*** * * PARTIALLY OVERRULED San Bernardino City Unified School District (1998) PERB Decision No. 1270 and Carmichael Recreation & Park District (2008) PERB Decision No. 1953-M * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED FACULTY OF CONTRA COSTA COMMUNITY COLLEGE DISTRICT, Charging Party, v. CONTRA COSTA COMMUNITY COLLEGE DISTRICT, Respondent.	Case Nos. SF-CE-3208-E SF-CE-3212-E PERB Decision No. 2652 June 26, 2019

Appearances: Weinberg, Roger & Rosenfeld by Stewart E. Weinberg, Attorney, for United Faculty of Contra Costa Community College District; Atkinson, Andelson, Loya, Ruud & Romo by Marleen L. Sacks, Attorney, for Contra Costa Community College District.

Before Banks, Shiners, and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on cross-exceptions filed by Contra Costa Community College District (District) and United Faculty of Contra Costa Community College District (United Faculty) to a proposed decision of an administrative law judge (ALJ).[1] The ALJ found that the District violated the Educational Employment Relations Act (EERA)[2] when it refused to provide United Faculty with copies of written discrimination complaints against two faculty members that United Faculty exclusively represented, in advance of representing them at investigatory

[1] PERB consolidated Case No. SF-CE-3208-E and Case No. SF-CE-3212-E for purposes of the underlying hearing and decision.

[2] EERA is codified at Government Code section 3540 et seq. Unless otherwise specified, all statutory references are to the Government Code.

interviews. As part of this proposed decision, the ALJ determined that the District failed to establish a countervailing privacy interest outweighing United Faculty's right to obtain the complaints.

In its exceptions, the District claims, among other arguments, that the information contained in the complaints may have been "relevant," but was not "necessary" to United Faculty's representation of its members, and that the complainants' privacy rights outweighed the union's right to information. We reject these arguments for the reasons discussed herein. However, we nonetheless reverse the proposed decision. By providing a union with the right to obtain a copy of the complaint prior to an investigatory interview, rather than reasonable notice of the alleged misconduct, the proposed decision disturbs our precedent's careful balance between employer, union, and employee rights prior to and during an investigatory interview. As discussed below, a union has a right to reasonable notice of the alleged wrongdoing in advance of an initial investigatory interview, but the union does not obtain the right to an underlying written complaint until after the initial investigatory interview.[3]

FINDINGS OF FACT

I. The First Discrimination Complaint

In November 2016, a faculty member requested assistance from United Faculty, explaining that the District had retained an attorney, Georgelle Cuevas (Cuevas), to investigate a student complaint against her, and that the District was requiring her to participate in an investigatory interview with Cuevas. United Faculty agreed to assist. To help prepare for the interview, United Faculty President Donna Wapner (Wapner) requested that the District provide a copy of the student complaint. After the District denied this request, United Faculty

[3] United Faculty excepts solely on the basis of a minor clerical mistake in the proposed decision. This exception is moot in light of our decision to reverse the proposed decision.

Executive Director Jeffrey Michels (Michels) followed up with an e-mail that included a legal justification for the request. Marleen Sacks (Sacks), legal counsel for the District, responded that the District had a policy of not honoring such requests. One of Sacks' primary points was that disclosure of the complaint prior to the interview would compromise the integrity of the investigation, because "by providing a copy of an actual complaint to the accused employee, in advance of an interview, the employee has an opportunity to review the allegations in detail and compose rehearsed (and possibly untrue or misleading) responses to potential questions." In addition to protecting the integrity of the investigation, Sacks stated that the decision to deny the request for information was grounded in "the need to protect the privacy of the complainant [and] the need to protect the student from retaliation."

Prior to the interview, Wapner surmised it would likely pertain to a student complaint that the faculty member allegedly used racially insensitive language in presenting class material, though Wapner was not certain that she was correct in her assumption.

II. The Second Discrimination Complaint

Also in November 2016, Michels learned of a separate discrimination complaint against another faculty member, who similarly had a forthcoming interview with Cuevas and asked Michels to represent her. Again, United Faculty requested a copy of the complaint. The District denied this request, too. Michels and the faculty member were aware that the complaint arose from an encounter with a student at a workshop, in which the faculty member ultimately asked law enforcement officers to remove the student. According to the faculty member, the student arrived 45 minutes late for the workshop, took offense when the faculty member asked the student a question, and alleged that the question was racist.

III. The District's Unwritten Policy of Refusing to Provide Copies of Complaints

The District has no written document reflecting its policy of refusing to provide accused employees or their exclusive representatives with copies of complaints. The District claims its policy is grounded in the Chancellor's Office model policy on discrimination and harassment (Chancellor's Policy), which states:

> Investigative processes can best be conducted within a confidential climate. Therefore, the District does not reveal information about such matters except as necessary to fulfill its legal obligations.

Cuevas testified that the Chancellor's Policy informs her approach and technique in investigations, including her policy of not providing accused employees with copies of complaints against them. District witnesses enumerated several reasons for this policy, including: (1) concern with the asymmetrical power relationship between the student and instructor, the potential for retaliation against the complainant, and the resulting "culture of fear"; (2) maintenance of complainants' privacy, and the chilling effect that disclosure might have on the filing of meritorious complaints; and (3) maintenance of the integrity of the investigation, particularly the concern that disclosure could lead to coaching of the respondent and to the respondent's ability to dispose of incriminating evidence. Cuevas further stated that the substance of the allegations are conveyed to the employee through her questioning at the interview, and that she allows breaks in the questioning if the accused employee wants to consult with her union representative.

The District's complaint form contains no promise of confidentiality to the filing party. The District acknowledges that it cannot promise complete confidentiality or withholding of the complainant's name, as an accused must be able to respond to the complaint. The District

further concedes that its policy does not promise confidentiality to complainants because release of some information on a "need-to-know" basis may be essential to a thorough investigation.

District policy prohibits retaliation against someone who has filed a complaint, referred a matter for investigation, or participated in the investigation of a complaint. Cuevas informs employees subject to investigation of this prohibition.

IV. United Faculty's Asserted Basis for Obtaining Complaints Prior to Investigatory Interviews

Michels testified that United Faculty's interest in representing members of the bargaining unit with respect to investigatory meetings is primarily to protect, advise, and represent them and prepare them for the investigatory interviews. In such meetings, the union attempts to advise employees on their rights and responsibilities in the interview, including the need to be cooperative and truthful, and to prepare them psychologically. In order to competently prepare and represent the employee, the union asserts that it needs to know the nature and scope of the accusations, viz. what will and will not be the subject of inquiry. United Faculty may counsel employees regarding their right to remain silent, if the union determines that there is a risk of criminal prosecution. Michels also expressed concern that non-disclosure of a complaint allows the interviewer to "trick and trap" the employee. He detailed several instances when an investigator solicited information regarding allegations which "veered" from the issues raised by the complaint, or claimed to have incriminating evidence which did not exist.

DISCUSSION

An exclusive representative is entitled to all information that is necessary and relevant to discharge its representational duties. (*Sacramento City Unified School District* (2018) PERB Decision No. 2597, p. 8 (*Sacramento*); *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 17 (*Petaluma*).) The terms

"necessary" and "relevant" are interchangeable, and a union can prove its case by meeting its burden to show either the information's relevance or its necessity. (*Sacramento, supra*, PERB Decision No. 2597, p. 8; *Petaluma, supra*, PERB Decision No. 2485, p 21; *Golden Empire Transit District* (2004) PERB Decision No. 1704-M, p. 6.) PERB uses a liberal, discovery-type standard, similar to that used by the courts, to determine relevance. (*Sacramento, supra*, PERB Decision No. 2597, p. 8; *Petaluma, supra*, PERB Decision No. 2485, p. 16.) Information pertaining to matters within the scope of representation is "so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant and must be disclosed unless the employer can establish that the information is plainly irrelevant or can provide adequate reasons why it cannot furnish the information." (*Petaluma, supra*, pp. 17-18.)

Moreover, a charging party is not required to show that it was harmed by an employer's failure to use adequate care, diligence, or thoroughness in responding to an information request. (*Petaluma, supra*, PERB Decision No. 2485, p. 23.) Thus, in this case, it is of no moment that the two faculty members were able to guess some aspects of the complaints against them, including the complainants' identities. (*Sacramento, supra*, PERB Decision No. 2597, pp. 14-15.)

