ACSA Negotiators Symposium

Understanding Employees’ Union Representation and Protected Activities Rights

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Janae Novotny and Janet Cory Sommer
Burke, Williams & Sorensen, LLP
1503 Grant Road, Suite 200
Mountain View, CA 94040
Telephone: 650.327.2672
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Janae H. Novotny
Janet Cory Sommer
Burke, Williams & Sorensen, LLP

Overview

Understand employees’
• right to union representation,
• right to engage in other protected activities, and
• protected speech, in order to
Avoid interference /retaliation unfair practice charges ( . . . or prevail before PERB).

Right to Union Representation Under the EERA
Right to Representation

A big issue at PERB recently.

We will discuss new cases and review the basics to help you accomplish your negotiations and HR goals while avoiding unfair practice charges.

EERA Right to Representation

The purpose of the EERA includes, “the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers.”

EERA § 3540

EERA Right to Representation

EERA § 3543: “Public employees shall have the right to form, join, and participate in the activities of employee organizations . . . for the purpose of representation on all matters of employer-employee relations.”
EE RA § 3543.1(a): “Employee organizations shall have the right to represent their members in their employment relations with . . . employers.”

Right to Representation

• Significant recent PERB decision.
• Clarified → two strands of individual representation rights in California public employee labor relations statutes.

Sonoma County Sup. Ct. (2015)
PERB Dec. No. 2409-C

Right to Representation

Employee has a right to union representation in an ADA/FEHA interactive reasonable accommodation process.
(Overturned 2006 decision.)

Sonoma County Sup. Ct. (2015)
PERB Dec. No. 2409-C, Judicial Appeal Pending
1. Traditional “Weingarten rights” strand, and
2. Broader strand based on employees’ statutory right to participate in union activities.

Sonoma County Sup. Ct. (2015)
PERB Dec. No. 2409-C

Weingarten Strand - 40 year old NLRA case
• Right to advice & active assistance of a union rep at employer-initiated disciplinary and investigative interviews that the employee reasonably believes might result in discipline.

Weingarten Strand Under PERB
• Absent the discipline element, employee is entitled to representation in employer-initiated interviews and investigations only in “highly unusual circumstances.”
**Right to Representation**

*Weingarten* Strand Under PERB

“Highly unusual circumstances”

- Employee summoned to a meeting to answer questions about her negative evaluation after the employee withdrew her request that her evaluation be reviewed by an independent reviewer.


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**Right to Representation**

*Weingarten* Strand Under PERB

“Highly unusual circumstances”

- Meeting called by a supervisor to discuss the employee’s request for a job audit.

*UC Regents* (1984)

PERB Dec. No. 403-H

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**Right to Representation**

*Weingarten* Strand Under PERB

- Evaluation meetings (1) where the District gave conflicting information to the employee about whether the evaluation was “scheduled” or “unscheduled” and the employee had a contentious relationship with the District and (2) where the District told her that the meeting was to give instructions to improve performance, but the District had already decided to terminate employee. (*San Diego Unified Sch. Dist.* (1991) PERB Dec. No. 885.)
**EERA's Independent Right Strand**

Employees have a right to union representation:

- In formal or informal grievance meetings.
  

- In other meetings to discuss issues related to contractual entitlements, e.g., leave entitlements.
  

- Before signing documents that will be placed in the personnel file.
  

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**Reasonable Accommodation Process**

PERB's reasoning:

- Resembles the grievance process:
  
  - Orderly discussion between employer & employee or union,
  
  - With give and take, compromise, and

Reasonable Accommodation Process
   - Good faith consideration of the other side’s position,
   - In order to reach a resolution.
   - Involves terms & conditions of employment, and

Sonoma County Sup. Ct. (2015)
PERB Dec. No. 2409-C

PERB’s reasoning:
• Because “a successful interactive process may mean the difference between full employment or being unemployed” . . . employee could benefit from union representation.

Sonoma County Sup. Ct. (2015)
PERB Dec. No. 2409-C

Union’s Right to Represent Employees in the Interactive Process
• Union also has a concurrent right to represent the employee in the interactive process . . .
• Only if employee requests union representation (acknowledges employee’s privacy right).

Sonoma County Sup. Ct. (2015)
PERB Dec. No. 2409-C
As an entity also covered by ADA/FEHA, a union has a duty to keep any medical information confidential.

Sonoma County Sup. Ct. (2015)
PERB Dec. No. 2409-C

Employee’s request for a union rep may be made to the employer or to the union, as long as the employer is informed of the request.

