budget and other documents indicates that . . . for multiple years that are included,

[11] See *supra*, text accompanying footnote 7.

[12] No relevant dispute is created by Young's presumably erroneous admission below that Teamsters still were not the representative of the unionized clerical staff in 2010-11, as this would make the Web-Posting potentially more misleading and thus strengthen Teamsters' position. See *infra*, fn. 17 and accompanying text.

they were actually merit-based raises."[13] Specifically, Vermie concluded that the 3 percent increase listed in the wage chart for unrepresented staff in 2011-12 was a merit increase. He reached this conclusion based on a "Recent History of Salary Increases for Non-Represented Staff" in a University report entitled "Budget for Current Operations [¶] Context for the Budget Request [¶] 2019-20," which states that in 2011-12, "[f]or the first time since 2007-08, non-represented staff were eligible for merit salary increases." Vermie admitted that the 2019-20 budget document "doesn't give the precise percentage, but argued that "it identifies the raise that happened that year for non-represented staff as being merit based." The same document notes that for 2015-16 through 2017-18 "[m]erit-based increases averaging 3% for non-represented staff . . . were implemented," leading Vermie to conclude that the 3 percent increases listed in the wage chart for unrepresented staff in these years were also merit increases. Similarly, a July 19, 2018 letter from University President Janet Napolitano to the Campus Chancellors states that "[t]he overall budget that is recommended for ["the merit pay program for non-represented staff for fiscal year 2018-19"] should be 3 percent." There is no evidence that unrepresented staff received any across-the-board, non-merit-based increases during the years in question, nor has the University controverted Vermie's reasoning or conclusions in this regard.

The third way in which Vermie found the wage chart misleading was that, whereas it *included* merit increases for unrepresented staff as just discussed, it

[13] Vermie testified that whereas across-the-board increases are "given to all employees," merit increases are "often contingent upon their performance."

excluded step increases for union-represented clerical staff, although step increases are also "performance based," like merit increases.[14] The wage chart shows across-the-board pay increases for unionized clerical staff of 2 percent in 2015-16 and 3 percent in each of 2011-12 through 2014-15 and 2016-17 through 2018-19. It however does not show the step increases that eligible unionized clerical staff—i.e., employees with at least ten years of service whose salary was within the salary range and who received an overall performance rating of satisfactory or above—received in each of 2011-12 through 2015-16 under the parties' contract.[15] According to Vermie, a step increase typically results in a pay increase of around 2 percent. Data that is available on the University's official website confirms this and there is no evidence to the contrary.[16]

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[14] See *supra*, fn. 13.

[15] See Article 45, subsections A.5, B.1.c, B.2, B.3, B.4, B.5, of the parties 2011-16 CBA. Unionized clerical staff also received an across-the-board pay increase of 3 percent, but no step increase, in each of 2017-18 through 2020-21. See Article 45, subsection B.4, of the 2017-22 CBA posted on the University's official website at https://ucnet.universityofcalifornia.edu/labor/bargaining-units/cx/contract.html and https://ucnet.universityofcalifornia.edu/labor/bargaining-units/cx/docs/cx_2017-2022_45_wages.pdf; see also *supra*, text accompanying fn. 8.

[16] Article 45, subsection A.2, of the 2011-16 CBA between Teamsters and the University for the Clerical Unit, as placed into evidence by Teamsters, refers to "Appendix A" for "[t]he applicable salaries." However, that version of the CBA does not contain Appendix A. The version of the 2017-22 CBA posted on the University's official website does contain Appendix A, which in turn refers the reader to "*the Corporate Title Code System Lookup* at: https://tcs.ucop.edu/tcs/jsp/homePage.htm. See https://ucnet.universityofcalifornia.edu/labor/bargaining-units/cx/contract.html; https://ucnet.universityofcalifornia.edu/labor/bargaining-units/cx/docs/cx_2017-2022_a_corporate-title-code-system-look-tcs.pdf; see also *supra*, text accompanying fn. 8. The chart for the first classification in the "Clerical & Allied Services" bargaining unit, "004105 - CHILD DEV CTR TEACHER 2" at "BKCMP," reflects a 2.2 percent

V. The University's View on Its Web-Posting

E. Kevin Young testified that he has been working for the University for approximately four years, most recently as Associate Director of Systemwide Labor Relations. In that capacity, he works with the University of California Office of the President (UCOP) and the University's ten campuses, its five hospitals, and the Lawrence Berkeley National Laboratory (Berkeley Lab) in interpreting and implementing the University's CBAs with various units. The University's Web-Posting was developed by the UCOP labor relations team under the direction of Peter Chester, its Executive Director. Young's role in this process was to compare the language in the Web-Posting as it was being drafted with the Teamsters' Flyer to which it responded and to discuss the matter with the Anthony DiGrazia, the University's then-Chief Negotiator for the Clerical Unit represented by Teamsters.

Young further testified that the University "knew that the Teamsters were in the process of trying to organize this particular title," i.e., the Academic Professionals. During "prior accretions" to the Clerical Unit, the University had received inquiries from employees. The University "wanted to provide them with some facts" or "a neutral aspect of the facts." It also wanted to "address what we believed were some inaccuracies in what was contained in this particular [Teamsters] flyer." In response to the question, "was it the University's intent . . . to get the employees . . . not to

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difference between the hourly wage rates for the first and second steps of that classification ($21.68 and $22.16, respectively). See https://tcs.ucop.edu/tcs/jsp/nonAcademicTitlesDetail.htm?tabId=&titleCode=004105&campus=10. The same chart reflects similar differences around 2 percent between the other adjacent steps within that classification. See *ibid*. So do the charts for the other classifications in the Clerical Unit. See https://tcs.ucop.edu/tcs/jsp/nonAcademicTitlesSearch.htm.

unionize," Young answered, "No, not at all." Instead, "the discussions were to make sure that the employees had all the facts." Young continued:

> "And I remember this specifically because we talked about that some of the stuff in there was not accurate. Whatever choice they made, they would make that choice. Ours was just neutral. . . . We never (indiscernible) them to be in any way, shape or form that indicated there was any intention of interfering. We're just providing information."

