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STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF TEACHERS LOCAL 6262, Charging Party, v. SANTA CLARITA COMMUNITY COLLEGE DISTRICT (COLLEGE OF THE CANYONS), Respondent.	PERB Case No. LA-CE-6616-E **STATEMENT OF EXCEPTIONS OF CHARGING PARTY AFT LOCAL 6262** Trial Dates: October 12-15, 2021 (Hon. Bernhard Rohrbacher)

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I. INTRODUCTION

The Proposed Decision issued by the Administrative Law Judge in this matter is not supported by the trial record and would require the Public Employment Relations Board ("PERB") to overturn decades of jurisprudence, by holding that an employer may harbor and implement a secret intent to implement wage cuts – without a corresponding proposal or notice at the bargaining table – and despite proposing "ongoing" wage increases.

After a four-day trial involving over 1,000 pages of evidence, bargaining history, and numerous witnesses, the Proposed Decision issued by the Administrative Law Judge in this matter instead relies in part on the internet version of the Merriam Webster dictionary to interpret the tentative agreement ("Tentative Agreement") between Charging Party American Federation of Teachers Local 6262 ("Charging Party" or "Union") and Respondent Santa Clarita Community College District (College of the Canyon) ("Respondent" or "COC"). Better interpretive tools are available and required here. The Proposed Decision fails to apply PERB's long-standing jurisprudence regarding the interpretation of a contract negotiated by a labor union and a public employer, and the Administrative Law Judge committed error and abused his discretion by failing to do so here.

On October 7, 2020, the COC proposed "ongoing" wage increases of 5.71 percent for adjunct faculty represented by the Union over a three-year term, with a hold-harmless provision guaranteeing a 1 percent increase as of July 1, 2020, and the Parties signed the Tentative Agreement memorializing these increases on October 8, 2020 (*i.e.*, all increases were retroactive). Nevertheless, as of July 1, 2020, the District imposed ***actual wage cuts*** over bargaining unit members' salaries from the year before. This occurred even though, at trial, the District's witnesses admitted that they never proposed or discussed actual wage cuts. As the trial transcript unambiguously confirms during cross-examination of a COC bargaining representative[1]:

[1] COC Associate Vice President of Business Services Jason Hinkle.

Q: [D]uring bargaining on October 7, 2020, did you advise the Union that as of July 1, 2020, after the tentative agreement took effect, that there would be some employees who would have ***cuts to their pay rates***?

A. No.

Q. Did [Respondent's Chief Negotiator] Diane Fiero give that information, state that to the Union?

A. Not to my recollection, no.

Q. Did anyone else on the College of the Canyons or bargaining team say that to the Union on October 7, 2020 before the bargaining agreement was signed? Excuse me, before the tentative agreement was signed?

A. No.

(Tr.III, 109:3-109:16 (emphasis added).) The wage increases provided under the COC's final bargaining proposal of October 7, 2020 (the "October 7 Proposal") and the Tentative Agreement are not complicated. They provide: (1) an "ongoing" 3.71 percent increase for the 2018-2019 fiscal year, (2) an "ongoing" 2 percent increase for the 2019-2020 fiscal year, and (3) a minimum 1 percent increase for the 2020-2021 fiscal year, upon "placement" on the agreed-upon salary schedules (the schedules themselves are not in dispute) on July 1, 2020 to *avoid wage cuts*.

The COC's explanation at trial in favor of wage cuts, adopted by the Administrative Law Judge, is that the "ongoing" wage increase of 5.71 percent was – as of July 1, 2020 – merely a budgeted allocation and not an actual wage increase for adjunct faculty. This finding constitutes reversible error. Even assuming a budgeted allocation of 5.71 percent, the District never proposed and never communicated to the Union that it intended to impose wage cuts on July 1, 2020. To the degree the COC's witnesses testified differently, there is a simple inference to draw – their testimony is not credible, *because there is no bargaining proposal which provides wage cuts.* Any other interpretation renders the hold-harmless provision of the Tentative Agreement surplusage, causes absurd results in the form of a wage cut which the COC never proposed or discussed, and contradicts PERB's jurisprudence on how bargaining history is used as an interpretive tool.

The COC's position and conduct at the bargaining table are misleading and false, and constitute both bad faith bargaining and a unilateral change to the status quo ante under the Educational Employment Relations Act ("EERA"), Cal. Gov. Code §§ 3540, *et seq.*; and that is what the Union's evidence established at trial. Charging Party therefore respectfully requests that PERB reverse the Proposed Decision and that PERB order, in addition to standard remedies, the restoration of the status quo ante including back pay and benefits, and interest thereon for all bargaining unit employees affected by Respondent's unlawful conduct.

II. STANDARD OF REVIEW

PERB "applies a de novo standard of review and is free to draw its own conclusions from the record." *State of California (Department of Social Services)*, PERB Decision No. 2624-S at p. 11 (2019). As further stated by the California Courts of Appeal regarding the scope of PERB's authority:

> In situations where parties file exceptions to an [Administrative Law Judge]'s proposed decision, PERB reviews the record de novo "and is empowered to reweigh the evidence and draw its own factual conclusions." *California Teachers Assn. v. Public Employment Relations Bd.*, 169 Cal.App.4th 1076, 1086 (2009). PERB is not bound by the ALJ's determination of the weight to be accorded to each piece of evidence. "'[PERB], not the hearing officer, is the ultimate fact finder, entitled to draw inferences from the available evidence.'" *Id.* at p.1087.

City of Palo Alto v. Public Employment Relations Bd., 5 Cal. App. 5th 1271, 1288 (2016).

Nevertheless, as part of its administrative jurisprudence, PERB recognizes that a "a hearing officer who has observed the testimony of witnesses under oath is better positioned than the Board itself to make credibility determinations based on observational factors, such as the demeanor, manner, or attitude of witnesses." *State of California (Department of Social Services)*, PERB Decision No. 2624-S at p. 11 (internal citations and quotations omitted). Therefore, PERB normally will "defer to an ALJ's findings of fact involving credibility determinations "unless they are unsupported by the record as a whole." *Id.* (internal citations and quotations omitted).

Importantly, PERB "accord[s] no deference, however, to those aspects of a credibility determination not based on the ALJ's firsthand observations." *Id.* (internal citations and quotations omitted).

III. SUMMARY OF TESTIMONY AND EXHIBITS ADMITTED AT TRIAL

A. The Tentative Agreement

The Parties executed a Tentative Agreement[2] on October 8, 2020, which (as described in the Complaint) includes the following terms:

(1) "[A]djustments" to "Adjunct Salary Schedules 7, 8, and 9," which "will be 3.71% effective July 1, 2018," (TA ¶ B.1. at CP0136);

(2) "[A]djustments" to "Adjunct Salary Schedules 7, 8, and 9," which "will be 2.00% effective July 1, 2019," (TA ¶ B.2. at CP0136);

(3) "Effective July 1, 2020, new salary schedules 10, 11, and 12 will be implemented," (TA ¶ B.3. at CP0136) (hereafter the "New Salary Schedules"); and

(4) "If upon initial placement on the new salary scale a member would receive less than their current rate of pay, that member will be placed on a step that will ensure at least a 1% pay increase," (TA ¶ L. at CP0138) (hereafter the "Hold Harmless Provision").