Fremont UHSD (1983)
PERB Dec. No. 301
Right to Representation Parameters

- Employee is not entitled to the union rep of employee’s choice.  
  *CALTRANS* (1994) PERB Dec. No. 1049-S

- Right does not apply to routine conversations, giving instructions, training, correcting work techniques.  

Right to Representation Parameters

- Employer has no duty to inform the employee of the right, but,
- If an employee requests union rep and the employer denies the request and assures the employee that no discipline will result, the employer may not impose discipline as a result of the interview.

Right to Representation Parameters

- Employee only needs to ask for representation once.  
  PERB Dec. No. 1648
**Right to Representation Parameters**

**Investigation/Discipline Interview**
- Must inform employee about nature of the suspected/charged wrongdoing.
- Allow time for employee and union rep to confer about the subject of the interview so that the rep can provide meaningful assistance.

*Jurupa USD (2012) PERB Dec. 2283*

**Right to Representation Parameters**

- No right to representation if the meeting is merely to inform the employee of discipline decision.
- No right to representation if the meeting is only to deliver the discipline notice.

**Right to Representation Parameters**

Employer’s conduct in a meeting to inform an employee of discipline decision may trigger the right to representation.
- Seek additional information to support the discipline.
- Attempt to secure an admission.
- Request that an employee sign an incriminating statement.
Right to Representation Parameters

- Employee may not be disciplined/retaliated against for refusing to attend an investigatory or disciplinary interview where their right to representation is denied.

Right to Representation Parameters

Union Rep’s Role
Must be allowed to speak and act for union on the employee’s behalf free of restraint, interference or coercion . . . . (even if the representative is rude, disrespectful, discourteous.)
State of Cal.
(Dept. of Corrections)
(2012) PERB Dec. No. 2282-S

Right to Representation Parameters

Employer’s options if an employee requests union representation:
- End the meeting and continue the investigation without the employee’s participation.
- End the meeting and reschedule with a representative present.
Right to Representation Parameters

Employer’s options if an employee requests union representation:
  • Continue the meeting only if the employee knowingly and voluntarily agrees to continue without a union rep.

Right to Representation Parameters

Employer’s options if an employee requests union representation:
  • If the employer continues the meeting without knowing, voluntary waiver,
  • Effectively denies the employee’s request for representation and commits an unfair labor practice.


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“Strained” working relationship between Food Service Lead II, Jane, and her Supervisor, John.

On other occasions, Jane had requested CSEA representation in meetings with managers.

Jane was outspoken in her opposition to new software being implemented by Food Services.


Jane said that John threatened an involuntary transfer if she “sabotaged” the new system.

Jane did not initially comply with John’s directives when the program was operational at her site.


John: Unannounced visit to Jane’s site.

John: He did not recall, but “it was possible” that he directed Jane to go into her office.

Right to Representation

• John: Purpose of unannounced visit & meeting was to determine whether Jane understood and intended to comply with his directives.

• Jane: If the meeting is going to be disciplinary, I want a union rep present.


Right to Representation

• John: Did not expressly grant request or allow her to call a CSEA rep. Repeatedly asked Jane to restate his directives and to indicate whether she understood and was following them.


Right to Representation

• Jane: First refused to answer, then restated John’s directives, confirmed she was following them. Began criticizing the program. Tried to call a CSEA rep. Yelled at John to get out of her kitchen.

Right to Representation

• John: Stayed seated in her office because he didn’t appreciate being told by a subordinate to leave “her” office.
• Jane: Left the site, reporting to VP that she felt harassed and ill.

Capistrano USD (2015)
PERB Dec. No. 2440

Right to Representation

• District: Referring to the meeting & prior events, issued written reprimand for “unprofessional, disrespectful, insubordinate and willfully disobedient” behavior and failure to follow directives.

Capistrano USD (2015)
PERB Dec. No. 2440

Right to Representation

• To establish a violation of the right to representation in an investigatory/disciplinary interview, CSEA, the charging party must establish:
## Right to Representation

1. The employee or union invoked the right on the employee’s behalf;
2. For an investigatory meeting;
3. Which the employee reasonably believed might result in discipline; and
4. The employer denied the request.

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## Did Jane Effectively Request Union Representation?

- No magic words required, as long as employer has reasonable notice of the employee’s desire for representation.
- May not even need to mention the union.

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## Did Jane Effectively Request Union Representation?

- No specific grammatical form required. Jane’s “If this is going to be disciplinary,” is an effective request for representation.

*Capistrano USD (2015)*

PERB Dec. No. 2440
**Was The Meeting “Disciplinary” or “Investigatory”?**

- Employer’s stated purpose for the meeting is not controlling.
- Meeting where some “give & take” between employee and management occurs on topic that may affect the employment relationship is an “investigatory interview.”