For example, Young felt that the statement in the Teamsters' Flyer that unrepresented employees enjoy "No Protections at Work" was not true, given that "[t]here is discrimination protection" and the ability to "ask for an equity adjustment" even for unrepresented employees," among the "numerous policies to ensure that you get equitable treatment." Similarly, Young felt that the statement in the Flyer that "You're on Your Own" implied that "if the Union did not provide you with assistance and advocacy you had none," and that "that's not true either," because "[w]e have EAP programs," "[w]e have ombudsmen," and "[w]e have programs for professional development"; therefore, "[w]e have programs where the University most certainly is providing assistance for [unrepresented] employees." Accordingly, the University "thought it was important that a neutral aspect of the facts be presented."

Young also testified that he had no role in creating the wage chart in the University's Web-Posting that compares the "[s]ystemwide salary program for policy-covered staff" to the "[a]cross-the board pay increases for unionized clerical staff." However, he reviewed and discussed it with Labor Relations Manager Patty Donelly "to ensure accuracy." As part of these discussions with Donelly "or anyone else," he "[n]ever become aware that there were any inaccuracies in the wage table."

In testifying about that wage chart, Young stated:

> "For instance, in 2007, [the salary increase] was four [percent] for the policy covered [staff] and an across-the-board [increase] for clerical staff was zero [percent]. These were numbers that it was my understanding were accurate. And that to me is neutral."

However, by the time of the hearing, Young had become aware that from 2007-08 through 2010-11, Teamsters were not the exclusive representative of the clerical staff.[17] Young did not know why in the paragraph immediately above the wage chart, the University's Web-Posting first states that "[t]he union's flyer suggests that *Teamsters-represented workers* receive pay increases that are three-times higher than policy-covered staff," but then states that "[t]he following chart shows the pay increases that policy-covered staff and *union-represented clerical employees* have received in recent years" (italics supplied), i.e., why it used different terms in each of these two statements to refer to the same group of employees.

ISSUE

(1) Did the University's Web-Posting deter or discourage public employees from becoming or remaining members of Teamsters, or from authorizing representation by Teamsters, or from authorizing dues or fee deductions to Teamsters, in violation of PEDD section 3500, and commit and unfair practice under PERB Regulation 32611, subdivision (a)?

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[17] Based on Vermie's testimony as summarized above, it appears that Teamsters in fact became the exclusive representative of the clerical staff already in 2010-11, i.e., one year earlier than admitted by Young during cross-examination. It will be recalled that Teamsters' Flyer to which the University's Web-Posting responded began its salary increase comparison with 2010-11 as the starting point.

CONCLUSIONS OF LAW

I. The Applicable Standard for Alleged Violations of PEDD Section 3500 Under *Regents I* and Its Progeny

Neither the Board nor any Court having previously analyzed the language of PEDD section 3550, *Regents I* was a case of first impression. As its starting point, the Board looked to the definition of similar language in a different statute, to wit, Government Code section 16645, subdivision (a), which governs the pre-existing prohibition in section 16645.1 et seq. on use of state funds and facilities to "assist, promote or deter" union organizing, and which reads as follows:

> "'Assist, promote, or deter union organizing' means any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding either of the following:
>
> "(1) Whether to support or oppose a labor organization that represents or seeks to represent those employees.
>
> "(2) Whether to become a member of any labor organization."

The Board observed:

> "In *Teamsters Local 2010 v. Regents of the University of California* (2019) 40 Cal.App.5th 659 . . . , the court considered whether a communication circulated by the employer could reasonably be found to 'deter' union organizing [under section 16645, subdivision (a)]. Although the employer argued there was no evidence presented to show the bulletin in question was intended to or did in fact 'deter' organizing, the appellate court held that the definition of 'assist, promote, or deter union organizing' only required a showing of 'any attempt by an employer to *influence* the decision of its employees . . .' (*Id*. at p. 666, original italics.) The court further noted that '[a]lthough the bulletin was not coercive, in that [the employer] professed neutrality on the

> issue of unionization, couched the communication in terms of providing employees with facts, and did not threaten employees with reprisals if they unionized, a trier of fact could reasonably find the bulletin was an attempt to 'influence' the employees who were on the receiving end.' (*Id*. at pp. 666-667 [citing Black's Law Dict. (10th ed. 2014) p. 898 and noting the definition of 'influence' as, among other things, 'one or more inducements intended to alter, sway, or affect the will of another, but falling short of coercion'].) We find the court's reasoning supports defining 'deter' similarly under section 3550."

(*Regents I*, *supra*, PERB Decision No. 2755-H, p. 22, ellipsis and all subsequent square-bracketed text so in original, footnote omitted.)

The Board went on to note that, although—unlike "deter"—"discourage was not defined in any related law, statutory comparison nevertheless favored interpreting "discourage" in a similar manner as "deter." (*Regents I*, *supra*, PERB Decision No. 2755-H, p. 23.) Thus, the Board observed:

> Under HEERA section 3571, subdivision (d) an employer may not 'in any way encourage employees to join any organization in preference to another.' To establish a violation, an employee organization need not show that the employer intended its actions to impact employee free choice. (*Santa Monica Community College District* (1979) PERB Decision No. 103, p. 22 (*Santa Monica*) [interpreting EERA section 3543.5, subd. (d), which has identical language to HEERA section 3571, subd. (d)].) 'The simple threshold test . . . is whether the employer's conduct tends to influence that choice or provide stimulus in one direction or the other.' (*Santa Monica*, *supra*, PERB Decision No. 103, p. 22; *State of California (Departments of Personnel Administration, Mental Health, and Developmental Services)* (1985) PERB Decision No. 542-S, pp. 2-3.) The Board's longstanding definition of 'encourage' as 'tending to influence' lends support for interpreting 'discourage' in a similar manner.

(*Regents I*, *supra*, PERB Decision No. 2755-H, pp. 23-24, square-bracketed text and ellipsis so in original, footnote omitted.)

The Board accordingly established the following standard that has to be met to prove a prima facie case of PEDD section 3500 violation:

> "Consistent with appellate precedent interpreting 'deter' and Board precedent interpreting 'encourage,' the test for whether conduct or communication deters or discourages employees in making the choices enumerated in section 3550 is objective. 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. We will look first to the conduct or communication itself in determining whether it tends to influence employee free choice. But context matters in even the objective assessment. 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. (Cf. *Los Angeles Unified School District* (1988) PERB Decision No. 659, p. 9 ["Statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning."].)"