On October 8, 2020, the Parties reached agreement on the Tentative Agreement, Appendix A, and the incorporated New Salary Schedules. The Union's bargaining team included Union Vice President of Negotiations and Chief Negotiator Warren Heaton ("Heaton"), Union Vice President of Grievances Member Aaron Silverman ("Silverman"), and Union President Dan Portillo ("Portillo"). Respondent's bargaining team included (among others) COC Acting Deputy Chancellor and Assistant Superintendent/Vice President of Human Resources Diane Fiero ("Fiero"), who served as chief negotiator

[2] The Tentative Agreement contains citation errors which are not in dispute. "Appendix A" of the Tentative Agreements includes the criteria for placement on "new salary schedules 10, 11, and 12" (the "New Salary Schedules"). (TA, Appx. A at CP0139-140.) The Parties do not dispute that Appendix A erroneously refers to "Table A," Table B," and "Table C," and that these are intended to refer to "salary schedules 10, 11, and 12." (Tr. I 86:15-87:10; *see* CP Ex. 3C at CP0117-119.) The Parties also do not dispute that, during bargaining, the New Salary Schedules were entitled "Schedule 7," "Schedule 8," and "Schedule 9," (CP Ex. 3B at CP0117-119), and that these are the identical schedules as those cited in the Tentative Agreement as "schedules 10, 11, and 12." (Tr. I 85:15-24, 86:15-88:4; *compare* CP Ex. 3B at CP0117-119 *and* CP Ex. 4B at CP0130.)

for Respondent, and COC Associate Vice President of Business Services and COC Bargaining Team Member Jason Hinkle ("Hinkle").

B. The Parties' Bargaining History

1. PERB's Factfinding Report dated September 18, 2020 and Panelists' Discussion of "One-Time" and "Ongoing" Wage Increases

In the Summer of 2020 before PERB's factfinding report issued, Silverman testified that bargaining between the Parties was at a "standstill," due to a "fundamental disagreement between both parties as to how we would proceed and reach an agreement over compensation." (Tr. I 69:21-70:2.) In particular, the "key issue was salary increase." (Tr. I 70:5.) According to Silverman, before the factfinding process, the "District was holding firm at . . . a 3.71 percent increase," and Respondent only was offering a "one year deal"; whereas the Union was seeking "more than 3.71 percent," a "multi-year deal," and a "new salary schedule." (Tr. I 70:7-12.)

In the Factfinding Report issued on September 18, 2020 ("Factfinding Report"), Union Panel Member Heaton, COC Panel Member Eileen O'Hare Anderson ("O'Hare-Anderson"), and Administrative Law Judge Najeeb N. Khoury all expressed familiarity and understanding of the concept of an ongoing wage increase to the bargaining unit as compared to a one-time payment (retroactive or otherwise). These two concepts were expressly considered and analyzed. Judge Khoury wrote the following in his Recommendation to the Parties:

> . . . . AFT successfully showed that its represented employees are lagging behind when it comes to wages in comparison with other adjunct faculty and in comparison to other employees at SCCCD, and while a 3.71% raise for 2018-2019 will help this situation, it will not fully remedy it.
>
> . . .
>
> **However, if SCCCD is reluctant to accept this recommendation because it represents an *ongoing* cost, I propose an alternative recommendation of providing AFT members the equivalent of 2% *one-time* money.** This would be a ***one-time expenditure*** of $287,170. While this is not an insignificant sum of money, it is a ***one-time expenditure*** that an entity with a $100 million budget should be able to absorb without much disruption. If the District decides to accept this alternative recommendation, I further

> recommend that the District discuss with AFT various ways to spend these ***one-time funds***, as the funds could be distributed in ways to reward longer term service

(CP Ex. 2 ("Factfinding Report") at CP0102 (emphasis added).)

Judge Khoury thus discussed raises of "3.71%" and "1%" as "ongoing" increases, and he also discussed an alternative of a "one-time" cost of "2%." This distinction was not lost on the COC in its "Concurring and Dissenting Opinion to the Factfinding Report." COC Panel Member O'Hare-Anderson stated in response:

> I agree with the finding regarding the ***proposed 3.71% pay increase to the salary schedule.*** That is consistent with the District's last, best, and [final] offer.
>
> The Recommendation, however, goes farther and offers two options to enhance the District's last, best, and final offer.
>
> **Option 1:** The first option is that the District accept AFT's proposal to pay adjunct faculty members their non-instructional rate (defined as 65% of the instructional rate) for office hours. The Panel Chair sets the cost of this option as roughly 1% or $143,585. This figure does not capture the true cost of this option. ***First, this option creates an ongoing obligation that will compound year after year.*** Second, this does not accurately capture the monetary cost of this option.
>
> This option creates an additional, ***ongoing cost*** of about $100,000 per year. Because this would compound for each year since 2018-19, this would create a payment of about $300,000 (2.1% Total Compensation) in the 2020-21 fiscal year, representing payment for the current year and two years of retroactive implementation and $100,000 (0.7% Total Compensation) ***ongoing each year after that.***
>
> . . .
>
> **Option 2:** The second option is for the District to provide the equivalent of 2% ***one-time money.*** This reflects a ***one-time cost*** of $287,170.

(Factfinding Report at CP0106-0107 (emphasis added, except where in original).) Both Judge Khoury and COC Panel Member O'Hare-Anderson thus concurred in their assessment that a "pay increase" (as stated by O'Hare-Anderson) was "ongoing" as a budgetary or salary increase, and could be distinguished from "one-time money" (as stated by O'Hare-Anderson) or a "one-time expenditure"/"one-time funds" (as stated by Judge Khoury) granted to bargaining unit employees. Union Panel Member Heaton used these terms similarly in his partial concurrence, distinguishing between "one-time" payouts and "ongoing" wage increases. (Factfinding Report at CP0104.)

In sum, Judge Khoury, Charging Party, and Respondent at the time of the Factfinding Report all

demonstrated facility and familiarity with the concept of a "salary increase" (Union's phrase) or "pay increase" (COC's phrase) as an *ongoing* expenditure or cost tied to "pay." The Parties also distinguished between "ongoing" wage increases and a "one time payout"/"one time expenditure" (Union's phrase) or "one-time money"/"one-time cost" (COC's phrase).

2. The COC's Bargaining Proposal of October 7, 2020 and the Parties' Different Version of Events at the Bargaining Table on October 7

a. Charging Party's Evidence – the COC's Final Bargaining Proposal of October 7, 2020 and COC Statements at the Bargaining Table

On October 7, the COC presented its final bargaining proposal (the October 7 Proposal). (CP Ex. 3B at CP0115.) The October 7 Proposal cites to the Factfinding Report, and continued its nomenclature of "ongoing" wage increases and "one-time" payouts. The October 7 Proposal summarizes the Factfinding Report as follows:

> [Factfinding Report][3] to Include Office Hours in Hourly Rate:
>
> - Option 1: $100,000 0.70% **On-Going**
>
> $532,700 3.71% **On-Going**
>
> $632,700 4.41% **On-Going**
>
> . . .
>
> - Option 2: $287,170 2.00% **One-Time**

(CP Ex. 3B at CP0115 (style omitted, emphasis added).) Continuing with the nomenclature of "ongoing" increases and "one-time" payments, the COC's actual proposal – which is on the same page and in the same table, in the cell below – then provides the following increases to each member of the bargaining unit:

[3] The October 7 Proposal refers to the Factfinding Report as a "Mediator Offer." This is a clerical error. The proposal's summary of "Option 1" and "Option 2" are identical to the Judge Khoury's Recommendation in the Factfinding Report.