The District's blanket refusal to provide United Faculty with written discrimination complaints presents three legal issues requiring close analysis: (I) Is a union entitled to information relevant to actual or proposed discipline of a bargaining unit employee when upcoming disciplinary meetings or proceedings are extra-contractual and the union therefore has no duty of fair representation? (II) When a student accuses a represented employee of discrimination or harassment, what are the employer's obligations in balancing the union's

right to information with the complainant's right to privacy? (III) What is the scope of information to which a union is entitled prior to and during an investigatory interview? We proceed to address each of these questions.[4]

I. Information Related to Extra-Contractual Disciplinary Meetings or Proceedings

A union has no duty of fair representation in extra-contractual meetings and proceedings such as investigatory interviews, *Skelly* hearings,[5] civil service board hearings, and reasonable accommodation meetings. (*International Union of Operating Engineers, Local 501, AFL-CIO (Huff)* (2000) PERB Decision No. 1382-S, adopting proposed decision at pp. 16-17.) Nonetheless, a union has a broad right to represent employees in such fora, even in the absence of any duty to do so. (See, e.g., *Capistrano Unified School District* (2015) PERB Decision No. 2440, pp. 11-13 (*Capistrano*); *Sonoma County Superior Court* (2015) PERB Decision No. 2409-C, pp. 14 & 22 (*Sonoma*).) Such representational rights derive from employees' right to be represented "on all matters of employer-employee relations" and from employee organizations' right to represent employees in all such matters, including, significantly, meetings that could adversely affect employment status. (EERA, § 3543, subd. (a);

[4] Our concurring colleague would prefer not to resolve the first two questions. Given that the District has raised multiple defenses, only one of which we find meritorious, we have discretion whether to address the first two issues. While the concurrence cites a fraction of the occasions in which the Board has exercised that discretion one way or the other, we note that our decision is precedential as to each of the three issues. (See, e.g., *United Steel Workers of America, Local 8599 v. Board of Education* (1984) 162 Cal.App.3d 823, 834 [A portion of a decision is generally found to be precedential, rather than mere dicta, if it "was based upon material facts" or "responsive to an argument raised by counsel."].)

[5] In *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*), the California Supreme Court held that public entities must afford their employees with adequate pre-deprivation due process before depriving them of a constitutionally protected property right.

Sonoma, *supra*, PERB Decision No. 2409-C, pp. 14 & 22.) Here, there is no dispute that the District's investigatory interviews triggered such rights.[6]

This case therefore presents a fact pattern that arises at PERB from time to time: a union requests information needed to advise or represent an employee on an important employment matter that falls outside of contract enforcement. As the ALJ noted, a union has a right to information regarding subjects within the scope of representation (often known as "mandatory subjects"), even if the parties are not in negotiations and the parties' collective bargaining agreement does not provide a contractual forum for resolving disputes as to the subject in question. (See, e.g., *State of California (Department of Veterans Affairs)* (2004) PERB Decision No. 1686-S, adopted proposed decision at p. 9, emphasis added ["If the information does ***not*** pertain to a mandatory subject . . . the union has the burden of demonstrating that the information is otherwise necessary and relevant to its 'representational responsibilities.' . . . For example, the claim can be defeated where the information is not presumptively relevant ***and*** it can be demonstrated that the union's sole purpose is to use the information for prosecution of a case in an extra-contractual forum."].)

We therefore hold that there is no categorical rule denying a union access to information pertaining to a mandatory subject, even when the parties are not in bargaining and the union intends to use the information to advise or represent an employee in relation to an extra-

[6] In *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251, 257 (*Weingarten*), the U.S. Supreme Court affirmed the NLRB's holding that an employer must grant an employee's request to have a union representative present at an investigative interview which the employee reasonably believes may result in discipline. While we often refer to employee and union rights relative to representation at meetings as "*Weingarten* rights," union and employee rights under California's public sector collective bargaining laws go well beyond the employee rights identified in *Weingarten*. (See, e.g., *County of San Joaquin (Sheriff's Department)* (2018) PERB Decision No. 2619-M, p. 10.)

contractual issue or forum. Moreover, because discipline is within the scope of representation (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 12; *Total Security Management* (2016) 364 NLRB No. 106, p. 11), we further hold that information pertaining to actual or potential discipline is presumptively relevant, even if the only contemplated disciplinary forum is extra-contractual. This approach recognizes that unions must be able to advise employees about actual and potential discipline, and that denying a union the right to information about proposed discipline in advance of an extra-contractual *Skelly* hearing may frustrate early dispute resolution.[7] Indeed, from early on PERB has recognized that a union's representational functions give it a right to information relevant to advising employees on discipline and on extra-contractual issues such as discipline for protected activity and new Supreme Court interpretations of the Education Code. (*Mt. San Antonio Community College District* (1982) PERB Decision No. 224, pp. 10-12 & fns. 8-9 (*Mt. San Antonio*.)

Mt. San Antonio, supra, PERB Decision No. 224 and *State of California (Department of Veteran's Affairs), supra*, PERB Decision No. 1686-S are not the only Board decisions touching on union requests for information that relate to a mandatory subject but arise in relation to neither contract negotiations nor contract administration. The District cites two such decisions

[7] EERA's very first sentence establishes that unions help to improve personnel management "by providing a uniform basis for recognizing [employee rights] . . . to be represented . . . in their professional and employment relationships with [employers]." (EERA, § 3540.) Building on such principles, PERB has noted the importance of encouraging early settlement of labor disputes, including disputes in front of PERB, which is an extra-contractual forum: "Policies encouraging voluntary settlement of labor disputes, including alleged unfair practices, cannot be overstated. Early resolution of disputes without litigation plays an obvious role in improving employer-employee relations, as it eliminates the cost, acrimony, and time of litigation and allows the parties to craft an agreement that fits their particular circumstance[.] PERB's interest in assisting parties in settling their disputes cannot be gainsaid." (*Santa Ana Unified School District* (2013) PERB Decision No. 2332, p. 19.)

for the proposition that a union categorically has no right to information with respect to an extra-contractual forum: *San Bernardino City Unified School District* (1998) PERB Decision No. 1270 (*San Bernardino*) and *Carmichael Recreation & Park District* (2008) PERB Decision No. 1953-M (*Carmichael*). As we proceed to explain, to the extent *Carmichael* or *San Bernardino* can be read in that manner, they were non-precedential and out-of-step with other PERB precedent protecting a union's ability to obtain information allowing it to intelligently advise and represent employees regarding topics within the scope of representation. We explain.

In *Los Angeles Unified School District* (1990) PERB Decision No. 835 (*LAUSD I*), the Board dismissed an unfair practice charge which alleged that the employer did not provide the union with documents in advance of an extra-contractual *Skelly* hearing. The Board reached this conclusion expressly because the union failed to request the documents, thereby suggesting, without deciding, that the union had a right to request such information. (*Id.* at p. 3.)

The Board returned to the issue in *Los Angeles Unified School District* (1994) PERB Decision No. 1061 (*LAUSD II*). There, the ALJ found that EERA provided the union with a right to disciplinary information in order to assist it in representing a bargaining unit member in an extra-contractual forum, irrespective of whether the union had a duty to represent the employee in that forum. (*Id*. at p. 5.) The employer took exceptions on this exact issue, and each of the three participating Board members wrote separately. Member Caffrey opined that the Board should not establish a categorical rule, emphasizing that "information requested by an exclusive representative for use in representing an employee in an extra-contractual forum can be relevant to its EERA-based responsibilities, thereby requiring the employer to furnish the requested information absent a valid excuse. "It is the relevance of the [] information and not the

nature of the forum for which it is requested, which determines whether the employer is mandated by EERA to provide it." (*Id*. at p. 12, fn. 9.) On the facts before the Board, Member Caffrey voted in the employer's favor, finding that the union waived its right to the information by failing to respond when the employer challenged the information's relevance. (*Id*. at p. 15.) Member Carlyle, in contrast, believed that the employer unlawfully denied the union information to which the union was entitled. (*Id*. at pp. 22-30.) Member Carlyle strongly defended "the ability of the union to represent its members in work-related disciplinary hearings if that is the joint desire, regardless of what the tribunal/forum is called[]" or whether it is mentioned in a collective bargaining agreement. (*Id*. at p. 29.) Member Carlyle noted that he and Member Garcia formed a majority favoring a union's right to information to assist in such extra-contractual fora. (*Id*. at p. 30.) Member Garcia similarly noted his agreement on this point (*id.* at p. 17), while voting to dismiss the case because he believed the employer had provided adequate access to the information in question. (*Id*. at p. 21.) Thus, two Board Members found a right to disciplinary information for use in an extra-contractual forum, while a third Board Member would handle such matters case-by-case.[8]

Four years later, in *San Bernardino*, *supra*, PERB Decision No. 1270, the Board granted the parties' joint motion to withdraw certain parts of the underlying charge, and the Board summarily adopted other parts of the ALJ's 95-page proposed decision. (*Id*. at p. 2.) Without citing *LAUSD II*, the ALJ wrote one paragraph regarding the extra-contractual forum issue, finding the charging party union had requested a witness list for an extra-contractual forum that was outside of the union's duty of fair representation, and that, on the specific facts before

[8] Member Caffrey's opinion appears first in *LAUSD II*, *supra*, PERB Decision No. 1061. For that reason, parties occasionally miss the mark by citing to parts of his opinion even as to areas where Members Carlyle and Garcia formed a majority and disagreed with Member Caffrey.

the ALJ, the union had failed to show that the requested information was necessary and relevant. (*Id.*, adopted proposed decision at pp. 70-71.) The Board reviewed the proposed decision solely on the District's exceptions to those portions of the case it lost, as the union filed no cross-exceptions regarding those portions that it lost. (*Id*. at p. 1.) Because no party filed any exceptions related to the union's claim for information relevant to an extra-contractual forum, the ALJ's decision as to that point remained non-precedential. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, pp. 7-8, fn. 6 [even where Board adopts a proposed decision, ALJ conclusions are binding only on the parties if there are no exceptions to such conclusions and the Board declines to reach the issues sua sponte]; accord *County of Orange* (2018) PERB Decision No. 2611-M, p. 2, fn. 2; *City of Torrance* (2009) PERB Decision No. 2004-M, p. 12.)