(*Regents I*, *supra*, PERB Decision No. 2755-H, pp. 24-25, square-bracketed text so in original.)

Although PEDD section 3550, on its face, only prohibits a public employer from "*deter[ring]* or *discourage[ing]* 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 of fee deductions to an employee organization" (italics supplied), the Board, "construing

the PEDD in harmony with other laws, as well as the above-noted Board precedent interpreting 'encourage' [in HEERA section 3571, subdivision (d)] as tending to influence 'in one direction or the other,'" decided to "treat section 3550 even-handedly as prohibiting public employer conduct which tends to influence employee choices as to *whether or not* to authorize representation, become or remain a union member, or commence or continue paying union dues," including by "encouraging" one choice over another. (*Regents I*, *supra*, PERB Decision No. 2755-H, pp. 25-28, italics in original.)

Next, the Board concluded that "[PEDD] section 3550 is not subject to the limitations of [HEERA] section 3571.3," which provides that employer speech "shall not constitute, or be evidence of, an unfair labor practice *under any provision of this chapter*, unless such [speech] contains a threat of reprisal, force, or promise of benefit," in part because PEDD section 3550 "does not duplicate the interference standard." (*Regents I*, *supra*, PERB Decision No. 2755-H, p. 28, italics in original.) The Board based this conclusion in other part on the fact that, by its plain language, HEERA section 3571.3 does not apply to conduct subject to PEDD section 3550, which is not part of the chapter that contains HEERA section 3571.3. (*Id*. at pp. 29-30.) The Board based the same conclusion in other part on the fact that, "deter" under section 16645 and "encourage" under HEERA section 3571, subdivision (d), carries no coercion requirement. (*Id.* at p. 30.) The Board also observed that "[t]reating [PEDD] section 3550 as providing no different protections than already existed [i.e., as merely "reiterating pre-existing interference prohibitions"] would also make it superfluous," a statutory construction that should be avoided if possible. (*Id.*

at 30-31, quoting *United Public Employees v. Public Employment Relations Bd*. (1989) 213 Cal.App.3d 1119, 1127, citing *Stewart v. Board of Medical Quality Assurance* (1978) 80 Cal.App.3d 172, 179.) In addition, the Board found that the overall statutory scheme and the legislative history "indicate[d] the Legislature's desire to afford special protection to employee decisions regarding union selection, membership, and support." (*Id.* at pp. 31-32.) The Board found some inconsistencies in the legislative history but concluded that "[o]n balance," they were "insufficient to overcome the plain meaning of the language and the many other interpretive principles and guidance noted herein, including the main thrust of the Legislature's purpose . . . and support from the comparisons to section 16645 and other instances which require neutrality." (*Id.* at p. 34.)

Finally, the Board held that, if the charging party proves its prima facie case of a violation of PEED section 3500 under the test articulated above, the employer must prove an affirmative defense that is similar to the defense that has to be proven to defeat a prima facie case of interference:

> "Where a charging party shows employer conduct tended to influence employee decisions on one of these topics, [i.e., "authorizing union representation, choosing to become or remain a union member, or commencing or continuing to pay union dues or fees,"] the burden shifts to the employer. The degree of likely influence dictates the employer's burden. If the likely influence is "inherently destructive" of employee free choice, then the employer must show that the deterring or discouraging conduct was caused by circumstances beyond its control and that no alternative course of action was available. For conduct that is not inherently destructive, the employer may attempt to justify its actions based on operational necessity and PERB will balance the employer's asserted interests against the

> likelihood of influencing employee free choice. Within the category of conduct or communications that are not inherently destructive of section 3550's protections, the stronger the likelihood to influence employee free choice, the greater is the employer's burden to show its purpose was important and that it narrowly tailored its conduct or communication to attain that purpose while limiting influence on employee free choice to the extent possible. If the likelihood of influence outweighs the asserted business necessity, we will find a violation."

(*Regents I*, *supra*, PERB Decision No. 2755-H, pp. 35-36, footnote omitted.)

The Board explained that, as in interference cases, assessing the employer's defense will depend on the evidence and circumstances of each particular case and a variety of factors, such as "truthfulness [of the employer communication], whether an employer is responding to a misleading union communication, and employer motive, as well as the mode, frequency, and/or timing of a communication." (*Regents I*, *supra*, PERB Decision No. 2755-H, pp. 36-37.)

In *Regents II*, the Board summarized the applicable standard for an alleged violation for PEDD 3500 as promulgated in *Regents II* as follows:

> "'Deter or discourage' means to tend to influence an employee's free choice regarding whether or not to (1) authorize union representation, (2) become or remain a union member, or (3) commence or continue paying union dues or fees. (*Regents* [*I*], *supra*, PERB Decision No. 2755-H, p. 21.) The test for "tends to influence" is objective; it is a charging party's prima facie burden to show that the challenged conduct or communication is reasonably likely to deter or discourage employee free choice, not that the conduct actually did deter or discourage. (*Id*. at p. 24.) Further, and as particularly relevant here, section 3550 creates a new and more robust protection that is not subject to the free speech safe harbor of HEERA section 3571.3. (*Id*. at pp. 28, 33.)

> "Where a charging party shows employer conduct tended to influence employee decisions about whether or not to authorize union representation, become or remain a union member, or commence or continue paying union dues or fees, the burden then shifts to the employer to plead and prove a business necessity as an affirmative defense. (*Regents* [*I*], *supra*, PERB Decision No. 2755, pp. 35-36.) The degree of likely influence dictates the employer's burden. (*Ibid*.) PERB will resolve such an asserted defense by weighing the tendency to deter or discourage against the employer's asserted business necessity. (*Ibid*.)"

(*Regents II*, *supra*, PERB Decision No. 2756-H, pp. 7-8.)