$532,700 3.71% One-Time 2018-19 Retro
$532,700 3.71% One-Time 2019-20 Retro

$532,700 **3.71% On-Going** In Tentative

. . .
$287,170 2.0% One-Time 2019-20 Retro
$287,170 **2.0% On-Going** 2020-21

$ 819,870 **5.71% On-Going**

(CP Ex. 3B at CP 0115 (emphasis added).) Consistent with the use of these words in the October 7 Proposal, Silverman and Heaton testified the following regarding the conversation at the bargaining table which occurred on October 7:

(1) With respect to the proposal's inclusion of "3.71% **On-Going** in Tentative," that the COC stated this figure represented "ongoing compensation money"; and specifically that "[o]ngoing meant that it began with the year offered and would continue throughout the entirety of the proposal," (Tr. I 78:25-79:7 (Silverman); Tr. II 30:11-21 (Heaton));

(2) With respect to the proposal's inclusion of "3.71% **One-Time** 2018-19 Retro" and 3.71% **One-Time** 2019-20 Retro," that the COC stated these figures represented "the addition of the 3.71 percent of one-time . . . for the 2018-19 and 2019-2020 in addition to the ongoing offer in the tentative of 3.71 percent," (Tr. I 79:23-80:1 (Silverman); Tr. II 29:23-29:9 (Heaton));

(3) With respect to the proposal's inclusion of "2.0% **On-Going** 2020-21," that the COC stated that this figure represented "the dollar amount for the two percent ongoing money that would be allocated to AFT for the 2020-2021 academic year and throughout the duration of the TA," (Tr. I. 80:11-13 (Silverman); Tr. II 31:18-24 (Heaton));

(4) With respect to the proposal's inclusion of "2.0% **One-Time** 2019-20 Retro," that the COC stated that this figure represented an "additional two percent offered by the District to AFT,

> both in terms of one time retro pay for 2019-2020 and then including that two percent for ongoing money in the 2020-2021 academic year," (Tr. I 80:16-17 (Silverman); Tr. II 31:13-17 (Heaton).)

To summarize, the District repeatedly stated at the bargaining table that the word "ongoing" in the October 7 Proposal was intended to be interpreted as "continuous compensation." (Tr. I 81:10-11.) Equally as important (and contrary to Respondent's arguments at trial, at the bargaining table and in its October 7 Proposal, the District never stated that the *ongoing* nature of the adjunct faculty wage increase was an aggregated percentage which had no individual application and which was conditioned on an estimated dollar cost *which may never be actualized upon placement of faculty members on the new salary schedules*. (Tr. I 81:7-16, 93:8-12.) In addition, the District did not state that the actual, *ongoing* increases *to each member of the bargaining unit* would be converted to *wage cuts* as of July 1, 2020, when the new salary schedule was implemented and the Hold Harmless Provision of the Tentative Agreement was activated. (Tr. I. 81:19-24.)

At the bargaining table on October 7, the Parties discussed the implementation of the New Salary Schedules which would take effect on July 1, 2020.[4] (Tr. I 84:15-22; *see* CP Ex. 3C at CP 0117.) Silverman testified that the COC stated that the application of the New Salary Schedules would work in conjunction with the Hold Harmless Provision of the Tentative Agreement as follows:

> At the bargaining table, the conversation was that the hold-harmless provision would be applied to those adjuncts in those steps and columns that, without the hold harmless provision, would not have received a one percent increase on the new salary schedule for 2020-2021 from the 2019-2020 salary schedule.

(Tr. I 151:12-17.) Silverman further testified:

[4] Again, the Parties do not dispute that the COC's proposal of October 7 entitles the new salary schedules as "Schedule 7," "Schedule 8," and "Schedule 9," (CP Ex. 3B CP0117-119), and that these are the identical schedules as those cited in the Tentative Agreement as "schedules 10, 11, and 12," on the one hand, and in Appendix A as "Table A," "Table B," and "Table C," on the other. (Tr. I 85:15-24, 86:15-88:4; *compare* CP Ex. 3B at CP0117-119 *and* CP Ex. 4B at CP0130.)

Q: . . . [D]id the District say how the hold-harmless provision would be applied as to bargaining unit members [who] would be impacted?

A: Yes, it would apply to the 2020 to 2021 academic year, so that when adjunct are placed on [the] new salary schedule, they would get at least a salary increase instead of a salary decrease or an increase that is at least one percent.

Q: At any point at the bargaining table, did the District say that . . . it was going to apply a one percent increase over the 2017-2018 salary range irrespective of whether this caused a decrease from 2019-2020?

A: No.

Q: Did the District say that there might be a reduction in pay . . . for any employee based on how they were paid prior to July 1, 2020 as compared to how they were paid after July 1, 2020?

A: No.

(Tr. I. 88:17-89:25.) Heaton similarly testified that the District never stated that the "ongoing 5.71 percent increase" would end during the Parties' Tentative Agreement. (Tr. II 33:10-13.) And Silverman confirmed that the COC representatives made these statements during bargaining on October 7, 2020, before the Tentative Agreement was signed:

Q: When did this person from the [COC] say that the one percent on the hold-harmless was to be based off of the 2019-2020 schedule?

A: That would be in our conference on October 7th, 2020.

(Tr. I 114:25-115:5.) Chief Negotiator Heaton concurred with Silverman's understanding of the District's October 7 Proposal, that it involved an ongoing increase of 3.71 percent of salaries beginning retroactively in 2018-19 and extending "to the present," in addition to an ongoing increase of 2 percent beginning in 2019-20 retroactively and extending "through to the present." (Tr. II 19:8-20:13.) Regarding the Hold Harmless Provision, Heaton testified:

The one percent would be on top of the 3.71 and two percent and would take effect in July '20-21. This was very appealing to us and is the reason ultimately that we took the offer

because at the time, 2020-2021 negotiations would be beginning soon.

> [Cost of Living Allowance increases were] . . . set by the State, [and they were] going be zero for 2020-2021, so we felt this was a way where we could give our members at least a one percent increase for '20-2021.

(Tr. II 23:8-22.) Put simply, as Heaton testified regarding the overall effect of wage increases on July 1, 2020: "when an individual was placed on the salary schedule . . . they had to have at least a one percent increase over their 5.71 percent salary that was in place in '19-20." (Tr. II 37:4-8.) The District expressly confirmed Heaton's understanding at the bargaining table with the Union on October 7. Heaton testified:

> I specifically asked Jason [Hinkle] if the hold-harmless would be applied to the pay increase or the 3.71 percent, the two percent, so that the one percent would be over and above the '19-20 pay. And his answers was in the affirmative, yes, those were ongoing pay increases and that one percent would be added to that. So that if any individual, when they were placed in the step and column that corresponded to their semesters of service and their level of education, would receive less than a one percent increase over their '19-20 rate, then they would be bumped up so that they would get at least a one percent increase.
>
> It could mean that the individual ends up with a 1.9 percent increase because they might have been a tenth of a percentage short, meaning at least one percent.

(Tr. II 53:14-54:5, 55:25-56:15.)

b. Respondent's Evidence – the COC's Denial that it Proposed Either Retroactive or Ongoing "Wage Increases" of 3.71 Percent and 2 Percent; and Respondent's Admitted Failure to Propose Wage Cuts as of July 1, 2020

i. The COC Witnesses Testify that the 5.71 Percent Increases are not "Ongoing" for Individual Faculty

Throughout the hearing, the COC witnesses maintained that the October 7 Proposal solely offers an "ongoing" increase based on an "aggregate" estimate of the cost of implementing the New Salary Schedules. Notwithstanding this testimony, which is not supported by the October 7 Proposal or any other document, the Parties do not dispute the impact of the COC's implementation of the New Salary Schedules was that certain employees received an actual wage *cut* or wage *reduction* comparing their actual 2019-20 salaries and their actual 2020-21 salaries. The Parties also do not dispute that the COC failed to propose or advise the Union that a wage cut would occur on July 1, 2020 compared to their actual salary in the

2019-20 fiscal year. (Tr. III 109:4-16.) As Hinkle testified under cross-examination:

> Q: [D]uring bargaining on October 7, 2020, did you advise the Union that as of July 1, 2020, after the tentative agreement took effect, that there would be some employees who would have *cuts to their pay rates*?
>
> A. No.
>
> Q. Did [Respondent's Chief Negotiator] Diane Fiero give that information, state that to the Union?
>
> A. Not to my recollection, no.
>
> Q. Did anyone else on the College of the Canyons or bargaining team say that to the Union on October 7, 2020 before the bargaining agreement was signed? Excuse me, before the tentative agreement was signed?
>
> A. No.

