CLIENT NEWS BRIEF

PERB Admonishes School District for Blanket Prohibitions on Distributing Union Literature

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On October 22, 2018, the Public Employment Relations Board (PERB) upheld an administrative law judge (ALJ) decision finding that the Petaluma City Elementary School District/Joint Union High School District ("District") interfered with employee and organizational rights by: (1) directing employees not to distribute literature "of a political or union nature" on District property, including during non-work time and in on-work areas; and (2) directing employees not to distribute any pamphlets "during the workday" without regard to breaks or other non-work time during the day.

Background

On September 5, 2014, the District administration emailed a memo to school administrators advising them of the "rules for staff handing out flyers." A school site principal forwarded this memo to teachers at his school site. The memo said:

> Teachers may hand out flyers after school when they finish their work obligations. They may not hand them out before school as they are to be in their classroom 30 minutes prior to school starting. They cannot hand out flyers of a political or union nature. They must be off school property when they hand out flyers, not in a driveway or walkway on school campus. The sidewalk in front of a school is public property and they may hand them out there.

On October 10, 2014, a different school site principal sent an email to at least one teacher, saying, in relevant part:

> It is my understanding that handing out pamphlets can only happen outside of your work day. I know the long hours you all put in and that an official 'work day' is not defined. Since an official teacher duty begins at 7:55, we can safely call that the start of your work day. And at the end of the day, the final teacher duty ends around 2:45 so that can be considered the end of your work day. Please hand out pamphlets outside of your work day.

The Petaluma Federation of Teachers, Local 1881 filed an unfair labor practice charge alleging the September 5 and October 10 emails interfered with union members' right to engage in protected activity – i.e., distribute flyers and pamphlets containing union information. An ALJ found that the union proved its allegations and held that both emails constituted interference with protected activity.

In its appeal to PERB, the District made two arguments. First, with regard to the September 5 email, the District challenged the union's evidence of interference, claiming that the union failed to prove "actual harm" to the teacher. PERB rejected this argument. Under *Carlsbad Unified School District* (1979) PERB Dec. No. 89 (*Carlsbad*), the appropriate inquiry "is an objective one which asks not whether any employee felt subjectively threatened or


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intimidated or was actually discouraged from engaging in protected activity, but whether, under the given circumstances, the employer's conduct had discouraged, or *reasonably would discourage*, employees from engaging in present or future protected activity."

PERB will apply a heightened level of review when an employer explicitly bans "union" activity. Specifically, the employer must show an *operational necessity* for the ban, or that there was *no alternative* available to the ban. (*Long Beach Unified School District* (1980) PERB Dec. No. 130.)

Second, with respect to the October 10 email, the District took exception with the ALJ's finding of interference because the email prohibiting the distribution of pamphlets never mentioned anything about the union. PERB also rejected this argument, holding that an employer's directive may be unlawful even without an explicit reference to union or protected activities. Rather, it is unlawful if a union member would reasonably construe the District's directive to prohibit protected activity. Since the October 10 email came soon after the memo was distributed, it was reasonable for the teacher to construe the email to mean it prohibited the distribution of pamphlets containing union information.

PERB further stated that an employee's right to "join, form and participate" in union activities protects "not only union-related speech, but broader categories of employment-related speech, including employees' communications with one another about their wages, hours and working conditions." Accordingly, an employer's rule banning a general category of conduct, that includes both protected and unprotected activity, is presumptively unlawful because "employees should not have to decide at their own peril what information is not lawfully subject to such a prohibition."

Takeaways

- Where a District's directive reasonably would discourage a union member from engaging in protected activity, no showing of actual harm is required to establish interference.
- A general directive that prohibits both protected and unprotected activity presumptively violates the Educational Employment Relations Act because the onus cannot be on union members to interpret which prohibitions are lawful or unlawful.
- Public employers should be careful when crafting directives that may unintentionally affect an employee's ability to engage in protected activity.

For more information about PERB's decision or to discuss protected activity and employee rights generally, please contact the authors of this Client News Brief or an attorney at one of our eight offices located statewide. You can also visit our website, follow us Facebook or Twitter or download our Client News Brief App.