The Board added that "[a]lthough *Regents*[] [*I*] involved communications to represented employees, the plain language of the statute suggests no reason a different test would necessarily apply where, as here, the employer's conduct or communication is directed toward unrepresented employees." (*Regents II*, *supra*, PERB Decision No. 2756-H, p. 8, footnote omitted.) The Board cautioned, however, that "[d]ifferent factors or differing emphases may be in play when assessing potential likely influence on employee free choice, as well as an employer's asserted business necessity during an organizing campaign." (*Id.* at p. 8, fn. 11.) Thus, the Board suggested that, "at the formal hearing in this matter," which as stated above was subsequently conducted before this ALJ, "the parties may litigate the truthfulness or misleading nature of their respective communications." (*Ibid.*) The Board further suggested that for communications to represented and unrepresented employees alike, the scope and weight of relevant contextual factors would develop through case law. (*Ibid.*)

The Board returned to the issue of employer communications under PEDD section 3550 in *Alliance Marc & Eva Stern Math & Science High School et al.* (2021) PERB Decision No. 2795 (*Alliance*). There it stated that "[a]bsent evidence sufficient to establish an affirmative defense, section 3550 leaves it to *employees* on each side of a unionization debate to marshal their arguments," but does not allow the *employer* to do so. (*Id.* at pp. 70-71 (italics supplied.) The Board also reiterated that under the affirmative defense of business necessity, "[an employer's communication may be justified by the need to accurately counter a union's misleading communication." (*Id.* at p. 72, citing *Regents II*, *supra*, PERB Decision No. 2756-H, p. 9.)

II. Application of the *Regents I* Standard to the Alleged Violation in this Case

A. Teamsters Have Proven Their Prima Facie Case Because the University's Web-Posting Tended to Influence Employee Free Choice

Under the objective test for alleged PEDD section 3550 violations developed in *Regents I* and its progeny, Teamsters must prove that "the conduct tends to influence employee free choice" or "employee decisions" regarding the issues enumerated in that section, namely, "becoming or remaining members of an employee organization, . . . authorizing representation by an employee organization, or . . . authorizing dues or fees deductions to an employee organization." (*Regents I*, *supra*, PERB Decision No. 755-H, pp. 24, 35; PEDD, § 3550.) By contrast, Teamsters do *not* have to prove that "the conduct actually did influence employee choice." (*Regents I*, *supra*, PERB Decision No. 755-H, p. 24.)

The University states in its post-hearing brief that the wage chart in its Web-Posting "showed that between fiscal years 2007-08 and 2018-19, unrepresented University employees received approximately 25 percent in salary increases while

Teamsters-represented clerical unit received 23 percent in across-the board pay increases during the same timeframe."[18] This comparison had the natural tendency to suggest to the unrepresented Administrative Professionals that they would fair better regarding salary increases if they remained unrepresented than if they chose representation by Teamsters. It is hard to imagine an issue that would be more important to an employee's decision as to whether to remain unrepresented or to seek union representation than the issue of salary increases. (See, e.g., *Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 16 (*Los Angeles*), quoting *Local 357, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB* (1961) 365 U.S. 667, 675 (*Local 357*) ["'When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it.'"].) Accordingly, and without question, this comparison "tend[ed] to influence employee free choice" or "employee decisions" regarding the issues enumerated in PEDD section 3550, namely, "becoming or remaining members" of, "authorizing representation" by, and "authorizing dues or fees deductions" to Teamsters.

[18] The salary increases for unrepresented employees listed in the wage chart total 25 percent exactly, not "approximately." However, this inaccuracy in the University's post-hearing brief is insignificant. Moreover, as stated above below, the Clerical Unit was not "Teamsters-represented" during some of "the same timeframe," i.e., "fiscal years 2007-2008 [through] 2018-2019." However, this statement in the University's post-hearing brief is nevertheless "correct" insofar as it is concluded below the Web-Posting falsely implied that the Clerical Unit *was* Teamsters-represented during that entire period.

(*Regents I*, *supra*, PERB Decision No.2755-H, pp. 24, 35; PEDD, § 3550.) This alone would prove Teamsters' prima facie case.

There is more, however. The wage chart showing that unionized clerical staff received 23 percent in across-the-board salary increases from 2007-08 through 2018-19, and that non-unionized staff received 25 percent during the same time period, was prefaced by the statements that "[t]he Union's flyer suggests that Teamsters-represented workers receive pay increases that are three-times higher than policy-covered staff" and that "[t]he following chart shows the pay increases that policy-covered staff and union-represented clerical employees have received in recent years." These statements in the Web-Posting, together with the wage chart that follows them, suggest that while Teamsters claimed in their Flyer that "Teamsters" employees received "Triple the Raises at UC" than "Non-Represented" employees ("33.09%" versus "10.94%," or 22.15 percent *more*), the "Teamsters" employees in fact received 2 percent *less* than the "Non-Represented" employees. The University's post-hearing brief makes this explicit by claiming that the salary-related statements in the Flyer were "inaccurate."

A union's truthfulness in its communications with prospective members is another issue that is naturally of great importance to an employee's decision as to whether to remain unrepresented or to seek representation by that union. Accordingly, and again without question, the University's implication that Teamsters' claim that "Teamsters" received "Triple the Raises at UC" (or 22.15 percent *more*) than "Non-Represented" employees was inaccurate and not truthful, because the former in fact—or so the University suggested—received 2 percent *less* than the latter,

also "tend[ed] to influence employee free choice" or "employee decisions" regarding the issues enumerated in PEDD section 3550, namely, "becoming or remaining members" of, "authorizing representation" by, and "authorizing dues or fees deductions" to Teamsters. (*Regents I*, *supra*, PERB Decision No. 2755-H, pp. 24, 35; PEDD, § 3550.) The University's implication of untruthfulness on the part of Teamsters would again by itself prove Teamsters' prima facie case, even if the University-claimed difference in the salary increases had not already done so, which however it has, as discussed above.