The ALJ decision in *San Bernardino* was clearly inconsistent with Member Carlyle and Member Garcia's majority view in *LAUSD II*. It may also have been inconsistent with Member Caffrey's minority view in *LAUSD II*, though arguably the ALJ in *San Bernardino* may have followed a case-by-case framework similar to Member Caffrey's approach. Even though *San Bernardino* was non-precedential on the question of extra-contractual fora, it sowed confusion, particularly when viewed together with the three opinions in *LAUSD II*. One ALJ, for instance, considered *San Bernardino* to have been precedential on information relevant to an extra-contractual forum, and he attempted to harmonize it with *LAUSD II*.[9]

[9] In *State of California (Department of Corrections)* (1999) 23 PERC ¶ 30102, an ALJ found that a union's right to information included the right to obtain the audiotape of an investigation, in order to determine if the employer had violated *Weingarten* or otherwise committed an unfair practice, even though an unfair practice is an extra-contractual matter. The ALJ grounded his decision, in part, on the *LAUSD II* majority supporting a union's right to information for extra-contractual purposes, and, further, on what he viewed as *San Bernardino*'s case-by-case approach. (*Ibid*.)

The first post-*LAUSD II* case in which the Board revisited the extra-contractual forum issue was *State of California (Department of Veterans Affairs), supra, PERB* Decision No. 1686-S. As discussed *ante*, the Board noted that the threshold query is whether information is presumptively relevant because of its relation to a mandatory subject of bargaining, and that the extra-contractual forum defense applies only to information that is not presumptively relevant. (*Id.* at pp. 2-3 & adopting proposed decision at p. 9.) The union was receiving inquiries regarding mandatory subjects such as workplace safety and a potentially hostile work environment, and the Board found that the union therefore needed the information to help advise employees on these important mandatory subjects of bargaining. (*Id*. at p. 2.)[10]

Four years later, the Board summarily adopted an ALJ's proposed decision in *Carmichael, supra*, PERB Decision No. 1953-M, wherein the ALJ found that a union had no right to information for a *Skelly* hearing. The proposed decision, while noting that the ALJ in *San Bernardino* had failed to cite or discuss *LAUSD II*, nonetheless expanded on the *San Bernardino* ALJ's assertions and seemed to suggest a categorical rule denying unions access to information for extra-contractual fora. (*Id*., adopted proposed decision at p. 25 & fn. 35.) When the Board summarily adopted the ALJ's proposed decision, it specifically noted that

[10] The concurrence argues that the union's request in *State of California (Department of Veterans Affairs), supra*, PERB Decision No, 1686-S may have been relevant to contract administration. However, the decision strongly supports a conclusion that mandatory subjects of bargaining are so central to a union's purpose that a union may request information in order to help it protect employees even absent a relevant contractual provision or forum. Not only did the Board lay out the analytic framework as first considering whether information relates to a mandatory subject, see *ante* at p. 8, but, further, the Board adopted this telling assessment: "Although I find nothing in the memorandum of understanding that would support a grievance as to either subject [discrimination or safety], that point is not essential. Both matters are negotiable subjects." (*Id.* at pp. 10-11.) The Board then endorsed the principle that even when a union has no right to grieve workplace safety, the employer must nonetheless provide the union with safety reports, as the union must be able to investigate safety in order to prevent accidents and protect employees. (*Id*. at p. 11.)

there were no exceptions before it regarding the union's right to information. (*Id*. at p. 1, fn. 2.) As discussed *ante*, this means that the ALJ's proposed decision on that point was non-precedential.

In *City of Burbank* (2008) PERB Decision No. 1988-M, p. 9 (*Burbank*), the respondent relied on Member Caffrey's opinion in *LAUSD II*, ignoring that Member Caffrey was in the minority on the point in question. The Board noted that, in any event, *LAUSD II* had no bearing on the *Burbank* facts, which involved an information request related to a contractual arbitration. (*Ibid*.) The Board therefore had no need to plumb the depths of PERB precedent on extra-contractual fora.[11]

In *County of Tehama* (2010) PERB Decision No. 2122-M, the Board adopted a proposed decision that suggested a conflict in Board precedent, between *LAUSD II* and *San Bernardino*, but did not address the other cases noted above. (*Id*., adopted proposed decision at pp. 17-19.) The Board supplemented the proposed decision by citing *Carmichael*, apparently regarding the *Carmichael* ALJ's decision on extra-contractual fora as if it had in fact been a precedential Board holding. (*Id*. at p. 11.) *County of Tehama*, however, did not turn on any of these issues. Rather, the sole information issue arose when the charging party moved to exclude certain exhibits because charging party had submitted an information request to the respondent, and the respondent had not provided documents that it later used as exhibits. On exceptions, the Board agreed with the ALJ's procedural decision to deny this motion because charging party failed to subpoena the documents in question. (*Id*. at pp. 10-11; see

[11] *Burbank* noted that the right to information extends beyond contract negotiations and "applies to labor-management relations during the term of an agreement," which "***includes*** information needed to police and administer an existing CBA" (*Burbank*, *supra*, PERB Decision No. 1988-M, p. 9, emphasis added), but the decision did not resolve whether "labor-management relations during the term of an agreement" also includes non-contractual disciplinary proceedings involving a bargaining unit employee.

also *Regents of the University of California* (1987) PERB Decision No. 640-H, adopted proposed decision at p. 89 [ALJ may exclude evidence based on refusal to comply with subpoena].)

In *City of Redding* (2011) PERB Decision No. 2190-M (*Redding*), PERB adopted an ALJ decision upholding a union's right to obtain investigative reports regarding workplace harassment. The ALJ recounted PERB's decisions in *LAUSD I*, *LAUSD II*, *San Bernardino*, *State of California (Department of Veteran's Affairs)*, and *Carmichael*, noting that *San Bernardino* did not discuss *LAUSD II* and that *State of California (Department of Veteran's Affairs)* had, on the facts before it, rejected the employer's argument that there was no contractual forum relevant to discrimination and workplace safety issues. (*Id*., adopted proposed decision at pp. 15-18 & fn. 26.)

Finally, in *Santa Monica Community College District* (2012) PERB Decision No. 2303 (*Santa Monica*), the Board adopted an ALJ's conclusion that retirement election forms were relevant and necessary to the union's representational duties, and the Board therefore found it irrelevant whether the union intended to use these records to advise employees regarding an extra-contractual forum. (*Id*., p. 2, fn. 2) The forms were necessary and relevant to representational duties primarily because they related to retirement, a mandatory subject of bargaining, and therefore their relevance to the union's duties was presumed. (*Id*., adopted proposed decision at pp. 6-8.) The same is true here, except the mandatory issue is discipline. The presumption makes sense given that a union can use information regarding mandatory topics both to advise employees and to evaluate and craft bargaining proposals. (*Id*., adopted proposed decision at p. 7.) While the union in *Santa Monica* asserted that the election forms would be useful both to advise employees and in negotiations, it is evident that the union

requested the information primarily to advise bargaining unit employees regarding a non-contractual forum, as several employees had received letters regarding their retirement, and those employees had requested assistance from their union. (*Id*., adopted proposed decision at pp. 3-8.) Indeed, the outcome of such a case does not turn on whether a union happens to be in negotiations at the time. Rather, irrespective of whether a union is in bargaining, it should be able to advise employees intelligently about critical employment matters, even if those matters may be resolved in extra-contractual fora.

In *Santa Monica*, the Board described the employer's violation as a failure to provide information "necessary or relevant to the [union's] right to represent bargaining unit employees." (*Santa Monica*, *supra*, PERB Decision No. 2303. at p. 2.) Indeed, the Board has adopted similar phrasing in the past, when a union requests information that it needs to represent employees even in the absence of any duty of fair representation. (See, e.g., *State of California (Department of Veterans Affairs)*, *supra*, PERB Decision No. 1686-S, pp. 1, 2, & 5 [referencing information that is necessary and relevant to a union "to represent its members" and to "determine if there are workplace safety concerns."].) In cases such as the instant one, *Santa Monica*'s broader phrasing makes sense, particularly given that California public sector unions have a right to represent that has no parallel in private sector labor law. (*Capistrano*, *supra*, PERB Decision No. 2440, pp. 13 & 16.) It also makes sense based on our holding in *Sonoma*, *supra*, PERB Decision No. 2409-C, where we found that one central purpose of a union is to advise employees in those interactions that "mean the difference between full employment or being unemployed" (*id*. at p. 20), irrespective of whether the union has a duty to do so. (*Id*. at p. 18, fn. 17.) Indeed, unions' right to advise employees regarding important employment matters (including discipline, safety, discrimination, and retirement) supports the

outcome of information request cases such as *State of California (Department of Veterans Affairs)*, *Mt. San Antonio*, and *Santa Monica*, as well as Member Carlyle's apt observation in *LAUSD II*: "[T]here is nothing more basic than the ability of the union to represent its members in work-related disciplinary hearings if that is the joint desire, regardless of what the tribunal/forum is called." (*LAUSD II*, *supra*, PERB Decision No. 1061, p. 29.)