(Tr.III, 109:3-109:16 (emphasis added).)

ii. The COC's Salary Schedule Comparison and the Parties' Differing Testimony at Hearing regarding its Meaning

During bargaining on October 7, the COC emailed an Excel spreadsheet to the Union titled "New Salary Schedule Comparison" ("COC Salary Comparison") which demonstrated according to Respondent the nature of the "5.71% On-Going" increase as stated in the October 7 Proposal. (*See* CP Exs. 3D, 3E, 3F.) The Parties' testimony differed regarding whether and how the COC Salary Comparison was discussed by the COC in bargaining on October 7. In addition, the Parties do not dispute that the COC Salary Comparison contains significant errors. For example, although the Parties' agreed-upon salary schedules contain three different salary schedules, (*see* CP Ex. 3C at CP0117 ("Schedule 7"), CP0118 ("Schedule 8"), and CP0119 ("Schedule 9"), the COC Salary Comparison incorrectly states that the "2017/18 Base" and "2019/20 Base" rate for each is the same (*i.e.*, the "base" rates for each schedule are not identical).

On its face, the COC Salary Comparison includes four different salary rate increases, which are identical in each of the three salary schedules, and includes a "Base Increase" of 7.8 percent. (CP Exs. 3D

at CP0121, 3E at CP0123, 3F at CP0125 (emphasis added).) Hinkle testified regarding the "Base Increase" that it had "nothing to do with the 3.71 percent or the 2 percent or anything else . . . It is just a number to start the new salary schedule." (Tr. III 135:5-9, 17-21.) In contrast, Heaton testified:

> . . . [a]ll [the COC Salary Comparison] demonstrates to me is that the spreadsheet acknowledges that there will be some cells that, if a person was placed on those cells, they could end up earning less than their '19-20 rate.
>
> And this is their analysis. I'm not, you know, I can't speak to why they did the analysis this way or what the formulas are. This is just what is, to me, that's what they're trying to demonstrate here, that they realize that some individuals, if they were placed in this cell, would have to be placed in a different cell in order not to receive a pay decrease over the '19-20 rate.

(Tr. II 43:5-16.) Heaton provided his inferences and calculations at bargaining as follows:

> The spreadsheet that show's Jason[Hinkle]'s – for lack of a better word – homework all indicate that the base increase is 7.8 percent. My inference . . . is that [it] includes 3.71, two percent, and 1.9 percent compounded. That's why it's 7.8. Instead of just adding them up, it's compounded for each year.

(Tr. II 84:3-11.) Heaton thus inferred during bargaining that the *purpose* of a "base rate" of 7.8 percent was "to populate the first cell to ensure that the other cells didn't go negative" in the salary schedule. (Tr. II 135:4-10.) Importantly, even this inference does not take into account that wage increases for individual faculty *cannot be determined* using the COC Salary Comparison without faculty *placement* information. As Heaton testified:

> There are over three thousand people in the [bargaining unit] pool, three to six hundred of them teaching a semester. We would have no way of knowing. But we also -- The Union doesn't keep records of the years of teaching service or their level of education. So, we would have no way of knowing which individuals would end up in which cell. And that information was not shared with us.
>
> Let me rephrase; that information was not shared with us during bargaining.

(Tr. II 43:17-44:4.) As described below, "placement information" only was provided by the COC after the Tentative Agreement was signed. (*Compare* CP Ex. 5 at CP0138 (e-signed by Dan Portillo at "October 8, 2020 20:09 PDT") *with* CP Ex. 7 at CP0146.) And, equally as important, the Union did not discover that its members had received actual wage cuts as of July 1, 2020 until December 2020, two months after the

Tentative Agreement was signed on October 8, 2020.

iii. The Tentative Agreement and the COC's Notice to the Union of Bargaining Unit Member Placement on the New Salary Schedules

The Tentative Agreement was signed by the Union at 8:09 p.m. on October 8, 2020. (CP Ex. 5 at CP0138 (e-signed by Dan Portillo at "October 8, 2020 20:09 PDT").) Shortly thereafter, at 9:23 p.m., Fiero emailed Heaton "the new salary schedules," in addition to "placement information" for faculty on the New Salary Schedules. (CP Ex. 7 at CP0146.) Fiero originally testified that she had provided the "placement information" to the Union before President Portillo signed the Tentative Agreement. (Tr. III 172:6-15.) Fiero's testimony was false, which Fiero and Hinkle later conceded.[5] (Tr. III 130:23-131:1, 137:15-20, 187:3-188:9.)

The following day on October 9 at 1:35pm, Heaton wrote to Fiero and stated:

> We have reviewed the salary schedules and they appear to be correctly updated. However, there does seem to be an error in the document titled '2020-2021 New Salary Schedule Placement Information' – Section 2.C. Hold Harmless. Jason [Hinkle] appears to be placing people one step below where they should be. ***He does not seem to be placing adjuncts on a step that gives the adjunct at least a 1% increase as is required by Article 10.L.***

(CP Ex. 7 at CP0146 (emphasis added).) In response, Hinkle wrote to Fiero and stated: "***I placed them on a step to ensure no loss, I didn't do at least 1%.*** We can adjust that by moving them up one step." (CP Ex. 7 at CP0145 (emphasis added).) And, Fiero then wrote back by email to Heaton on October 9, forwarding the above statement from Hinkle, and stated to Heaton:

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[5] In addition, Respondent's Exhibit E was submitted by the COC purportedly to demonstrate the initial faculty placement information placed in the Parties' bargaining Dropbox during bargaining, but the record does not establish this fact. Fiero testified that Respondent's Exhibit E then was replaced in the shared Dropbox with Charging Party's Exhibit 10B, stating: "I think I saved it with the same name, and unfortunately, it overrode the document. So, I think that's what happened." (Tr. III 176:8-13.) Fiero did not alert the Union when she placed the revised placement information in the Parties' bargaining Dropbox; and the Parties do not dispute that Charging Party's Exhibit 10B (the revised salary placement information submitted to the COC Board) was not presented to the Union during bargaining. (Tr. II 129:25-130:1.)

FYI – ***looks like we are in agreement***. We will take this into account when placing adjuncts. Thank you for bringing this to our attention.