Combined with the content of the Web-Posting itself, the context in which it was made also tended to influence employee choice. (See *Regents I*, *supra*, PERB Decision No. 2755-H, pp. 43-45; *Alliance*, *supra*, PERB Decision No. 2795, pp. 66-69.) The University made the Web-Posting at a time when Teamsters were engaged in an effort to organize the University's then-unrepresented Administrative Professionals, not when such an effort was only a theoretical possibility. (See *Regents I*, at p. 44 [reasonable employee could infer from receiving University's related communication within 48 hours of issuance of Supreme Court decision that University believed communication was particularly urgent and important]; *Alliance*, at pp. 66-66, 69 [timing of e-mail messages shortly before and after representation petitions were filed strengthened tendency of the messages to influence employee choice].) In addition, the University posted the statement on its official "Labor News" website, not in some forum of lesser prominence. (See *Regents I*, at p. 44 [communication posted conspicuously across the University's campuses].) Thus, like the Board in *Alliance*, the ALJ has "no trouble concluding, based on both content and context, that the [Web-

Posting] tended to influence whether or not employees supported [Teamsters]." (*Alliance*, at p. 69.) Teamsters have thus carried their burden to establish their prima facie case.

B. The University Has Failed to Prove Its Affirmative "Operational Necessity" Defense Because It's Web-Posting Was Not a Truthful and Accurate Response to a Misleading Union Communication

Teamsters having established its prima facie case, the burden shifts to the University to prove its affirmative defense. (*Regents I*, *supra*, PERB Decision No. 2755-H, p. 35; *Regents II*, *supra*, PERB Decision No. 2576-H, p. 7; *Alliance*, *supra*, PERB Decision No. 2795, p. 70.) Teamsters do not argue that the University's conduct was "inherently destructive" of employee free choice,[19] but the matter does not need to be decided here, because even under the less stringent test for conduct that is not inherently destructive of such choice, the University has failed to prove that its "operational necessity" interests outweigh the likelihood of influencing the same, as discussed next. (*Regents I*, at p. 36; *Alliance*, at p. 70, fn. 21.)[20]

[19] Teamsters' post-hearing brief does not cite to either *Regents I* or *Regents II*, the latter of which issued in this very case. Instead, it erroneously states that "[t[he Board has yet to interpret [PEDD section 3550]," thus incorrectly treating this case as a case of first impression. The reason appears to be that the relevant portions of the Teamster's post-hearing brief are cobbled together from several of its pleadings in this case that predate the issuance of *Regent I* and *Regents II*.

[20] In its post-hearing brief, the University also invokes its right to free speech under the federal and California constitutions. However, under Article III, section 3.5, subdivisions (a), (b) of the California Constitution, PERB lacks authority to rule on constitutional issues such as this one. (See *Alliance*, *supra*, PERB Decision No. 2795, p. 43, citing *California Assn. of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 381-382; *Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, p. 22.)

Assessing the University's operational necessity defense depends on the evidence and circumstances of this particular case and factors such as the "truthfulness [of the University's communication], whether [the University was] responding to a misleading [Teamsters] communication, and [the University's] motive, as well as the mode, frequency, and/or timing of [the] communication." (*Regents I*, *supra*, PERB Decision No. 2755-H, pp. 36-37.) As the Board suggested in the instant case, "the parties may litigate the truthfulness or misleading nature of their respective communications." (*Regents II*, *supra*, PERB Decision No. 2576-H, p. 8, fn. 11; see also *Alliance*, *supra*, PERB Decision No. 2795-E, p. 70, p. 72, citing *Regents II*, *supra*, p. 9 ["[a]n employer's communication may be justified by the need to accurately counter a union's misleading communications"].) These two factors are indeed paramount in the instant case, and neither weighs in favor of the University.

In its post-hearing brief, the University claims that its Web-Posting was "providing truthful factual information" in response to the allegedly "inaccurate statement[]" in the Teamsters' Flyer that "Teamsters"-represented employees had received or would receive "Triple the Raises at UC" than "Non-Represented" employees from 2010-11 until 2021-22, to wit, "Teamsters: 33.09%" versus "Non-Represented: 10.94%." However, the University does not point to, and the ALJ is unaware of, any evidence that would allow the conclusion that the statement just quoted from the Flyer was indeed inaccurate or misleading. There is no testimonial or documentary evidence as to which "Raises" Teamsters considered in their calculation

or how they arrived at the percentages quoted above.[21] Without such or similar evidence, it cannot be concluded that this calculation and these percentages were in fact inaccurate or misleading.[22] Thus, at a minimum this factor does not weigh in favor of the University, and may in fact weigh against it.

By contrast, the evidence shows that the University's response to the Flyer was misleading, inaccurate, and untruthful. First, in the Flyer, Teamsters compare the salary increases already received or yet to be received by "Teamsters"-represented employees, i.e., "Local 2010 Member[s]," with those received by "Non-Represented" employees from the beginning of Teamsters' representation of the Clerical Unit in 2010-11 until the expiration of the current CBA in 2021-22. By contrast, in its Web-Posting, the University compares the salary increases received by "unionized clerical staff" with those received by "policy-covered staff" from 2007-08 until 2009-10, when the Clerical Unit was unionized but was not yet represented by Teamsters, and from then until 2018-19, the then-current fiscal year. As a result, the University's comparison includes three years in which the unionized but not yet Teamsters-

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[21] The evidence suggests that during the ten-year period in question, Teamsters-represented employees received 29 percent in across-the-board pay increases. See *supra*, fn.15 and accompanying text. However, just as the University included other, non-across-the-board increases in its Web-Posting, although it explicitly claimed otherwise in that posting, so also may Teamsters have done in their Flyer, and, in contrast to the University, they did not claim otherwise in that Flyer.

[22] Because it is the University's burden to proof its affirmative "operational necessity" defense, it must come forward with evidence that the factors claimed to weigh in its favor indeed do so. Although Teamsters presented no live witnesses at the hearing in the instant case, the University could have subpoenaed such witnesses. Moreover, the University had an opportunity to cross-examine, and did in fact cross-examine, Teamsters' live witnesses in Case No. SF-CE-1234-H.

represented Clerical Unit received no across-the-board salary increase and the non-unionized policy-covered staff received one across-the board increase of 4 percent.

Not only was the University comparing apples to oranges; it also obfuscated this fact. The wage chart in question is prefaced by statements that "[t]he union's flyer suggests that Teamsters-represented workers receive pay increases that are three-times higher than policy covered staff" and that "[t]he following chart shows the pay increases that policy-covered staff and union-represented clerical employees have received in recent years." A reasonable person reading these statements would assume that "Teamsters-represented workers" and "union-represented clerical employees" were one and the same and that the time periods under consideration in Teamsters' Flyer and the University's Web-Posting were also one and the same, but as explained above, that is not the case. At the hearing, Young could not explain the change in terminology from quoted statement to quoted statement above. It is concluded that it was calculated falsely to suggest an apples-to-apples comparison.