For these reasons, we clarify that there is no categorical rule denying a union access to information pertaining to a mandatory subject of bargaining merely because it may be used in an extra-contractual forum, meeting, or proceeding. Information pertaining to actual or potential discipline is presumptively relevant, no matter in what forum the disciplinary matter might be resolved. Any other rule would place form over substance given, for instance, that some collective bargaining agreements spell out all *Skelly* rights and all post-discipline dispute resolution proceedings, while in other collective bargaining relationships some or all such meetings and proceedings are extra-contractual. Therefore, when a union is considering whether to exercise its right to represent employees in a meeting or proceeding that may adversely affect employment status, or the union does exercise that right, an employer may not deny the union's related information request on the basis that the meeting or proceeding is extra-contractual or that the union has no duty of fair representation.[12]

II. Balancing A Union's Right to Information with A Complainant's Right to Privacy

When faced with an employer's privacy assertion in response to a union's request for relevant information, PERB, like the National Labor Relations Board (NLRB), uses a

[12] In the private sector, most collective bargaining agreements provide for arbitration of discipline. In contrast, public sector employers and unions often make use of extra-contractual fora to resolve disputes over discipline, as in *LAUSD II*, *supra*, PERB Decision No. 1061. Private sector precedent is not a useful guide given both this significant difference and the fact that California law affords public sector unions a right to represent, as discussed above.

balancing test and places the burden on the employer to demonstrate that the privacy interest outweighs the union's need for the information. (*Los Angeles Unified School District* (2015) PERB Decision No. 2438, pp. 7-8; *Detroit Edison Co. v. NLRB* (1979) 440 U.S. 301, 318-320 (*Detroit Edison*).) Even if the employer meets this burden, the employer may not simply refuse to provide the information, but rather must meet and negotiate in good faith to seek an accommodation of all legitimate competing interests. (*Sacramento, supra*, PERB Decision No. 2597, p. 12; *American Baptist Homes of the West dba Piedmont Gardens* (2015) 362 NLRB No. 139, p. 4, aff'd. (D.C. Cir. 2017) 858 F.3d 612 (*American Baptist Homes*).)

The District asks us to adopt a blanket rule protecting student complaints, akin to the NLRB's former policy exempting witness statements from disclosure, which the NLRB applied from the time it decided *Anheuser-Busch, Inc.* (1978) 237 NLRB 982, until it ruled in *American Baptist Homes*, *supra*, 362 NLRB No. 139, that the *Detroit Edison* balancing test applies to witness statements. PERB never followed *Anheuser-Busch, Inc.*, even when it was extant NLRB precedent, and we decline to adopt the District's proposed rule. Rather, we continue to apply the traditional balancing test in all information request cases in which an employer raises a privacy or confidentiality defense. (*Sacramento, supra*, PERB Decision No. 2597, p. 14, fn. 8, citing *Redding, supra*, PERB Decision No. 2190-M, p. 2 and adopting proposed decision, at pp. 13-14 [If the "employer satisfies its burden of demonstrating that disclosure would compromise privacy rights, PERB engages in balancing test set forth in *Detroit Edison Co. v. NLRB* 440 U.S. 301, 314."].)

PERB has "noted that a union's unique representational functions gives it a right to arguably private information," including workplace complaint investigation reports. (*Sacramento, supra*, PERB Decision No. 2597, p. 11.) Indeed, we have generally reached this

conclusion even when the employer raises "constitutionally significant privacy rights of third parties." (*Ibid*., citing *Redding*, *supra*, PERB Decision No. 2190-M, adopting proposed decision at pp. 16-18.) In those instances in which an employer raises legitimate third party privacy interests in response to a union's request, the employer must meet and confer in good faith to reach an accommodation. (*Sacramento*, *supra*, PERB Decision No. 2597, pp. 12-14.) For instance, an appropriate accommodation may consist of (a) redacting information that is not relevant to the union's purpose in requesting records, or for which privacy otherwise outweighs the union's need; or (b) arrangements in which the union and accused employee agree to use witness statements and complaints only for purposes of defending the accused employee, and to disclose such records to the union's employees, attorneys, or agents only as needed to defend the accused employee. (*Id.* at pp. 12-13 & fn. 7.)

In this case, the District flatly rejected United Faculty's requests. In doing so, the District "frustrated EERA's purposes by converting the applicable procedure from a two-way negotiation to a unilateral decision[.]" (*Sacramento*, *supra*, PERB Decision No. 2597, p. 13.) Indeed, the District admitted at the hearing that it had a blanket policy of not releasing the accuser's complaint form to the accused, at least prior to the investigatory interview, if ever.[13]

[13] The District's primary reason for withholding the complaints at the investigation stage had little to do with privacy. Indeed, the District admitted that in order to conduct a fair investigation, it must allow the accused employee to learn the name of the complainant and the substance of the complaint. Withholding the substance of the complaint initially and then revealing it piece by piece during the course of an interview was the District's chosen investigation technique. In the final part of our discussion, *post*, we discuss how this employer tactic is in tension with an employer's duty to provide reasonable notice regarding the allegations at issue, in order to allow effective *Weingarten* representation. At this stage, however, we simply note that we balance third party privacy concerns against the union's right to information even though the District based its reasoning largely on issues unrelated to complainants' privacy rights.

Where an employer flatly refuses a union's request, without meeting and conferring to seek an accommodation, normally that alone is a sufficient basis to find a violation, without engaging in the *Detroit Edison* balancing test. (*Sacramento, supra*, PERB Decision No. 2597, p. 14.) In this case, however, even though the District's blanket rejection alone violated EERA, we nonetheless consider the third party privacy issues at stake, as part of considering whether to order the District to produce the complaints.

In discussing potential privacy rights of third party students, the parties have primarily asked us to assess the impact, if any, of federal laws including the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA) and federal civil rights laws such as 42 U.S.C. § 2000d et seq. (Title VI) and 20 U.S.C. § 1681 et seq. (Title IX). With the aid of the parties' briefs, we have reviewed these laws, their equivalents under California law, related federal and state regulations, and agency interpretive guidance.

In order to receive federal funds, schools must create policies compliant with the privacy protections that FERPA affords to personally identifiable information contained in certain education records that are both "directly related to a student" and "maintained by" a school or agent thereof. (20 U.S.C. § 1232g(a)(4)(A).) The District, citing several non-California state court decisions and federal district court decisions from around the country, notes that it is unclear whether a student's written complaint about a school employee falls within the above definition of an "education record." Illustrating this uncertainty, the District cites a Florida appellate decision that describes some of the relevant split authority. (*Rhea v. District Board of Trustees of Santa Fe College* (2013) 109 So.3d 851, 856-858 & fns. 3-4 [citing precedent finding that student complaints against employees directly relate to the accused

employees rather than to the complaining students, but declining to follow this line of cases as applied to a student's email complaining about a teacher].)

In analyzing whether FERPA applies, the parties neglect several important strands of analysis. To begin with, FERPA itself excludes employee records. (20 U.S.C. § 1232g(a)(4)(B)(iii).) Furthermore, the United States Supreme Court has interpreted FERPA as protecting "institutional records kept by a single central custodian, such as a registrar[.]" (*Owasso Independent School District v. Falvo* (2002) 534 U.S. 426, 435 (*Owasso*).) Most importantly, California precedent treats records regarding student complaints against school employees as being employment records rather than student records kept by a registrar or other similar central custodian of student records. In *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742 (*BRV*), a media outlet made a public records request for records concerning allegations that a school district superintendent verbally abused students and sexually harassed female students. The court considered whether the records were "education records" under FERPA and "pupil records" under its California equivalent, Education code section 49073 et seq.[14] (*Id*. at ¶. 751-755.) The court treated the inquiry as equivalent under state and federal law, particularly since California's statutes were the state's "statutory response to [FERPA]," and noted that there is scant precedent to guide the inquiry. (*Id.* at pp. 751-752.) Ultimately, *BRV* followed *Owasso* in finding that FERPA protects records that a school regularly collects and maintains about its students, rather than records about student complaints against a school employee:

> Certainly the language of the statute, though broadly written, does not encompass every document that relates to a student in any way

[14] Whereas Education code section 49073 et seq. apply to elementary and secondary schools, in the present case the California equivalent to FERPA, applicable to community colleges, is found at Education code section 76240 et seq.

> and is kept by the school in any fashion. A pupil record is one that 'directly relates' to a student and 'maintained' by the school. We agree with [Owasso] that the statute was directed at institutional records maintained in the normal course of business by a single, central custodian of the school. Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like. [¶] The [document at issue] does not fall within that group . . . [it] was not directly related to the private educational interests of the student. Its purpose was to investigate complaints of malfeasance allegedly committed by the [superintendent].

(*Id*. at pp. 754-755.)