**Did Jane Reasonably Fear Discipline?**

Totality of the circumstances:
- Employee’s history.
- Previous communications with management on the same topic.

**Did The District Deny Jane’s Request For Representation?**

- John asked about whether Jane understood and would comply with his directives after she asked for a union rep.
- Eventually responding to John was not a waiver of her right to representation.
Remedy

- “Make whole” relief.
- PERB ordered District to rescind and expunge the entire reprimand.

Capistrano USD (2015)
PERB Dec. No. 2440

Interference With Protected Employee Rights

PERB’s “Interference Test”

- Employee must show that employer’s conduct tends to or does harm employee rights.
- If harm is slight, PERB will balance the degree of harm against any legitimate operational defense raised by the employer.
Interference With Protected Employee Rights

PERB’s “Interference Test”
- Evidence of an unlawful employer motive is not required.

Carlsbad USD (1979)
PERB Dec. No. 89

Interference With Protected Employee Rights

District gave employee a letter marked “Confidential.”
- Placed employee on paid adm leave pending a fitness for duty exam, and
- Directed employee “not to contact any members of the faculty, staff or students.”

Los Angeles CCD (Perez) (2014)
PERB Dec. No. 2404

Interference With Protected Employee Rights

- District routinely used the “boilerplate” directive “not to contact any members of the faculty, staff or students” when placing employees on administrative leave.
- Directive did not threaten discipline.

Los Angeles CCD (Perez) (2014)
PERB Dec. No. 2404
PERB concluded that the directive interfered with the employee’s protected rights because it could be reasonably interpreted to prohibit protected activities, such as:

- Contacting union members and reps,
- Filing a grievance,
- Communicating with co-workers regarding concerns about employment conditions.

*Los Angeles CCD (Perez) (2014)*
PERB Dec. No. 2404

“The scope of the directive is overbroad and vague in that the directive fails to define the specific conduct it sought to prohibit in a clear manner. At no time did the District clarify that protected communications were excluded from its scope.

*Los Angeles CCD (Perez) (2014)*
PERB Dec. No. 2404
Interference With Protected Employee Rights

By failing to delineate which communications are lawful or unlawful, the directive would reasonably be construed to mean that all communications, including those made while engaging in protected activity, are prohibited.”

Los Angeles CCD (Perez) (2014)
PERB Dec. No. 2404

Interference With Protected Employee Rights

PERB acknowledges - under some circumstances, the employer may have a right to demand confidentiality but the employer must demonstrate business justification to support interfering with employee protected rights.

Los Angeles CCD (Perez) (2014)
PERB Dec. No. 2404

Interference With Protected Employee Rights

• Avoid using “blanket” confidentiality directives.
• Explain that your confidentiality directive does not include talking to the employee’s union representatives.
• Tailor your directive to each situation.

Los Angeles CCD (Perez) (2014)
PERB Dec. No. 2404
Parties have right to appoint their own negotiators.
No right to dictate members of opposing party’s team.
Limited exception if “clear & present danger” to bargaining process.

PERB Dec. No. 2434

Requires “persuasive evidence” that team member will “make good-faith bargaining impossible.”
District failed to provide evidence that employee’s presence would interfere with bargaining.

PERB Dec. No. 2434
Right to Union Insignia

• Employees have right to wear union insignia on clothing, including uniform
• Unless special circumstances exist, e.g.
  – employee safety,
  – damage to machinery,
  – employee dissension,
  – work distraction,
  – disruption of discipline,
  – damage to public image
  County of Sacramento (2014)
  PERB Dec. No. 2393-M

Union Buttons at School

• School districts have a right to educate students in the classroom without “undue distraction and disruption.”
• Buttons that contain profanity, incite violence or disparage specific individuals will always meet the “special circumstances test.”


Union Buttons at School

• In all other cases, PERB’s objective test requires looking at the button in the context of the classroom to determine whether an objectively reasonable person would find it unduly distracting or disruptive.
• Look to PERB and NLRA precedent, and
• Other distractions prohibited/allowed by the district, e.g. jewelry, clothing.

Union Buttons at School

- Wearing “Double Digit Time” buttons in instructional areas while students are present is protected activity.
- Union buttons - not a “political activity” within the meaning of Ed Code § 7055.


Retaliation For Engaging In Protected Activities

PERB’s Test
Employee must show:
1. The employee engaged in activities protected under the EERA,
2. The employer knew about his protected activities, and
3. The employer took adverse action against the employee because of his protected activities.