The University argues in its post-hearing brief that Teamsters became the representative of the Clerical Unit through an amendment of certification that changed the designation of the exclusive representative from "Coalition of University Employees" to Coalition of University Employees, International Brotherhood of Teamsters"; that such an amendment is appropriate only where "there is no change in the basic identity of the representative [chosen] by the employee"; that the requisite "substantial continuity" formed the basis for granting the amendment in the case at hand; and that therefore "the wage chart cannot be deemed to be inaccurate or misleading." (Quoting *South County Community College District* (1990) PERB Order

No. Ad-215, p. 10; see *Regents of the University of California & Coalition of University Employees* (2010) Representation Case No. SF-AC-48-H, administrative determination at pp. 5-7.) This argument falls flat, however, because the goal of the organizing campaign was for Administrative Professionals to choose representation by "Teamsters Local 2010," not with the Coalition of University Employees," with or without the addition "International Brotherhood of Teamsters," and the Flyer mentions only the former, but not also the latter. Whatever the "substantial continuity" between the two may have been, Teamsters could surely contend that affiliation with them makes a heretofore unaffiliated union a more effective exclusive representative, a contention that appears be borne out in the instant case at least with respect to salary increases before affiliation (0 percent in each of three years) and afterwards (0 percent in the first year followed by 3 percent in each of ten years except one, when there was only a 2 percent increase). In the Flyer, Teamsters point to *their* track record at the University, not to that of the unaffiliated Coalition of University Employees prior to its affiliation with Teamsters. To attempt to hold Teamsters responsible for the lack of across-the-board salary increases prior to affiliation is misleading, especially when done, as here, by sleight of hand, as discussed above.

Next, the University's Web-Posting was also misleading, inaccurate, and untruthful in that it claims that the wage chart "[d]oes not include merit or equity increases for policy covered employees," when the evidence shows that, in fact, at least five of the eight salary increases listed for "policy-covered staff" were merit increases. In its post-hearing brief, the University argues that "even if the footnote regarding [merit] increases is in error, the mistake is insubstantial [and "[i]nsignificant"]

as the wage table accurately compares the pay increases between represented and unrepresented employees." Apart from the fact—discussed below—that this is untrue, given that the wage chart excludes, as the note also states, "step increases for eligible unionized employees," this is also untrue given that the chart compares merit increases that not every unrepresented employee received with across-the-board increases that every represented employee received. Nevertheless, the wage chart suggests that every unrepresented employee received a 3 percent increase in each of 2011-12 and 2015-16 through 2018-19, which almost certainly was not the case.

Moreover, even if the wage chart is read to indicate that *on average*, every unrepresented employee received a 3 percent increase, this has not been proven to be true. Thus, the 2019-20 budget document notes that for 2015-16 through 2017-18, "[m]erit-based increases averaging 3% for non-represented staff . . . were implemented." This statement may only mean that the merit increases that were paid out averaged 3 percent for every unrepresented employee *who received one*, not that they averaged 3 percent for every unrepresented employee *regardless of whether or not they received one*.

Similarly, Napolitano's July 19, 2018 letter states that "[t]he overall budget that is recommended for ["the merit pay program for non-represented staff for fiscal year 2018-19"] should be 3 percent." This statement may mean no more than that the budget would allow every unrepresented employee to receive a 3 percent merit increase if all were eligible and that if not all were eligible, those who were each *could receive* more than that up to an average of 3 percent across all unrepresented employees, including those who were not eligible. By contrast, the statement does not

necessarily mean that, if not all unrepresented employees were eligible for a merit increase, those who were each *would receive*, or that any of them *did receive*, more than 3 percent up to that average across all unrepresented employees, whether eligible or not. In any event, and regardless of how one looks at the wage chart, placing 3 percent merit increases that not every unrepresented employee received next to 3 percent[23] across-the-board increases that every represented employee received was misleading in and of itself, and it was even more so given that the footnote falsely claims that the wage chart does "not include merit or equity increases for policy-covered employees." This "error" was neither "insubstantial" nor "insignificant," but highly likely to influence employee free choice, the University's claim to the contrary notwithstanding. (See *Los Angeles*, *supra*, PERB Decision No. 2566-C, p. 16, quoting *Local 357*, *supra*, 365 U.S. 667, 675 ["'When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it.'"].)

Finally, it was misleading, inaccurate, and untruthful for the University, having included in the wage chart merit increases that were not paid to every unrepresented employee but only to those who met performance and other eligibility criteria, to not also include step increases that likewise were not paid to every represented employee but only to those who met performance and other eligibility criteria. The University's claim that "there was no way to accurately include them in the wage table" is not

[23] Two percent in 2015-16.

believable. Surely the University knows how many employees in the Clerical Unit received a step increase and what the percentage of each increase was each year. Equally surely the University knows how many employees were in the Clerical Unit each year. All it takes to calculate the average step increase per unit member, regardless of actual eligibility, is to add up the individual increases and divide them by the total number of unit members. Not doing so while including, under the reading of the wage chart most favorable to the University, the average merit increase per unrepresented employee, regardless of actual eligibility, was indeed misleading, inaccurate, and untruthful. It was also highly likely to influence employee free choice. (See *Los Angeles*, *supra*, PERB Decision No. 2566-C, p. 16, quoting *Local 357*, *supra*, 365 U.S. 667, 675.)

Thus, "truthfulness" of the employer communication weighs heavily against the University" and "whether [the] employer is responding to a misleading union communication" at a minimum does not weigh in favor of the University, if it does not actually weigh against it. (See *Regents I*, *supra*, PERB Decision No. 2755-H, p. 36.) As discussed above in connection with Teamsters' prima facie case, "mode" and "timing of [the] communication" (posting on the University's "Labor News" website in the middle of Teamsters' organizing campaign) further increased the likelihood that the Web-Posting would influence employee free choice and thus also weigh against the University. (See *id.* at pp. 36-37.) Of all the factors listed in *Regents I* as relevant to assessing the employer's defense, only "frequency" (one posting) possibly weighs in favor of the University, although even that is unclear, given that the posting

remained permanently on the University's web page. (See *id.* at p. 36.)[24] On balance, then, the University has clearly failed to prove its affirmative "operational necessity" defense, primarily because its Web-Posting was not a truthful and accurate response to the Teamsters' Flyer, which has not been proven to have been misleading. The strong likelihood of the Web-Posting to influence employee free choice imposes a commensurately heavy burden on the University "to show its purpose was important and that it narrowly tailored its communication to attain that purpose while limiting influence on employee free choice to the extent possible." (*Id.* at p. 36.) The University has failed to carry that burden.