(CP Ex. 7 at CP0144 (emphasis added).) The Union's understanding of Fiero's "agreement" was unambiguous. As Silverman testified, the Union then expected the COC to implement a percentage wage of at least one percent over the 2019-20 salaries (*i.e.*, over the 5.71% "ongoing" increases). (Tr. I 101:15-102:7.) Nevertheless, Heaton testified that the errors that he identified in the COC's placement of faculty under the Tentative Agreemen were *never corrected* before approval by the COC Board of Trustees:

> Q: . . . So, could you explain again how it was that you determined that the District had not determined the hold-harmless cells correctly?
>
> A: What I can say is, there was a document in the folder when I reviewed those documents prior to 1:35 [pm] that purported to indicate where adjuncts should be placed on the '20-21 salary schedule.
>
> I looked at the first couple lines of that document. I went to the 2019-2020 salary schedule. And then I went to the '20-21 salary schedule, and I did the math, and it was wrong.
>
> . . .
>
> And so I immediately e-mailed Diane to tell her that it looked like the District was applying the hold-harmless clause improperly.
>
> Diane responded that she agreed and that they would fix it when they placed the adjuncts on the salary schedule.
>
> Q: . . . And to your recollection, did the District send back a corrected document? . . .
>
> A: . . . They never indicated to me that they sent – that they were posting or sending a corrected version. The version that went to the Board was still wrong.

(Tr. II 127:15-128:12.) Heaton testified that, before the COC Board implemented its (unlawful) unilateral change in or about November or December 2020: "no corrected version was ever sent to me or brought to my attention." (Tr. II 129:25-130:1.)

C. Notice to the Union of the COC's Unilateral Change Eliminating "Ongoing" 5.71% Increases and Imposing Unilateral Wage Cuts as of July 1, 2020 for Certain Faculty

The Parties do not dispute the impact of the COC's unilateral change. Certain adjunct faculty received an actual wage *cut* comparing their 2019-20 salaries and their 2020-21 salaries, which took effect

on July 1, 2020. The Parties also do not dispute that the COC failed to advise the Union that an actual wage cut would occur at the bargaining table on that date.

Heaton testified regarding the Union's first awareness of the wage cuts: "adjuncts had begun to be placed on the 2020-2021 salary schedule and had complained that they were receiving a pay cut." (Tr. II 70:15-19.) On or about December 14, 2020, a bargaining unit member named Daniel Nelson wrote to President Portillo and stated:

> . . . I don't think that COC has my pay rate correct. I wanted to check with you first before sending an email to HR.
>
> Historically, I have been in Range 1, Step 3. So, prior to these recent changes, my pay rate was $68.75. According to the charts provided by the union, I would be at $71.30 for 2018-2019 and then $72.73 for 2019-2020. My understanding is that for 2020-2021, they go to the new 20 step chart, but they factor in where your pay is to start when determining what your rate should be based on your semesters of service. I have 15 semesters of service including Fall 2020. **On the new chart, that would put my pay at $72.10, which is less than the $72.73 I should be at for 2019-2020. I thought I had heard that if your pay rate was higher than where you fell on the new chart, you would just get a 1% increase for this year on top of what you got for 2018-2019 and 2019-2020. For me, this would put my rate at $73.45.**
>
> **All this being said, my last check was at a rate of $72.10, which I believe is not correct. That, at minimum, denies me the rate I am due for the increase for 2019-2020.**
> . . .

(CP Ex. 11 at CP0227 (emphasis added).) The Union's response to its bargaining unit member was consistent with the conversations at the bargaining table. Silverman responded by email (with a copy to COC Human Resources Director Rian Medlin ("Medlin")):

> According to my estimations, you should currently be at Range A, Step 8 in the new Schedule 9, for an hourly rate of $72.10. **However, a 5.71% increase from your 2017-2018 payrate is $72.67. Therefore, as your currently hourly rate is less than your 2019-2020 wages, this should be rectified to demonstrate at least a 1% increase.**

(CP Ex. 11 at CP0226 (emphasis added).) For the first time, the COC then notified the Union of its unlawful, unilateral change to its position and unilateral change from its proposals at the bargaining table. Medlin responded to the Union (Silverman):

> **Our understanding is that the agreement was to a 1% increase over the 17-18 rate, not 19-20.**

(CP Ex. 11 at CP0225-226 (emphasis added).) The Union's bargaining team then discussed their understanding (without a copy to the COC). Silverman emailed Union President Portillo and stated:

> **. . . I thought 2019-2020 was *ongoing*, and if so the salary schedule placement for the adjunct in question does not make sense.**

(CP Ex. 11 at CP0224 (emphasis added).) Portillo responded to Silverman and Heaton:

> **I completely agree . . . I thought we had a clear agreement with Diane [Fiero] and Omar that no one would go backwards in pay.**

(CP Ex. 11 at CP0224 (emphasis added).) Heaton then emailed the Union's position to Fiero on December 19, 2020:

> **Our understanding of the District's final offer was that for 2018-19 adjuncts would receive an ongoing pay increase of 3.71%, and for 2019-20 adjuncts would receive an ongoing pay increase of 2%.** Additionally, beginning in July 2020, adjuncts would be placed on the new salary schedule. For some adjuncts, we understood that schedule placement would result in a rate that would be less than their 2019-20 rate. To avoid this situation, the hold harmless clause ensured that everyone would be placed on a step that ensured at least a 1% increase over their 2019-20 hourly rate . . .
>
> The District's final offer was the first offer of a 2 year deal. Previous offers were for a single year, so that referring to 2017-18 as the current salary and 2018-19 as the proposed salary was clear. **However, in the District's final offer, the reference to the "current rate of pay" (see Article 10 L.) was understood to mean the current salary as of the implementation of the new salary schedule for 2020-2021; in other words, salary placement would be based on the 2019-2020 salary schedule, which the District had indicated would be ongoing.**
>
> This understanding was based on the District's presentation of its final offer (see the attached word document 2018-19 Fact Finding AFT and District Proposal .docx'), and on the language of Article 10 and its appendices (see attached documents as they appeared in Dropbox on October 9th)

(CP Ex. 13A at CP0232.)

IV. EXCEPTIONS TO THE PROPOSED DECISION OF THE ADMINISTRATIVE LAW JUDGE

The Proposed Decision of the Administrative Law Judge must be reversed by PERB for the following reasons:

(1) The Proposed Decision errs and commits abuse of discretion in interpreting the Tentative Agreement by: (a) finding that the plain meaning of the word "current" in the Tentative Agreement (applicable to its 1% "hold harmless" wage increase) signifies at the "time of contracting" on October 8, 2020, based on this word's definition in the online version of the Merriam Webster dictionary, and not at the time of "placement" as of July 1, 2020 (incorporating ongoing 5.71% waged increases) as is required under the Tentative Agreement; (b) failing to harmonize the entire Tentative Agreement, which provides a 3.71% wage increase effective as of July 1, 2018 and a 2% wage increase effective as of July 1, 2019, and which on its face describes no wage cuts; and (c) causing absurd results by interpreting the Tentative Agreement to include a wage cut which the COC never proposed to the Union and never discussed with the Union at the bargaining table, and rendering the Hold Harmless Provision, which was intended to avoid wage cuts, surplusage.

(2) The Proposed Decision errs and commits abuse of discretion in its findings regarding the Parties' bargaining history, which must be used to interpret the Tentative Agreement, by: (a) failing to acknowledge the undisputed fact that the COC never proposed wage cuts to the Union and never discussed wage cuts with the Union at the bargaining table, which must considered as the evidence of the Parties' mutual intent to avoid wage cuts as of July 1, 2020; (b) failing to find that the COC's October 7 Proposal to the Union provides "ongoing" 5.71% *wage* increases to *wage scales* (and not an "approximate" wage increase or "budgeted allocation"), incorporated as "adjustments" to "salary schedules" in the Tentative Agreement; (c) erroneously finding the COC's October 7 Proposal to the Union provides a

5.71% "total amount that had to be budgeted" and an "approximated" wage increase of 5.71% as of July 1, 2020, without regard for the plain meaning of the October 7 Proposal, bargaining table discussions, and the October 7 Proposal's citations to the Factfinding Report which expressly discusses "wage" increases (and not a "total amount that had to be budgeted"), and (d) erroneously finding that the COC Salary Comparison provides an unambiguous description of implied wage cuts (which the COC admits it never proposed or discussed) and charging Union representatives with constructive knowledge of such (*e.g.*, erroneously finding the Union "would have" known about wage cuts without supporting evidence), as erroneously supported by the Administrative Law Judge's personally calculated percentages, which never were shared with the Union in bargaining and which contradict ongoing "base" wage increases of 7.8 percent in the COC Salary Comparison, and (e) erroneously finding that the COC Salary Comparison is sufficient to infer wage cuts (which the COC admits it never proposed or discussed), and charge Union representatives with constructive knowledge of such, when the trial record unambiguously establishes that faculty *placement* information is required to interpret the Tentative Agreement and determine whether wage raises or cuts would occur as of July 1, 2020.