Novato USD (1982)

Retaliation For Engaging In Protected Activities

PERB’s Test
When the employee establishes a \textit{prima facie} case, the burden shifts to the employer to show:
1. A non-discriminatory reason for the adverse action, and
2. It would have taken the adverse action even if the employee had not engaged in protected activities.

Novato USD (1982)
“Protected” Activities Under the EERA
- Participating in representation elections.
- Participating in negotiations.
- Participating in the contractual grievance procedure.
- Right to representation in disciplinary and non-disciplinary meetings with the employer.

Teacher Brian Crowell filed an unfair practice charge alleging that the district threatened discipline, gave him an unsatisfactory evaluation and placed him in PAR in retaliation for . . .

- Filing a complaint about the district’s 9th grade curriculum, and
- Investigating the race and age of teachers placed in PAR.

*Berkeley USD (Crowell) (2015)*
*PERB Dec. No. 4211*
• PERB Office of General Counsel concluded that the teacher’s activities were not protected under the EERA and dismissed the charge.

• PERB granted Crowell’s appeal, reversed the dismissal and directed that a complaint be issued.

  Berkeley USD (Crowell) (2015)
  PERB Dec. No. 4211

PERB looked to unique EERA language:

• § 3540 – employees’ right to be represented in their “professional and employment” relationships with public school employers.

  Berkeley USD (Crowell) (2015)
  PERB Dec. No. 4211

• § 3543.2 – gives the exclusive representative the right to consult on the definition of educational objectives, determination of course content and curriculum and textbook selection, to extent the public school employer has discretion over these topics.

  Berkeley USD (Crowell) (2015)
  PERB Dec. No. 4211
Remember at this preliminary stage,
• The charging party only has to allege facts sufficient to state a *prima facie* case, and
• PERB assumes that the essential facts alleged by the charging party are true.

*Berkeley USD (Crowell) (2015)*
PERB Dec. No. 4211

Crowell’s alleged facts showed that he pursued his curriculum complaint on behalf of himself and other teachers concerned about the curriculum.

*Berkeley USD (Crowell) (2015)*
PERB Dec. No. 4211

Because EERA protects teachers right to be represented in their professional relationship with their employer and to have a voice in formulating educational policy, PERB concluded that filing the curriculum complaint is protected activity for *prima facie* purposes.

*Berkeley USD (Crowell) (2015)*
PERB Dec. No. 4211
Crowell showed that he investigated the PAR program as a union site rep on behalf of concerned teachers.

PERB concluded that this activity was also protected under the EERA for prima facie purposes.

Berkeley USD (Crowell) (2015)
PERB Dec. No. 4211

At a formal hearing, Crowell must still prove his factual allegations by a preponderance of the evidence and successfully satisfy his burdens of proof and persuasion.

Berkeley USD (Crowell) (2015)
PERB Dec. No. 4211
**Protected Employee Activities**

- Joining an employee organization.
- Participating in a union organizing campaign.
- Holding union office, serving as a local chapter president or union steward or taking leave to participate in union activities.

**Protected Employee Activities**

- Filing a unit modification petition.
- Reporting safety concerns to the employer or a union representative.
- Political activities by union officers acting in their union officer capacity.

**Protected Employee Activities**

- Opposing a candidate perceived as less favorable to unions.
- Reporting that employees are being assigned too much work and not receiving appropriate overtime pay.
• Filing or threatening to file an unfair labor practice charge.
• Appearing as a witness in PERB proceedings.

• Threatening to seek union assistance.
• Exercising right to union representation in disciplinary and non-disciplinary meetings with the employer.

• Participating in representation elections.
• Participating in negotiations.
• Participating in the contractual grievance procedure.
Speech related to employer-employee relations will generally not lose its statutory protection unless it is so “opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice” as to cause “substantial disruption of or material interference with” the school district’s operations.


- Speech must be “so disrespectful of the employer as seriously to impair the maintenance of discipline.”
- “some leeway for impulsive behavior” . . . “balanced against the employer’s right to maintain order and respect.”

Protected Employee Speech

• District “terminated” a substitute teacher for “rude, argumentative, uncomplimentary and intimidating” phone calls and correspondence with HR staff. Teacher also sought union help.
• PERB – “forceful, not abusive.” Threatened a grievance, subpoena, or contact by the IRS. No “substantial disruption.”


Unprotected Employee Speech

• School bus driver lawfully disciplined for making an unscheduled stop to tell his student riders about an upcoming strike and asking them to support the strike by boycotting school.
• Method of communicating indefensible. PERB did not rule that employees may never communicate with students about a labor dispute.