We are bound by California precedent, which, while scant, does not support the proposition that FERPA covers the complaints that United Faculty sought. However, this case does not ultimately turn on whether FERPA and its California equivalent protect personally identifiable information in the student complaints at issue. To the contrary, proving FERPA coverage is neither a necessary nor a sufficient basis for the District to withhold the complaints. FERPA coverage would not be sufficient, because FERPA allows disclosure by consent of a student, and student consent is typically necessary to allow a school to investigate fully the student's complaint. The District, like most other employers, properly informs complainants that if they do not consent to disclosure as needed to investigate, it may be impossible to investigate their complaints. On the other hand, even in the absence of FERPA coverage, we must weigh complainants' interests in having their complaints treated as confidential to the extent possible while still affording all applicable rights to accused employees and their exclusive representatives. (See, e.g., 5 Cal. Code Reg., § 4964 ["All complaints or allegations of discrimination or sexual harassment will be kept confidential during any informal and/or formal complaint procedures except when disclosure is necessary during the course of an investigation, in order to take subsequent remedial action and to conduct ongoing monitoring."].)

To parse the complex interplay between rights held by different parties when a student complains of mistreatment by an employee or by another student, both parties rely on interpretive guidance from the U.S. Department of Education, Office of Civil Rights (OCR). In 2001, OCR published in the federal register revised Title IX guidance (OCR Guidance), after a notice and comment period. The District introduced the OCR Guidance as an exhibit in this matter, and it is viewable online at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf, last accessed June 18, 2019.

The OCR Guidance initially summarizes comments that OCR received and considered, including comments that "raised concerns about the interrelation between [FERPA] and Title IX" and particularly highlighted "the due process rights of individuals, including teachers, accused [by] a student, to obtain information about the identity of the complainant and the nature of the allegations." (OCR Guidance at pp. vi-vii.) OCR notes that commentators asked it to strengthen its guidance in this area because withholding information at the request of a complainant "undermines the fairness of the investigative and adjudicative process." (*Id.* at, p. viii.) OCR states that, in response to such comments, it substantially amended its guidance in several areas. (*Ibid*.) Specifically, the OCR Guidance states that public school employees have constitutional due process rights, public and private school employees may also have additional rights under state law, collective bargaining agreements, faculty handbooks, and other similar sources, and schools must honor these rights. (*Id*. at pp. viii, 17, 18 & 22.)[15]

Where, as here, a student complaint is relevant to a union in representing an employee, it does not follow automatically that the employer must always fully disclose the entire student

[15] In reaching this conclusion, OCR assumes that a student's written complaint against a school employee is a FERPA record, but finds that FERPA does not override employee rights, meaning that discipline may not be possible absent the student's willingness to disclose relevant records. (See, e.g., OCR Guidance at p. viii.)

complaint to the union. Rather, there are two main categories of exceptions. First, a complaining student may insist on confidentiality, even knowing this may limit the school's ability to respond. Indeed, in discussing a school's need to "inform the student that a confidentiality request may limit the school's ability to respond," OCR concludes that a student's insistence on complete confidentiality may mean that "OCR would not expect disciplinary action against [the] alleged harasser." (OCR Guidance at p. 17.) In such circumstances, absent other witnesses willing to come forward, a school may be limited to taking actions other than discipline, or may need to limit its investigation to accusations by other complainants or witnesses who do not insist on complete confidentiality. (*Id*. at p. 18.) Indeed, the District introduced into evidence model policies issued by the California Community Colleges Chancellor's Office, which track this approach:

> Investigative processes can best be conducted within a confidential climate. Therefore, the District does not reveal information about such matters except as necessary to fulfill its legal obligations.
>
> Potential complainants are sometimes reluctant to pursue a complaint if their names will be revealed. The inability to reveal the name of a complainant or facts that are likely to reveal the identity of the complainant can severely limit the ability of the District to respond. Complainants must also recognize that persons who are accused of wrongdoing have a right to present their side of the matter, and this right may be jeopardized if the District is prohibited from revealing the name of the complainant or facts that are likely to disclose the identity of the complainant.
>
> If a complainant insists that his or her name not be revealed, the responsible officer should take all reasonable steps to investigate and respond to the complaint consistent with the complainant's request as long as doing so does not jeopardize the rights of other students or employees.[16]

[16] The District's policies similarly note that if the complainant insists on confidentiality, "the District should take all reasonable steps to investigate and respond to the complaint consistent with the complainant's request, as long as doing so does not jeopardize the rights of other students and employees."

Secondly, where the student is willing to allow disclosure to permit a fair investigation, a school may still propose to the union limits on disclosure that keep complaints confidential to the extent possible while maintaining the union's ability to represent the employee. For instance, a school may propose that the accused and his or her union agree to use a written complaint only for the purposes of responding to it and defending the accused, and to disclose such records to the union's employees, attorneys, or agents only as needed to defend the accused employee. A school may also propose redaction of information not necessary to the accused employee's defense. This may or may not include the student's name, depending on whether student names are relevant to providing a full defense. At times, as in both instances at issue here, a student's name may already be known, or may become quickly identifiable given the nature of the complaint. Other times, as where "an instructor [is accused of making] explicit remarks about his or her personal life in front of an entire class[,]" OCR notes that due process rights do not necessarily entitle the accused employee to learn, during the investigation, which class member made the report. (OCR Guidance, p. 18.)

Such accommodations may assuage a student's concerns sufficiently to convince her to agree to limited disclosure. Even in cases where a student has raised no such concerns and agrees to full disclosure, such accommodations are appropriate under the terms of 5 California Code of Regulations section 4964 and related principles governing discrimination complaints. These same principles apply to any workplace investigation of a discrimination or harassment complaint, irrespective of whether the complainant is a student or another employee. Indeed, the District introduced into the record the California Department of Fair Employment and Housing Workplace Harassment Guide for California Employers, which provides the following guidance:

> Can the investigator keep the complaint confidential?
>
> The short answer is no. Employers can only promise *limited* confidentiality – that the information will be limited to those who 'need to know' . . . . [¶] [I]n the process of investigating, it is likely that people will know or assume details about the allegations, including the identity of the person who complained . . . . since allegations are often clear enough for people to figure out who complained about what . . . . [¶] [W]hile the identity of the person who brought the complaint may in some cases be kept confidential, the complaint itself cannot be.

(Italics in original.)

As noted *ante*, the District eschewed the required nuanced approach described above and instead maintained a blanket policy of nondisclosure, which is inconsistent with its duty to provide information. (*Sacramento, supra*, PERB Decision No. 2597, p. 13.)

III. Scope of the Right to Information in Advance of an Investigatory Interview

In *Capistrano, supra*, PERB Decision No. 2440, p. 12, we noted that in advance of an investigatory meeting, the employer must provide information about "the nature of any charge of impropriety." That information must be sufficient to allow "meaningful" representation. (*Ibid*; *State of California (Department of Corrections)* (1998) PERB Decision No. 1297-S, adopted proposed decision at p. 12.) In order to provide meaningful representation, we note that an employer must permit an employee's representative to participate in the meeting, which may include, for example, reasonable requests seeking to clarify questions and allegations, both prior to and during an investigatory interview. And while the representative cannot turn the interview into an adversarial proceeding, neither may the employer "insist that the representative remain silent or take no active role in the meeting." (*Capistrano, supra*, PERB Decision No, 2440, p. 12.) However, with or without such clarifying questions by a union representative, a critical question remains: to what extent do EERA and other California labor

relations laws require an employer to provide relevant details of the alleged misconduct prior to an investigatory interview?

In *Pacific Telephone & Telegraph Co.* (1982) 262 NLRB 1048 (*Pacific Telephone*), the NLRB found that an employer need not "reveal its case, the information it has obtained, or even the specifics of the misconduct to be discussed. A *general* statement as to the *subject matter* of the interview, which identifies to the employee . . . the misconduct for which discipline may be imposed, will suffice." (*Id*. at p. 1049, emphasis in original.) To the extent that *Pacific Telephone* can be read as always protecting an employer from having to provide specifics of the misconduct to be discussed, we disagree, as our touchstone is what is necessary to allow meaningful representation. Indeed, even under NLRB precedent, an employer does not satisfy its duty to allow meaningful representation if it provides only general information about the charges of misconduct. (*U.S. Postal Service* (2005) 345 NLRB 426, 436 [employer's oral notice in advance of interviews—that one set of charges involved "a vehicle accident you were involved in on [a specific date]," while another set of charges involved "insubordination and/or sabotaging of the [employer's] mission"—were too vague to allow meaningful representation, though in the former case the employer cured this problem by providing an advance copy of all questions to be asked].) We endorse these principles from *U.S. Postal Service*, *supra*, 345 NLRB at p. 436. (See also *Capistrano*, *supra*, PERB Decision No. 2440, p. 12 [citing *U.S. Postal Service*, *supra*, 345 NLRB at p. 436].)[17]

We also take note of a related body of law under the Public Safety Officers Procedural Bill of Rights Act (POBR) (§ 3300 et seq.) and the Firefighters Procedural Bill of Rights Act

[17] While we have repeatedly noted that PERB precedent protects representational rights to a greater extent than corresponding NLRB precedent, we consider NLRB precedent for its persuasive value when it is consistent with California authority. (*Capistrano*, *supra*, PERB Decision No. 2440, pp. 13-15 & 29, fn. 15.)