(3) The Proposed Decision further errs and commits abuse of discretion in its findings as further described in this brief.

V. ARGUMENT

A. The Legal Standard to Establish a Unilateral Change at PERB under EERA, and PERB Authority Regarding Interpretation of a Contract or Written Agreement

It is unlawful for a public school employer to "[r]efuse or fail to meet and negotiate in good faith with an exclusive representative." Cal. Gov. Code § 3543.5(c). A unilateral change to a matter within the scope of representation constitutes a per se violation of the duty to meet and negotiate. *Stockton Unified*

School District, PERB Decision No. 143 at 22 (1980). To establish a prima facie case of an unlawful unilateral change, a charging party must prove: (1) the employer took action to change policy; (2) the change in policy concerned a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the action has a generalized effect or continuing impact on terms and conditions of employment. *Fairfield-Suisun Unified School District*, PERB Decision No. 2262 at 9 (2012). The Board has recognized three general categories of unilateral changes: (1) changes to the parties' written agreement; (2) changes in established past practice; and (3) newly created policy or application or enforcement of existing policy in a new way. *Lodi Unified School District*, PERB Decision No. 2723 at 11 (2020) (citing *Pasadena Area Community College District* PERB Decision No. 2444, p. 12, fn. 6 (2015)). "PERB may interpret contract language if doing so is necessary in deciding an unfair practice charge case." *County of Ventura*, PERB Decision No. 1910-M at 9 (2007).

Traditional rules of contract law guide interpretation of a collective bargaining agreement between a public employer and a recognized employee organization. *National City Police Officers ' Assn. v. City of National City*, 87 Cal.App.4th 1274, 1279 (2001); *Grossmont Union High School District*, PERB Decision No. 313 at 15-16 (1983). "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) "[T]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." *Lodi Unified School District*, PERB Decision No. 2723 at 12 (2020) (quoting Cal. Civ. Code § 1641). Thus, the Board must avoid interpreting contract language in a way which leaves a provision without effect. *State of California (Department of Corrections)*, PERB Decision No. 1317-S at 9 (1999). Where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning. *Lodi Unified School District*, PERB Decision No. 2723 at 12 (2020) (citing Cal. Civ. Code § 1638; *Marysville Joint Unified School District*, PERB Decision No. 314 at 9 (1983). Where contract terms

are ambiguous, PERB may look to bargaining history and past practice to discern the parties' intent. *State of California (Department of Forestry and Fire Protection),* PERB Decision No. 2546-S at 9-10 (2018).

B. The Proposed Decision Commits Reversible Error by Failing to Harmonize the Entire Tentative Agreement, which Provides Wage Increases and Does Not Describe Wage Cuts, and Creates Absurd Results and Surplusage which are Inconsistent with the Bargaining History

The Administrative Law Judge finds that "[t]he dictionary definition of 'current'" according to the *Merriam Webster.com Dictionary* is "'existing at the present time' or 'most recent.'" (Prop. Dec. at 44.) Based on this treatise or guide, the Proposed Decision then states that the hold-harmless provision of the Tentative Agreement should grant 1 percent increases over 2017-18 salaries, which were in effect at the time the Tentative Agreement was signed on October 8, 2020. (Prop. Dec. at 44.) By this reasoning, the Proposed Decision ignores the remainder of the Tentative Agreement to ascertain the plain meaning of the document, and the Administrative Law Judge commits reversible error.

The plain language of the Tentative Agreement initially requires two retroactive, ongoing wage increases: (1) an "adjustment[] to the Adjunct Salary Schedule" or wage increase of 3.71 percent "effective July 1, 2018," (TA ⁋ B.1. at CP0136); and (2) an "adjustment[] to the Adjunct Salary Schedule" or wage increase of 2 percent "effective July 1, 2019," (TA ⁋ B.2. at CP0136). Under traditional PERB authority, even though granted retroactively, these wage increases continue unless modified by either contract or bargaining, because they are mandatory subjects of bargaining. *See California State Employees Assn . v. PERB*, 51 Cal. App. 4th 923, 935 (1996). The Tentative Agreement next provides that, "[e]ffective July 1, 2020, new salary schedules 10, 11, and 12 will be implemented," (TA ⁋ B.3. at CP0136). "Implementation" of the New Salary Schedules is different than "placement" of individual faculty members, which the Tentative Agreement recognizes. Section L. of the Tentative Agreement states that, "upon initial *placement* on the new salary scale [schedules 10, 11, and 12]," each member must receive a "1% pay increase" over "their current rate of pay." (TA ⁋ L. at CP0138 (emphasis added).) The Tentative Agreement does not

define "current rate of pay," and it is impossible to interpret Section L. without reviewing the contract as a whole, consistent with relevant PERB authority. *Lodi Unified School District*, PERB Decision No. 2723 at 12 (2020) ("[T]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other" (internal quotation and citation omitted)). While the Administrative Law Judge erroneously finds that "current" refers to actual wages as of October 8, 2020 (the date the Tentative Agreement was signed) and therefore discounts the agreed-upon "ongoing" effect of wage increases, this is not a logical reading of the Tentative Agreement. The date October 8, 2020 is not mentioned anywhere in the Tentative Agreement as a date when any aspect of the wage increases take effect. A faculty member's step "placement" as of July 1, 2020 therefore ultimately *must be equal to or greater than* a 5.71 percent increase over wages from 2017-18, firstly in order to be a permanent wage increase until amended (as a mandatory subject of bargaining), and secondly because otherwise the Hold Harmless Provision fails to prevent actual wage cuts as of July 1, 2020 and therefore is rendered surplusage as a contractual term. By defining the "current rate of pay" as of October 8, 2020, at the time of signing, the Proposed Decision produces absurd results which were not proposed and not discussed in bargaining: wage cuts to members' actual 2019-20 pay rates as of July 1, 2020. It is axiomatic in the interpretation of collective bargaining agreements that results which neither party has proposed should be avoided. Of course, nothing prevented the Parties from agreeing expressly and unequivocally to actual wage cuts as of July 1, 2020, but there is no proposal, no document, and no testimony which supports this conclusion. The Parties equally referred to Section L. in their testimony regarding bargaining as a "hold harmless" provision. This strongly suggests that the Parties' agreed-upon function of Section L., consistent with its plain language, was to *avoid* unforeseen wage cuts as of July 1, 2020.