It has been concluded that the University's Web-Posting has not been proven to have been justified by "the need to accurately counter a union's misleading communication." (*Alliance*, *supra*, PERB Decision No. 2795, p. 72.) In this regard, the present case resides at one end of the spectrum, given that the University's Web-Posting has been shown to have been *inaccurate but* the Teamsters' Flyer has *not* been shown to have been *misleading*. It is clear that an employer has no defense in such a case.[25]

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[24] The ALJ declines to delve into the question of the University's "motive" but notes that he is not convinced that the University had a motive other than to influence employee free choice. (See *Regents I*, *supra*, PERB Decision No. 2755-H, p. 36.)

[25] It is less clear what the outcome will be in cases in which *both* the union communication and the employer response are *accurate*, or *both* are *misleading*. In *Regents I*, the Board suggested that truthfulness of the employer communication and whether the employer is responding to a misleading union communication are independent *factors* and that, therefore, one of them, in connection with the remaining factors, may establish a defense even without the other. (See *Regents I*, *supra*, PERB Decision No. 2755-H, p. 36.) By contrast, the quote from *Alliance* in the first

Teamsters having proven its prima facie case and the University having failed to prove its affirmative defense, it is hereby found that the University violated PEDD section 3550 by posting its Web-Posting in response to the Teamsters' Flyer. [26]

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sentence of this paragraph suggests the two are *elements* and that both of them must be present to establish a defense.

[26] Although in their post-hearing brief, Teamsters focus exclusively on the wage chart, it is worth noting that the University's Web-Posting probably runs afoul PEDD section 3500 also in regards to the "facts" it counterposes to allegedly "inaccurate claims about policy-covered employees' rights and protections." For example, the Web-Posting responds to the "Teamsters Claim" that whereas unionized employees receive "Guaranteed Raises," non-unionized employees receive "Raises when Management Feels like it," by claiming as fact that "UC has a demonstrated commitment to paying market wages and providing regular pay raises to policy-covered employees" and that "[p]eople are at the heart of UC's excellence and fairly compensating employees is a top UC policy." However, Teamsters' claim has not been proven to be an "inaccurate claim[]," and the University's claim has not been proven to be a fact. The latter claim probably is not even capable of being proven to be fact, as it is more in the nature of an opinion than a (potential) fact. Moreover, Teamsters could counter that the University no more than argues that its management regularly feels like giving raises to non-unionized employees, which after all would not contradict Teamsters' claim that non-unionized employees receive raises only "when management feels like it." Similarly, the Web-Posting suggests that it is another "incorrect claim[]" for the Teamsters' Flyer to state that "Union" employees have "Union Representation" whereas "Non-Union" employees are "on [their] own," because "[v]arious personnel and programs exist to support and advocate for employees, including HR [i.e., Human Resources] and ombuds office." Teamsters might wish to counter that employees need union representation most when dealing with the Human Resources office, which inter alia has jurisdiction over discipline matters. In putting together these "Fact[s]," the University appears to have been engaging in precisely the "marshal[ling]" of "arguments" that the Board in *Alliance* held "[PEDD[section 3550 leaves . . . to the employees" but—"[a]bsent evidence sufficient to establish an affirmative defense"—does not allow the employer to engage in. (*Alliance*, *supra*, PERB Decision No. 2795, pp. 70-71.)

REMEDY

It has been found that the University violated PEDD section 3550 and thereby committed an unfair practice under PERB Regulation 32611, subdivision (a). PEDD section 3551 gives PERB authority to remedy violations of sections 3550 and 3553, incorporating by reference the Board's remedial responsibilities initially set forth in section 3541.3, subdivision (i). The Legislature has delegated to PERB broad authority to effectuate the remedies it deems necessary to fulfill the purposes of the Acts within its jurisdiction. (See *Regents I*, *supra*, PERB Decision No. 2755-H, p. 54, citing EERA, § 3541.5, subd. (c); HEERA, § 3563.3; MMBA, §§ 3509, subd. (b), 3510; *City of San Diego* (2015) PERB Decision No. 2464-M, p. 42, affirmed *sub nom. Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 920, rehg. den. (Oct. 10, 2018); *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189-190.) Under PERB's developing precedent regarding the PEDD, it is appropriate to order the University to (1) cease and desist from deterring or discouraging employees from becoming or remaining members of, authorizing representation by, or authorizing dues or fee deductions to Teamsters; (2) rescind and remove the Web-Posting at issue in this case from its "Labor News" and all other websites; and (3) post the traditional notice. (See *Regents I*, *supra*, at pp. 54-56, 61-62; *Alliance*, *supra*, PERB Decision No. 2795-E, pp. 76-77.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in these cases, it is found that REGENTS OF THE UNIVERSITY OF

CALIFORNIA (University) violated the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD), Government Code section 3550 et seq., when it posted a communication dated November 26, 2018 and entitled "UCnet: Facts about pay raises and employment protections for policy-covered staff" (Posting) on its "Labor News" website that deterred and discouraged employees from becoming or remaining members of, authorizing representation by, and authorizing dues or fees deductions to TEAMSTERS LOCAL 2010 (Teamsters).

Pursuant to section 3551 of the Government Code, it hereby is ORDERED that the University, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Deterring or discouraging employees from, becoming or remaining members of, authorizing representation by, or authorizing dues or fee deductions to Teamsters.

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

1. Within 10 workdays of the service of a final decision in this matters, rescind and remove the Posting from its "Labor News" and all other websites.

2. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees customarily are posted, a copy of the Notice attached hereto as Appendix B. The Notice must be signed by an authorized agent of the University, indicating that it will comply with the terms of this

Order. Such postings shall be maintained for a period of 30 consecutive workdays.[27] Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. The Notice shall also be sent to all employees by electronic message, intranet, internet site, or other electronic means customarily used by the University to communicate with employees.