(FBOR) (§ 3250 et seq.). This precedent interprets a distinct statutory scheme that affords rights to individual public safety employees rather than to unions. Moreover, POBR and FOBR do not feature the same triggering circumstances as exist under PERB precedent. Nonetheless, we consider precedent under these statutes for its persuasive value, to the extent it is consistent with the statutes we enforce. (See, e.g. *City of Davis* (2016) PERB Decision No. 2494-M, p. 43 [noting that "adverse action" under the MMBA encompasses a greater set of employer conduct than "punitive action" under POBR].)

In an early case interpreting POBR, the California Supreme Court found that an accused peace officer employee must receive reasonable pre-investigation information about all misconduct allegations, but need not receive the underlying written complaint until after the employer conducts an initial investigatory interview. (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 572-579 (*Pasadena*).) A quarter century later, the California Court of Appeal explained how *Pasadena* represents a balance between "prompt, thorough, and fair investigations" and fair treatment for the accused employee. (*Ellins v. City of Sierra Madre* (2016) 244 Cal.App.4th 445, 454 (*Ellins*), quoting *Pasadena*, *supra*, 51 Cal.3d at p. 568.) Fair treatment, according to *Ellins*, requires that employees and their representatives be able to prepare for interviews, even though they have no right to full discovery at the pre-interview stage:

> Although the disclosure of *discovery* regarding misconduct in advance of an interrogation might 'frustrate the effectiveness of any investigation' by 'color[ing] the recollection of the person to be questioned or lead[ing] that person to confirm his or her version of an event to that given by witnesses' whose statements have been disclosed in discovery [citing *Pasadena*], advanced disclosure of the *nature of the investigation* has the opposite effect: It allows the officer and his or her representative to be 'well-positioned to aid in a full and cogent presentation of the [officer's] view of the matter, bringing to light justifications, explanations, extenuating circumstances, and other mitigating factors' and removes the

> incentive for 'uninformed representatives . . . to obstruct the interrogation "as a precautionary means of protecting employees from unknown possibilities." [Citing *United States Postal Service v. NLRB* (D.C. Cir. 1992) 969 F.2d 1064, 1071.] Thus, advance disclosure of the nature of the investigation serves *both* purposes of [POBR] by contributing to the efficiency and thoroughness of the investigation while also safeguarding the officer's personal interest in fair treatment.

(*Ellins*, *supra*, at p. 454, emphasis in original.)

Ellins adopted a reasonableness requirement regarding how far in advance of the interview an employer must disclose the nature of the allegations. (*Ellins*, *supra*, 244 Cal.App.4th at pp. 453 & 456.) The court noted that the employer must afford "enough time for the officer to meaningfully consult with any representative he elects to have present," and the court further defined what is reasonable as follows:

> The time necessary to do so may depend upon whether the officer has already retained a representative (or instead needs time to secure one) and upon the nature of the allegations; their complexity; and, if they are unrelated, their number. However, an employing department with reason to believe that providing this information might risk the safety of interested parties or the integrity of evidence in the officer's control may delay the notice until the time scheduled for interrogation as long as it thereafter grants sufficient time for consultation.

(*Id*. at p. 453.)[18]

As in *Ellins*, we find that the amount of advance notice is but one factor, which should be analyzed in context, together with the nature of the allegations and the level of detail the

[18] *Ellins* noted the similarity between POBR rights and representation rights under NLRB precedent, including *Pacific Telephone*, *supra*, 262 NLRB 1048. As noted *ante*, PERB precedent typically protects representational rights to a greater extent than corresponding NLRB precedent, and we do not find the NLRB's discussion in *Pacific Telephone* to describe fully an employer's obligation to provide notice of the nature of misconduct allegations. *Ellins*, while noting that NLRB precedent is not binding for POBR cases, interpreted that precedent as largely supporting a reasonableness requirement. (*Ellins*, *supra*, 244 Cal.App.4th at p. 455.) *Ellins* similarly noted that *Pasadena* had analogized to procedural protections afforded criminal defendants. (*Ibid*.) As with the analogy to NLRB precedent, *Ellins* found that criminal law precedent, while not binding, supports a reasonableness requirement. (*Ibid*.)

employer provides. The overall notice must be reasonable, taking into account both its temporal and substantive aspects. In *Ellins*, the allegations were straightforward: the employer was investigating an accusation that an officer had accessed the California Law Enforcement Telecommunication System (CLETS) to locate an ex-girlfriend without a law enforcement purpose. (*Id.* at p. 450.) The employer delayed giving Ellins detailed notice about the nature of the allegations, fearing he would retaliate against his ex-girlfriend given the unique circumstances. When the employer provided notice of the allegations, it gave significant details, telling Ellins: "[I]n May 2010 [you are alleged to have] inappropriately accessed the [CLETS database] and made numerous inquiries regarding [your] former girlfriend . . . and her relatives." (*Ibid*.) After providing this notice, the employer permitted Ellins up to an hour to consult with his representative. (*Ibid*.) The court found that the employer's notice was reasonable on the whole. (*Id*. at p. 457.)

Based on similar principles, we hold that an employer violates union and employee representational rights when it fails to provide sufficient information regarding alleged wrongdoing to enable a union representative to represent an employee in a meaningful manner during an investigatory interview. This is necessarily a fact-specific inquiry. While our above discussion, including *U.S. Postal Service*, *supra*, 345 NLRB at p. 436, suggests the District likely violated the reasonableness standard by strategically withholding the substance of the allegations, the PERB complaints did not allege that the District failed to provide United Faculty with reasonable notice of the alleged wrongdoing. Nor did the parties litigate that issue. Rather, United Faculty's charges in this matter, and the resulting unfair practice complaints, challenged only the District's failure to provide United Faculty with a copy of the students' written complaints. Thus, United Faculty invites us to alter our precedent

substantially by holding that, between the time an employer announces an investigatory interview and the time the interview occurs, a union may request the underlying complaint, and that the employer cannot lawfully go forward with the interview until it has complied with this request. We decline United Faculty's invitation.[19]

CONCLUSION

For the foregoing reasons, we reject the District's relevance and privacy arguments that would cast doubt on whether it ever has a duty to provide United Faculty with underlying complaints against accused faculty members, but we nonetheless reverse the proposed decision. When representing an employee in an investigatory interview, a union has a right to reasonable notice of the alleged wrongdoing in advance of the interview. However, consistent with *Pasadena*, *supra*, 51 Cal.3d 564 the employer has no obligation to provide the underlying written complaint until after the employer conducts an initial investigatory interview.

ORDER

The unfair practice complaints and underlying unfair practice charges in Case Nos. SF-CE-3208-E and SF-CE-3212-E are DISMISSED.

Member Banks joined in this Decision.

Member Shiners' concurrence begins on p. 32

[19] Notably, an investigatory interview is often scheduled with minimal lead time. Providing a copy of a discrimination complaint may require an employer to work with the accused employee's union over redactions or other privacy accommodations, which may or may not be feasible in the timeframe prior to the interview.

SHINERS, Member, concurring: I agree with my colleagues that the Contra Costa Community College District (District) did not violate the Educational Employment Relations Act (EERA) when it refused to provide United Faculty of Contra Costa Community College District (United Faculty) with written discrimination complaints against two instructors prior to the instructors being interviewed as part of the District's investigations of the student complaints. I also join my colleagues in holding that, prior to an investigatory interview, an employer's obligation to provide information is satisfied by providing the exclusive representative with sufficient information about the nature of the allegations being investigated to allow the union to provide meaningful representation to the interviewed employee.

I do not, however, join the majority decision's discussion of an employer's potential privacy defenses when a student complaint is the subject of a post-investigatory interview information request or its discussion of an exclusive representative's right to information when representing an employee in proceedings not governed by the collective bargaining agreement. My objection to these discussions is that, notwithstanding the parties' extensive briefing on these issues, neither must be resolved to decide this case. As noted above, we conclude United Faculty had no right to obtain the written discrimination complaints from the District before the instructors' investigatory interviews. Thus, there is no need to address the District's possible privacy defenses to production of the complaints after an investigatory interview. And because this case involves only pre-investigatory interview information requests, there is no need to address what right an exclusive representative may have to obtain a complaint when representing an employee in an extra-contractual proceeding following an investigatory interview. Because both issues are superfluous to the resolution of this case, I decline to join the majority's discussion of them. (See *United Teachers Los Angeles (Raines, et al.)* (2016)

PERB Decision No. 2475, p. 5 ["PERB does not issue advisory opinions or generalized declarations of law on issues not raised by the facts of a case *or not necessary for its resolution*."], italics added; see also *Oak Valley Hospital District* (2018) PERB Decision No. 2583-M, p. 10 [where ruling on single exception fully resolved the relevant complaint allegation, the Board declined to address remaining exceptions]; *Capistrano Unified Education Association (La Marca)* (2001) PERB Decision No. 1457, p. 12 (concurring opinion of Member Whitehead) [agreeing that PERB lacked jurisdiction over the charge but declining to join the majority's discussion of the timeliness of the charge because the issue was "unnecessary to the resolution of this matter"]; cf. *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 58, fn. 1 (concurring opinion of Chair Martinez) ["[T]he cardinal principle of judicial restraint is that if it is not necessary to decide more, it is necessary not to decide more"], internal quotations and citations omitted.)