To the degree that PERB is inclined to look outside of the Tentative Agreement, the best evidence of the Parties' intent is found in the COC's October 7 Proposal. The October 7 Proposal unambiguously describes wage increases that are "ongoing" in the amounts of 3.71 percent and 2 percent, and an increase of 5.71 percent that is "ongoing." It thus is not surprising both Heaton and Silverman testified for Charging

Party that the COC stated at the bargaining table that these percentages were *ongoing wage increases*, or "continuous compensation." (Tr. I. 81:10-11.) Of particular note, and consistent with the Parties' treatment of "ongoing" and "one-time" wage increases in the Factfinding Report, the COC's October 7 Proposal cites to the Factfinding Proposal, which also refers to *wages* (and not any "budged allocation"). In the Factfinding Proposal, Judge Khoury discussed raises of "3.71%" and "1%" as *ongoing* increases, and he also discussed an alternative of a "one-time" cost of 2 percent. These percentages (and their reference to *wages* and not a "budgeted allocation") were cited expressly in the October 7 Proposal as follows:

> [Factfinding Report] to Include Office Hours in Hourly Rate:
>
> - Option 1: $100,000 0.70% **On-Going**
>
> $532,700 3.71% **On-Going**
>
> $632,700 4.41% **On-Going**
>
> . . .
>
> - Option 2: $287,170 2.00% **One-Time**

(CP Ex. 3B at CP0115 (style omitted, emphasis added).) Continuing with the nomenclature of "ongoing" wage increases, the COC's actual proposal – which is on the same page and in the same table, in the cell below – then provides the following increases to each member of the bargaining unit:

> . . .
>
> $532,700 **3.71% On-Going** In Tentative
>
> . . .
>
> $287,170 **2.0% On-Going** 2020-21
>
> . . .
>
> $ 819,870 **5.71% On-Going**

(CP Ex. 3B at CP 0115 (emphasis added).) Consistent with the use of these words in the October 7 Proposal, Silverman and Heaton testified as follows regarding the conversation *at the bargaining table* which occurred on October 7:

(1) With respect to the proposal's inclusion of "3.71% **On-Going** in Tentative," that the COC stated *at the bargaining table* that this figure represented "ongoing compensation money"; and specifically that "[o]ngoing meant that it began with the year offered and would continue throughout the entirety of the proposal" or "tentative agreement," (Tr. I 78:25-79:7 (Silverman); Tr. II 30:11-21 (Heaton));

(2) With respect to the proposal's inclusion of "2.0% **On-Going** 2020-21," that the COC stated *at the bargaining table* that this figure represented "the dollar amount for the two percent ongoing money that would be allocated to AFT for the 2020-2021 academic year and throughout the duration of the TA," (Tr. I. 80:11-13 (Silverman); Tr. II 31:18-24 (Heaton));

To summarize, the COC repeatedly stated to the Union *at the bargaining table* that the word "ongoing" was intended to be interpreted as "continuous compensation." (Tr. I 81:10-11.) Equally as important, at the bargaining table (and in its October 7 Proposal), the District never stated that the *ongoing* nature of the adjunct faculty wage increase was an aggregate figure which had no individual application, which was conditioned on an estimated allocation or increase *which may never be actualized upon placement of faculty members on the new salary schedules*. (Tr. I 81:7-16, 93:8-12.) Furthermore, the District did not state in any proposal or conversation at the bargaining table that the October 7 Proposal would result in actual wage cuts as of July 1, 2020. (Tr. I. 81:19-24.)

Of course, Respondent's witnesses (Hinkle, in particular) testified that the COC never proposed to increase individual faculty wages at all at the bargaining table. With respect to the retroactive payments, Hinkle went so far as to say that "[T]hose retro payments for '18-19 and '19-20 were one-time payments, not paid on regular wages, however, but one-time retro payments. . . ." (Tr. III 96:2-4.) This is false, as Hinkle later recanted, when he admitted the "retro payments" were salary adjustments increasing *wages* (a mandatory subject of bargaining which cannot be unilaterally cut) and not some sort of bonus or one-time

payout to unit members. (Tr. III 107:25-108:12.) The COC's own Panelist at Factfinding also contradicts Hinkle's (false) statements. *Pay increases* were expressly referenced in the Factfinding Report by the COC Panel Member O'Hare-Anderson, who stated (regarding the Factfinding Recommendation of Judge Khoury): "I agree with the finding regarding the proposed 3.71% *pay increase* to the salary schedule. That is consistent with the District's last, best, and [final] offer." (CP Ex. 2 at CP0106-0107 (emphasis added).) These *pay* or *wage increases* from the Factfinding Report are cited directly in the October 7 Proposal by the COC and these *pay* or *wage increases* are described as "ongoing" in the October 7 Proposal.

Ultimately, the Administrative Law Judge's findings regarding the October 7 Proposal err by failing to incorporate the whole trial record, and the inadequacy of COC witness testimony when compared to the October 7 Proposal. For example, COC representative Hinkle implausibly testified that the October 7 Proposal states (without any supporting clarification in the October 7 Proposal) two very different types of wage increases, both proposed as "5.71 percent":

(1) *actual* percentage increases to *individual wages* for bargaining unit members paid on a retroactive basis over the 2017-18 salary schedule in 2018-19 (3.71 percent "ongoing") and in 2019-2020 (2 percent "ongoing"); and

(2) an *estimated* 5.71 percentage increase to *aggregate* wages representing the *budgeted* increase in aggregate wages – irrespective of *actual* wage increase or decrease for individual bargaining unit members (*i.e., an estimated* or *budgeted* increase of 5.71 percent, based on the aggregate bargaining unit salary cost of the New Salary Schedule using the 2017-2018 fiscal year as a base).

Hinkle and other COC witnesses' testimony that the same 5.71 percent increase cited in the October 7 Proposal simultaneously (and impossibly) conflates (in the same table cell of the same proposal) an *actual* individual wage increase and an *estimated* or *budgeted* aggregate increase is implausible and not credible. Again, the adjective "approximate" increase (as stated by the Administrative Law Judge), or any synonym such as "budgeted aggregate" or "average increase across the salary schedule," does not appear in the COC's October 7 Proposal or in the Tentative Agreement; and this meaning therefore

cannot be imputed by Respondent or the Administrative Law Judge in reading the Tentative Agreement. Instead, as described above, the October 7 Proposal uses the word "on-going," consistent with the usage of this term to describe *actual wage increases* in the Factfinding Report, which the October 7 Proposal cites directly, and as confirmed by Union witnesses regarding *COC statements at the bargaining table*. Respondent's witnesses' testimony on this point therefore is self-serving, implausible, and illogical.

The COC should be held to the bargain it struck, and PERB should reverse the Administrative Law Judge. As described by Union witnesses, the October 7 Proposal and bargaining table discussions are aligned on the subject of "ongoing" wage increases to individual bargaining unit members. The Administrative Law Judge committed reversible error by failing to find that the Tentative Agreement provides for: (1) a 3.71 percent, "ongoing" increase to individual faculty as of 2018-19; (2) a 2 percent, "ongoing" increase to individual faculty as of 2019-20; and (3) no actual wage cuts on July 1, 2020 (which were never discussed or proposed by Respondent). The Administrative Law Judge further committed reversible error by failing to find that the "placement" of adjunct faculty on the New Salary Schedules is contingent on their first receiving an "ongoing" 5.71 percent increase, and that the Hold Harmless Provision thereafter applies to any bargaining unit member who does not receive a 1 percent increase over 5.71 percent upon "placement" on the New Salary Schedules on July 1, 2020.