Retaliation For Engaging In Protected Activities

Probationary Employees
• Employer can terminate with or without cause, BUT
• Probationary employees have the right to engage in protected activities without retaliation.
Retaliation – “But For” Defense


• Probationary teacher
• Complained at Board meetings about after-school programs & contract negotiations.
• Board issued non-reelection notice. (Before the vote, Board inquired whether the employee was on the non-reelect list.)

District’s Defense

• Non-reelection based on principal recommendation.
• Documented history of performance concerns that pre-dated protected activity.

PERB ruling
Affirmed dismissal of unfair practice charge against the District.

THANK YOU
Janae Novotny
Janet Cory Sommer
Burke, Williams & Sorensen, LLP
Janae H. Novotny

Janae Novotny is a partner in the law firm of Burke, Williams & Sorensen, LLP. She was previously a partner at Kay & Stevens. She has 30 years of experience representing cities, special districts, and school districts in labor relations, employment law, public agency access law, and education law. She advises public agencies regarding all matters within the scope of bargaining, including pension and retiree benefits issues, including CalSTRS, CalPERS, and local retirement systems. She represents public agency employers through the negotiations spectrum, from planning and developing negotiations parameters based on statutory fact-finding criteria through negotiations, impasse, mediation and fact-finding hearings. She advises MMBA employers regarding both safety and miscellaneous employee groups. She utilizes both traditional and interest-based bargaining approaches and also serves as a facilitator with employers and unions who have elected the interest-based bargaining approach. She has handled numerous sexual harassment and other employee investigations, grievance arbitrations, unfair labor practice hearings, and fact-finding hearings.

In addition to bargaining with all employee groups under the education employer collective bargaining statues, for school district clients she also handles certificated and classified discipline, dismissal, and layoff, and administrator reassignment and release issues. She advises school districts regarding all Education Code personnel issues, including employee classification and leave issues, as well as discrimination complaints and personnel investigations. Ms. Novotny also advises school districts regarding board governance issues, the Brown Act and Public Records Act, student issues, school district reorganization, federal and state constitutional issues.

Ms. Novotny is a presenter at various conferences, including the CALPELRA Annual Conference, California State Association of Counties, the Association of California School Administrators, the California Association of School Business Officials, and the California School Boards Association trainings and conferences. She contributed to the development of CALPELRA ACADEMY 9, The Impasse Process From Declaration Through Post Fact-finding. Ms. Novotny also conducts trainings in labor relations, interest-based bargaining, employee evaluation and discipline, sexual harassment, disability accommodation, FMLA/CFRA, and other public sector employment issues. She is a contributing author of California Public Sector Labor Relations, Labor and Employment Law Section, State Bar of California, Matthew Bender and a contributing author of Burke’s annual Legal Trends publication. She is an author of CPER’s Pocket Guide To Factfinding. Ms. Novotny earned her Juris Doctor at Georgetown University Law Center.
Janet Cory Sommer

Janet Sommer is a partner in the law firm of Burke, Williams & Sorensen. She was previously a partner at Kay & Stevens. Ms. Sommer focuses on labor relations, employment, education, and other public law matters. She has worked in California public sector law and policy since 1984. Ms. Sommer worked with the California Legislature as Chief Consultant to the Assembly Education Committee. Before turning her focus to labor, employment, and education, Ms. Sommer represented public sector and political clients in education, election, and political matters.

Ms. Sommer acts as a negotiator and represents school districts and other local agencies on a variety of employment, labor relations, education, and other public law issues.

Ms. Sommer provides labor and employment services to public agencies, and has extensive bargaining experience in complex matters including pension and retiree medical benefits. She represents public agencies in all facets of negotiations, including planning and developing negotiations parameters, drafting bargaining proposals, leading negotiations at the table, and handling impasse procedures, including mediation and fact-finding. She advises public agencies in responding to grievance and unfair labor practice charges, and represents them in related hearings and arbitrations. Ms. Sommer also has substantial litigation experience on matters involving public agencies in state and federal court, and administrative proceedings.

Ms. Sommer also conducts trainings in labor relations, employee evaluation and discipline, sexual harassment, and other public sector employment issues. She has presented trainings for the Association of California School Administrators (ACSA), the California School Boards Association (CSBA), the School Employers Association (SEA), the California Association of School Business Officials (CASBO), the Center for Collaborative Solutions (CCS), the National Public Employers Labor Relations Association (NPELRA), the California Public Employers Labor Relations Association (CALPELRA), the Labor and Employment Law Section of the State Bar of California, the California State Association of Counties (CSAC), the League of California Cities, and for many public agency clients. Ms. Sommer is a co-author of the California Public Employee Relations (CPER) Pocket Guide to Factfinding, and a contributing author of Legal Trends.