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

[27] In light of the ongoing COVID-19 pandemic, the University shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If the University so notifies OGC, or if Teamsters request in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all relevant parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing the University to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing the University to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing the University to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

RIGHT OF APPEAL

A party may appeal this proposed decision by filing with the Board itself a statement of exceptions and supporting brief, within 20 days after the decision is served. (PERB Regulation 32300.) If a timely statement of exceptions is not filed, the proposed decision will become final. (PERB Regulation 32305(a).) The text of PERB's regulations may be found at PERB's website: www.perb.ca.gov/laws-and-regulations/.

A. Electronic Filing Requirements

Unless otherwise specified, electronic filings are mandatory when filing appeal documents with PERB. (PERB Regulation 32110(a).) Appeal documents may be electronically filed by registering with, and uploading documents to the "ePERB Portal" that is found on PERB's website (https://eperb-portal.ecourt.com/public-portal/). To the extent possible, all documents that are electronically filed must be in a PDF format and text searchable. (PERB Regulation 32110(d).) A filing party must adhere to electronic service requirements described below.

B. Filing Requirements for Unrepresented Individuals

Individuals not represented by an attorney or union representative, are encouraged to electronically file their documents as specified above; however, such individuals may also submit their documents to PERB for filing via: in-person delivery, US Mail, or other delivery service. (PERB Regulation 32110(a) and (b).) All paper documents are considered "filed" when the originals, including proof of service (see below), are actually received by PERB's Headquarters during a regular PERB

business day. (PERB Regulation 32135(a).) Documents may be double-sided, but must not be stapled or otherwise bound. (PERB Regulation 32135(b).)

The Board's mailing address and contact information is as follows:

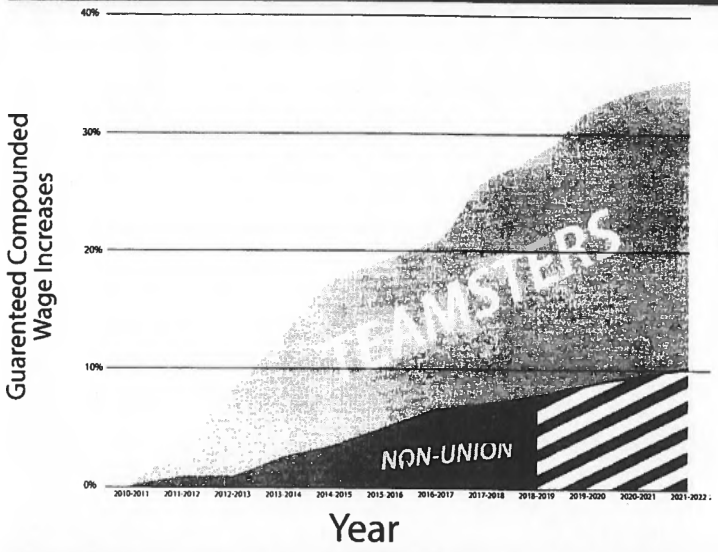
Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
Telephone: (916) 322-8231

C. Service and Proof of Service

Concurrent service of documents on the other party and proof of service are required. (PERB Regulations 32300(a), 32140(c), and 32093). Proof of service forms can be located on PERB's website: www.perb.ca.gov/about/forms/. Electronic service of documents through ePERB or e-mail is authorized only when the party being served has agreed to accept electronic service in this matter. (See PERB Regulations 32140(b) and 32093.)

Appendix A

Live Better · Work Union



Triple the Raises at UC
Teamsters v. Non-Represented

Teamsters: 33.09%

Non-Represented: 10.94%

**Comparison of Unrepresented Worker and Local 2010 Member.*

THE RUN DOWN

Administrative Professionals

Union Vs Non-Union

Guaranteed Raises ☑	☒ Raises when Management Feels like It
Union Contract & Protections ☑	☒ No Protections at Work
Bargaining & Ratification by Members ☑	☒ You have No Voice
Grievance Procedure ☑	☒ No Rights
Union Representation ☑	☒ You're on Your Own

Questions? *Contact Us*

Wendy Rodriguez: *wrodriguez@teamsters2010.org*
Alex Topete: *atopete@teamster.org*

APPENDIX B

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. SF-PE-5-H, *Teamsters Local 2010 v. Regents of the University of California*, in which all parties had the right to participate, it has been found that the REGENTS OF THE UNIVERSITY OF CALIFORNIA (University) violated the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD), Government Code section 3550 et seq., when it posted a communication dated November 26, 2018 and entitled "UCnet: Facts about pay raises and employment protections for policy-covered staff" (Posting) on its "Labor News" website that deterred and discouraged employees from becoming or remaining members of, authorizing representation by, and authorizing dues or fees deductions to TEAMSTERS LOCAL 2010 (Teamsters).

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

A. CEASE AND DESIST FROM:

1. Deterring or discouraging employees from, becoming or remaining members of, authorizing representation by, or authorizing dues or fee deductions to Teamsters.

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

1. Within 10 workdays of the service of a final decision in this matters, rescind and remove the Posting from its "Labor News" and all other websites.

Dated: _____ Regents of the University of California

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.

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, Appeals Office, 1031 18th Street, Suite 207, Sacramento, CA, 95811-4124.

On December 29, 2021, I served PERB Decision No. HO-U-1705-H regarding *Teamsters Local 2010 v. Regents of the University of California*, Case No. SF-PE-5-H on the parties listed below by

____ I am personally and readily familiar with the business practice of the Public Employment Relations Board for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Sacramento, California.
____Personal delivery.
_X_Electronic service (e-mail).

Kena Cador, Attorney
Beeson, Tayer & Bodine
492 Ninth Street, Suite 350
Oakland, CA 94607
Email: kcador@beesontayer.com

Timothy Yeung, Attorney
Sloan Sakai Yeung & Wong LLP
555 Capitol Mall, Suite 600
Sacramento, CA 95814
Email: tyeung@sloansakai.com

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 29, 2021, at Sacramento, California.

J. Seisa
(Type or print name)

J. Seisa
(Signature)