Nonetheless, in anticipation that parties and PERB may rely in future cases on the majority decision, I provide my view on each of the nonessential issues.

First, I agree with the majority's observation that neither the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) nor any of the other federal and state statutes cited by the District categorically bars a public school employer from disclosing a student complaint in response to an exclusive representative's post-investigatory interview information request. Rather, consistent with our longstanding decisional law, the student's privacy interest must be weighed against the exclusive representative's interest in obtaining the complaint for representational purposes on a case-by-case basis. (*Los Angeles Unified School District* (2015) PERB Decision No. 2438, pp. 7-8.)

Second, I strongly disagree with the majority's view that an exclusive representative has the same right to information when representing an employee in an extra-contractual proceeding as it does when negotiating, administering, or enforcing the collective bargaining agreement. It is well-established that "an exclusive representative is entitled to all information that is necessary and relevant to discharge its representational *duties*." (*Sacramento City Unified School District* (2018) PERB Decision No. 2597, p. 8, italics added; *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 17; see also, *Stockton Unified School District* (1980) PERB Decision No. 143, p. 13 ["the exclusive representative is entitled to all information that is necessary and relevant to discharging its *duty* to represent unit employees"], italics added.) The exclusive representative's representational duty applies to contract negotiations, as well as to administration and enforcement of the contract. (*Cal Fire Local 2881 (Tobin)* (2018) PERB Decision No. 2580-S, p. 3; *United Teachers Los Angeles (Raines, et al.), supra*, PERB Decision No. 2475, p. 70.) Correspondingly, we have long held that the exclusive representative's right to information applies during both contract negotiations and contract administration, including grievance processing. (*City of Burbank* (2008) PERB Decision No. 1988-M, p. 9; *Chula Vista City School District* (1990) PERB Decision No. 834, pp. 50-51.) As these decisions indicate, the exclusive representative's right to information is predicated upon the necessity of the information to discharge its representational duty. Because the exclusive representative has no duty to represent employees outside the context of contract negotiations or contract administration, the exclusive representative's right to information accordingly is co-extensive with its duty of fair representation.

The necessary corollary to this conclusion is that when an exclusive representative chooses to exercise its right to represent an employee when it has no duty to do so, it is entitled only to the same information to which the employee is entitled under the circumstances.[20] As the majority acknowledges, an exclusive representative has no duty to represent an employee in an extra-contractual proceeding. (See *Sonoma County Superior Court*, *supra*, PERB Decision No. 2409-C, p. 18, fn. 17 [exclusive representative has no duty of fair representation when representing an employee in an interactive process meeting]; *International Union of Operating Engineers, Local 501, AFL-CIO (Huff)* (2000) PERB Decision No. 1382-S, adopting proposed decision at pp. 16-17 [exclusive representative has no duty of fair representation when representing an employee in an investigatory interview].) Consequently, when an exclusive representative chooses to represent an employee in an extra-contractual proceeding, it is not entitled to obtain any more information from the employer than that to which the represented employee is entitled.[21] (See *Pacific Telephone & Telegraph Co.* (1982) 262 NLRB 1048, 1049 (*Pacific Telephone*) [employee and union representative are entitled to know subject matter of investigation prior to employee's investigatory interview]; cf. *Ellins v. City of Sierra Madre* (2016) 244 Cal.App.4th 445, 455 [public safety officer is entitled to know subject of investigation so he or she may meaningfully consult with a representative before being interviewed].) Consistent with the above principles, I believe prior Board decisions

[20] This is consistent with this Board's recognition that the exclusive representative's right to represent an employee when it has no duty to do so is co-extensive with the employee's right to be represented in such a situation. (*Sonoma County Superior Court* (2015) PERB Decision No. 2409-C, p. 22.)

[21] Under the majority's contrary view, exclusive representatives enjoy the full panoply of representational rights even in circumstances where they have no duty to represent an employee. In my view, neither EERA nor the other statutes under PERB's jurisdiction allow employee organizations to enjoy full representational rights without corresponding full representational duties.

concluding (even in dicta) that the duty to provide information does not apply when an exclusive representative requests information solely for use in an extra-contractual proceeding are correct, and would confirm that as the governing rule in future cases.

The majority's contention that PERB has adopted a contrary rule is not supported by our decisional law. First, the majority's reliance on *State of California (Department of Veterans Affairs)* (2004) PERB Decision No. 1686-S, *City of Redding* (2011) PERB Decision No. 2190-M (*Redding*), and *Mt. San Antonio Community College District* (1982) PERB Decision No. 224 (*Mt. San Antonio*), is misplaced. According to the majority, these decisions establish that an employer must provide information relevant to a mandatory subject of bargaining (in this case discipline) even when there is no contractual mechanism for resolving a dispute over that subject. But the majority's review of these decisions overlooks important facts.

In *State of California (Department of Veterans Affairs), supra*, PERB Decision No. 1686-S the applicable memorandum of understanding (MOU) prohibited discrimination against employees. (*Id*., adopting proposed decision at p. 7.) Although the MOU's anti-discrimination provision did not appear to be subject to the contractual grievance procedure, the MOU did appear to allow the filing of discrimination complaints.[22] (*Ibid*.) After the Department received an investigator's report addressing alleged discriminatory behavior by a supervisor, the union requested a copy of the report to determine whether to file a discrimination complaint under the MOU. (*Id*., adopting proposed decision at pp. 8 & 11.)

[22] Notably, neither the Board nor the ALJ drew a distinction between a grievance and a complaint for purposes of their analysis. (*State of California (Department of Veterans Affairs), supra*, PERB Decision No. 1686-S, adopting proposed decision at p. 7, fn. 3.)

Although the Board stated generally that the report was related to the issues of "workplace safety and freedom from a hostile work environment[]" (*State of California (Department of Veterans Affairs), supra*, PERB Decision No. 1686-S at p. 2), the Board did not overturn the ALJ's finding in the adopted proposed decision that the union requested the report for the purpose of determining whether to file a discrimination complaint under the MOU. Indeed, as later recognized in *Redding*, the Board "rejected the employer's argument that the information was sought for use in an extra-contractual forum." (*Redding*, *supra*, PERB Decision No. 2190-M, adopting proposed decision at p. 16 & fn. 26.) Thus, because *State of California (Department of Veterans Affairs)* involved information requested for possible use in a contractual dispute resolution procedure, it does not support the majority's proposition that similar information would have to be provided for potential use solely in an extra-contractual proceeding. (See *Oak Valley Hospital District*, *supra*, PERB Decision No. 2583-M, p. 9 ["cases are not authority for propositions not considered"].)

Nor does *Redding*, *supra*, support the majority's proposition. There, the union requested an investigator's report addressing allegations of a hostile work environment, harassment, and unfair work assignments so it could decide whether to file grievances based on the report's findings. (*Redding*, *supra*, PERB Decision No. 2190-M, adopting proposed decision at pp. 8-10.) The decision does not indicate that the union sought to use information from the report in extra-contractual proceedings. Thus, just like *State of California (Department of Veterans Affairs), Redding* did not address information sought for use in an extra-contractual proceeding.

The same appears to be true for *Mt. San Antonio*. The requested information there consisted of (1) the names of employees disciplined for distributing leaflets and (2) the home

addresses of part-time instructors who might have been affected by a recent California Supreme Court decision. In cursory fashion, the Board resolved the first issue by noting that among a union's representational duties is the "insistence that employees not be disciplined for engaging in protected activity."[23] (*Mt. San Antonio*, *supra*, PERB Decision No. 224 at pp. 9-10.) The decision does not say, however, whether such discipline would have been subject to a contractual grievance procedure. On the second issue, the Board found the union was entitled to part-time instructors' home addresses even though the instructors were no longer district employees because it pertained to benefits they may have accrued during their district employment. (*Id*. at p. 13.) Again, the decision is silent as to whether failure to provide these benefits could have been subject to the contractual grievance procedure. On the other hand, there also is no indication in the decision that the union requested either type of information for use in an extra-contractual proceeding. As a result, *Mt. San Antonio* also fails to support the majority's proposition.

Nor can *Los Angeles Unified School District* (1994) PERB Decision No. 1061 (*LAUSD II*) bear the great weight the majority places upon it to establish its purported rule of law. In *LAUSD II*, each member of the panel wrote a separate opinion, with two members agreeing the charge should be dismissed. The concurring and dissenting members also agreed the duty to provide information extends to extra-contractual proceedings. Notably, there was no agreement among the panel members on any rationale for the outcome, so there was not

[23] The Board supported this observation by citing *Transportation Enterprises Inc.* (1979) 240 NLRB 551 for the proposition that "[d]isciplinary letters have been held to be presumptively relevant to the union's duty to represent employees." (*Mt. San Antonio*, *supra*, PERB Decision No. 224, p. 10, fn. 8.) But that decision offers no support for the majority here because in that case the union requested disciplinary letters "so that it could better represent employees in grievance proceedings." (*Transportation Enterprises Inc.*, *supra*, 240 NLRB at p. 561.)

even a plurality opinion. As a result, *LAUSD II*'s precedential value is highly dubious. (See *George Lithograph* (1992) 305 NLRB 1090, 1092 [a Board decision "cannot be relied on" when it "consists of three separate opinions by three different Board members"].) And later decisions' declination to cobble the concurrence and dissent into a holding further undercuts *LAUSD II*'s value as support for the asserted rule that the duty to provide information extends to extra-contractual proceedings. (See *Fresno County In-Home Supportive Services Public Authority*, *supra*, PERB Decision No. 2418-M, pp. 31-32 [finding precedential value of prior decision "uncertain" where all panel members wrote separate opinions and the majority's view had not been adopted in subsequent decisions]; *General Electric Co.* (1966) 160 NLRB 1308, 1316 [noting later decisions that deviated from prior decision without overruling it "weakened [the prior decision's] value as a precedent"]; cf. *People v. Dungo* (2012) 55 Cal.4th 608, 628 [when determining the holding of a fractured U.S. Supreme Court decision, the court must find a legal standard that would "necessarily produce *results* with which a majority of the Court from that case would agree"], citation omitted, italics added.) Accordingly, PERB's decisional law does not support the majority's contention that PERB has a long-established rule granting an exclusive representative a right to information for use solely in an extra-contractual proceeding.

I agree with the majority on one point, however: there is no categorical rule barring production of information merely because it *may* be used in an extra-contractual proceeding. Rather, PERB has adopted the "dual purpose rule," under which information must be produced if it is necessary and relevant to fulfilling a simultaneous representational duty, notwithstanding that it also could be used in an extra-contractual proceeding. (*Santa Monica Community College District* (2012) PERB Decision No. 2303, p. 2, fn. 2; *LAUSD II*, *supra*,

PERB Decision No. 1061, p. 12, fn. 9; see *Westinghouse Electric Corp.* (1978) 239 NLRB 106, 110-111 ["If information is relevant to collective bargaining, it loses neither its relevance nor its availability merely because a union additionally might or intends to use it to attempt to enforce statutory and contractual rights before an arbitrator, the Board, or a court"].) The majority appears to believe this rule will always be satisfied with respect to extra-contractual disciplinary proceedings because discipline is a mandatory subject of bargaining. But only "the criteria for discipline and the procedure to be followed[] are matters within the scope of representation." (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 12.) Our decisional law has never held that an employer's individual discipline decisions must be negotiated.[24] Thus, unless the information requested pertains to the criteria or procedure for discipline and thus could be used in support of a bargaining proposal or grievance, it would not have to be provided under the dual purpose rule.

In addition to being unsupported by PERB's decisional law, the majority's expansion of the right to information is inconsistent with the statutes under PERB's jurisdiction. Under the

[24] In the absence of any PERB decision on point, the majority cites *Total Security Management* (2016) 364 NLRB No. 106, where the National Labor Relations Board held the employer had a duty to negotiate over individual discipline decisions. But that case involved a unique set of facts not present here. There, an exclusive representative had been certified but no collective bargaining agreement was in place yet. (*Id*. at p. 2.) The employer stipulated that when it discharged three employees, "it did not apply any uniform policy or practice regarding discipline for their asserted misconduct." (*Ibid*.) Because the disciplinary decisions were wholly discretionary, the Board held the employer was obligated to bargain over them. (*Id*. at p. 10.) Notably, the Board stated that "imposition of discipline on individual employees alters their terms and conditions of employment and implicates the duty to bargain *if it is not controlled by preexisting, nondiscretionary employer policies or practices*." (*Id*. at p. 3, italics added.) Thus, the bargaining obligation recognized in *Total Security Management* applies only when there are no existing policies or practices, e.g., collective bargaining agreement provisions, personnel rules, etc., governing employee discipline. Here—and in by far the majority of cases that come before PERB—there are state laws, employing agency policies, and contractual rules governing employee discipline. Thus, there is no basis to apply *Total Security Management* in this case. Indeed, it is unlikely the factual predicates for applying *Total Security Management* would ever exist in California public sector employment.

majority's rule, an exclusive representative's right to represent an employee entitles the union to use an information request to bypass any rules and procedures an extra-contractual forum may have for obtaining information. But the non-supersession language in our statutes expressly protects such rules from being bypassed. EERA, for instance, provides in relevant part: "This chapter shall not supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system." (EERA, § 3540.) Likewise, the Ralph C. Dills Act governing state employer-employee relations provides, in relevant part:

> Nothing in this chapter shall be construed to contravene the spirit or intent of the merit principle in state employment, nor to limit the entitlements of state civil service employees, including those designated as managerial and confidential, provided by Article VII of the California Constitution or by laws or rules enacted pursuant thereto.

(Dills Act, § 3512.)[25] And the Meyers-Milias-Brown Act governing local agency employer-employee relations similarly states, in relevant part: "Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies that establish and regulate a merit or civil service system." (MMBA, § 3500, subd. (a).)[26]

As the above quoted language indicates, the Legislature's intent in enacting these labor relations statutes was not to diminish the role of established civil service systems. But the majority's overly broad interpretation of an exclusive representative's right to information does just that by necessarily overriding any civil service system's procedural rules for obtaining

[25] The Ralph C. Dills Act is codified at Government Code section 3512 et seq.

[26] The Meyers-Milias-Brown Act is codified at Government Code section 3500 et seq.

information when an employee has union representation in a civil service proceeding.[27] On the other hand, the dual purpose rule, which recognizes a right to information only in contractual disciplinary proceedings but not in those governed by non-contractual rules, creates no conflict between the statutory right to represent and the non-supersession provisions. Because we must strive to harmonize statutory provisions rather than render them inconsistent (*Faulder v. Mendocino County Bd. of Supervisors* (2006) 144 Cal.App.4th 1362, 1370), I would continue to apply the dual purpose rule in extra-contractual forum cases.

Not only is the majority's legal analysis untenable, but the broad rule announced today creates a disparity among public employees facing potential or actual discipline. While an employee has a statutory right to be represented by their union in an extra-contractual proceeding, an employee is not required to exercise that right, and instead may choose self-representation or representation by another. (EERA, § 3543.)[28] Likewise, while an exclusive representative has a right to represent employees in extra-contractual proceedings, it is not required to exercise that right and may decline to represent an employee. Under the majority's rule, employees who elect not to have union representation or who are denied union representation would not be able to obtain as much information in extra-contractual

[27] Indeed, although it is unclear whether the majority intends to overrule *County of Tehama* (2010) PERB Decision No. 2122-M, that will be the result. Starting today, in a case before PERB challenging an employee's discipline an exclusive representative will be able to submit an information request instead of following the process in PERB Regulations for issuance of a subpoena for the production of documents.

[28] The same is true under the other statutes administered by PERB. (Gov. Code, §§ 3502 [MMBA], 3515 [Dills Act], 3524.56 [Judicial Council Employer-Employee Relations Act, codified at § 3524.50 et seq.], 3565 [Higher Education Employer-Employee Relations Act, codified at § 3560 et seq.], 71631 [Trial Court Employment Protection and Governance Act, codified at § 71600 et seq.], 71813 [Trial Court Interpreter Employment and Labor Relations Act, codified at § 71800 et seq.]; Pub. Util. Code § 99563 [Transit Employer-Employee Relations Act, codified at Pub. Util. Code § 99560 et seq.].)

proceedings as employees who have union representation. Adherence to the dual purpose rule, on the other hand, would ensure that all employees who participate in extra-contractual proceedings are able to obtain the same information in those proceedings. Principles of fundamental fairness thus lead me to reject the majority's rule while urging continued application of the dual purpose rule.[29]

Finally, I am puzzled by the majority's implication that an exclusive representative cannot adequately represent an employee in an extra-contractual proceeding when it is unable to obtain information beyond that which the employee may obtain. By holding that an exclusive representative is entitled to sufficient information about the nature of the allegations being investigated to allow the union to provide meaningful representation to an employee during an investigatory interview, the majority necessarily concedes that, with respect to such interviews, the information provided to the employee is sufficient for the union to perform its representational function. But the majority does not explain why in any other extra-contractual proceeding, such as a *Skelly* hearing, interactive process meeting, or civil service commission hearing, a union would need more information than what an employee may obtain. Nor is there any evidence before us to support the majority's claim that early resolution of disciplinary matters would be more likely if the employer were required to provide a union with more information than the represented employee could obtain. Although it is understandable that a union representative would want as much information as possible when representing an employee in an extra-contractual proceeding, I cannot find on the record before

[29] Indeed, by providing a benefit to employees who choose union representation in extra-contractual matters, the majority implicitly signals a preference for exercise of that right over exercise of the statutory rights to self-representation and to refuse to participate in employee organization activities. As a neutral agency, PERB should not encourage or discourage the exercise of particular statutory rights.

us that having more information than that to which the employee is entitled is necessary for the union to fully exercise its statutory right to represent the employee.

In sum, I join the majority in holding that, prior to an investigatory interview, an exclusive representative is entitled to obtain only such information about the allegations being investigated as is necessary under the circumstances for it to meaningfully represent the interviewed employee. I decline, however, to join the rest of the majority decision.