C. The Administrative Law Judge Committed Reversible Error and Abused his Discretion by Finding the Union had Constructive Knowledge of Respondent's Wage Cuts Implemented on July 1, 2020, Wage Cuts which the COC Never Proposed or Discussed in Bargaining

The Administrative Law Judge's holding that Charging Party's Complaint should be dismissed is not based on a bargaining proposal, but on the COC Salary Comparison, an Excel spreadsheet provided during bargaining. (Prop. Dec. 49-50.) According to COC witness testimony, Respondent created the COC Salary Comparison to explain the Hold Harmless Provision of the Tentative Agreement. The Administrative Law Judge found the COC Salary Comparison highly persuasive and the Proposed Decision relies on this document for each of its findings. In the words of the Proposed Decision: "The

five-table comparison document and Silverman's contemporaneous understanding of it form the basis for four separate but related arguments in favor of the District's interpretation of the Hold Harmless Provision in the Tentative Agreement. Some of these arguments may each be sufficient by themselves to find in the District's favor. Together, these arguments are undoubtedly conclusive." (Prop. Dec. at 50.) In so finding, the Administrative Law Judge has committed reversible error and improperly disregarded the language of the October 7 Proposal, the Tentative Agreement, and the undisputed evidence in the trial record regarding bargaining.

First, the Proposed Decision finds that the COC Salary Comparison unambiguously applies the 1 percent wage increase over 2017-2018 wages, without incorporating ongoing wage increase of at least 5.71 percent in 2018-19 and 2019-20. This is wrong as a matter of admitted fact and contradicts the document itself. Second, the Proposed Decision finds that the District proposed or describes wage cuts, based on the COC Salary Comparison. This again is wrong as a matter of admitted fact and contradicts the document itself. ***The District never proposed or discussed wage cuts at the bargaining table.*** Third, the Proposed Decision finds that the COC Salary Schedule may be interpreted without knowing where adjunct faculty will be *placed* on it, information which was not provided to the Union until *after the Tentative Agreement was signed*. Again, the Proposed Decision is incorrect as a matter of admitted fact and contravenes the very document it relies on, along with the Parties' bargaining history.

With respect to the "ongoing" nature of wage increases, the COC Salary Comparison provides for a "base increase" of 7.8 percent in every single salary schedule. (CP Ex. 3d at CP 0121, CP Ex. 3e at CP0123, and CP Ex. 3f at CP0125.) While the Administrative Law Judge does not acknowledge this undisputed fact, the Union witnesses testified that this "base increase" of 7.8% signified that wage increases were ongoing, based on their understanding of the document. As Heaton testified,

> . . . [a]ll [the COC Salary Comparison] demonstrates to me is that the spreadsheet acknowledges that there will be some cells that, if a person was placed on those cells, they could end up earning less than their '19-20 rate.

> And this is their analysis. I'm not, you know, I can't speak to why they did the analysis this way or what the formulas are. This is just what is, to me, that's what they're trying to demonstrate here, that they realize that some individuals, if they were placed in this cell, would have to be placed in a different cell in order not to receive a pay decrease over the '19-20 rate.

(Tr. II 43:5-16.) Heaton provided his overall conclusions at bargaining as follows:

> The spreadsheet that show's Jason[Hinkle]'s – for lack of a better word – homework all indicate that the base increase is 7.8 percent. My inference . . . is that [it] includes 3.71, two percent, and 1.9 percent compounded. That's why it's 7.8. Instead of just adding them up, it's compounded for each year.

(Tr. II 84:3-11.) Heaton added that the *purpose* of a "base rate" of 7.8 percent in his review of the document was "to populate the first cell to ensure that the other cells didn't go negative." (Tr. II 135:4-10.) As described above, the Union then *confirmed the "ongoing" nature of the 5.71 percent wage increases at the bargaining table*. (Tr. I 78:25-79:7, 80:11-13, 88:17-89:25 (Silverman); Tr. II 30:11-21, 31:18-24 (Heaton).)

Instead of acknowledging this evidence, the Administrative Law Judge instead speculates about Union representatives' state of mind based on, based on his personal calculation of spreadsheet percentage increases, which are not included in the COC Salary Comparison and were never communicated to the Union. As stated in the Proposed Decision: (1) "Looking at the first cell on Step 1 of Range B in the table captioned 'Variance by Cell' [in the COC Salary Comparison] ***would have*** revealed to Heaton, Portillo, and Silverman that the increase reflected was . . ***only a 1.92 percent increase*** . . ."; and (2) "[L]ooking at the first cell on Step 1 of Range D [in the COC Salary Comparison] ***would have*** revealed to [the Union] that the increase reflected in that cell was . . . ***only 1.56 percent***, far below the 5.71 percent that Local 6262 argues trigger the application of the hold-harmless clause." (Prop. Dec. at 53 (emphasis added).) There is, of course, a reason why the phrase "would have" is deployed in the Proposed Decision here, and it demonstrates reversible error.

The Administrative Law Judge commits reversible error by explaining what Union representatives Heaton, Portillo, and Silverman "would have" understood, because his analysis of the Union's intent in

reaching agreement is not based on information which was communicated at the bargaining table, but rather on the Administrative Law Judge's speculation about the Union representatives' state of mind. This speculative finding by the Administrative Law Judge is not based on any communication at the bargaining table, but rather on his personal calculation of spreadsheet *percentage increases*, which are not included in the COC Salary Comparison and were never communicated to the Union. There is no authority which permits PERB to disregard what the Parties actually stated and proposed at the bargaining table, in favor of an agency-created percentage which was not communicated during bargaining. There is no table, no proposal, and no testimony which corroborates that the *percentages* which the Administrative Law Judge calculated were provided to the Union such that the Union "should have made an issue of them." (Prop. Dec. 53.) Rather, the COC Salary Schedule demonstrates an "ongoing" or "base" wage increase of 7.81 percent, and the Union negotiators were entitled to rely on this percentage to support their assertion that the October 7 Proposal included, at minimum, 5.71 percent "ongoing" increases, because the COC representatives advised the Union that 5.71 percent increases would be "ongoing" in discussions at the bargaining table. This is consistent with long-standing PERB jurisprudence that undisclosed thoughts or impressions, even if they are percentages calculated *sua sponte* by a PERB hearing officer, cannot be used to demonstrate bargaining table communications and therefore used as a tool to interpret a collective bargaining agreement. *See Vallejo Police Officers Assn. v. City of Vallejo*, 15 Cal.App.5th 601, 617 (2017) (a bargaining party's subjective understanding is irrelevant if it was never disclosed to the other party); *California Teachers' Ass'n. v. Governing Bd. of Hilmar Unified School Dist.*, 95 Cal.App.4th 183, 189, fn. 3 (2002) (undisclosed subjective intent is irrelevant to determining contractual meaning).

None of this is to argue that Respondent's COC Salary Comparison is clear and unambiguous. The COC Salary Comparison is rife with confusion and ambiguity, and Charging Party urges PERB to disregard it. Why does the COC Salary Comparison provide a "base increase" of 7.81 percent, but then also provide increases of 4 percent, 10 percent, and 14 percent? The District's unsatisfying explanation is that these are just "number[s] to start the new salary schedule." (Tr. III 135:5-9, 17-21.) Regardless, the Union is entitled

to rely on the percentage increases in the COC Salary Comparison, including the stated "*base increase*" of 7.81 percent, and the Administrative Law Judge may not charge the Union with understanding of percentages which the COC Salary Comparison does not contain and which were never provided to the Union. Again, there is no testimony and no evidence where the District states that wage cuts will occur as of July 1, 2020, yet the Proposed Decision charges the Union with *constructive knowledge* of this (undisclosed) inference. And none of this changes the undisputed fact that the District never stated at the bargaining table that it intended to impose wage cuts on July 1, 2020. As COC representative Hinkle testified:

> Q: [D]uring bargaining on October 7, 2020, did you advise the Union that as of July 1, 2020, after the tentative agreement took effect, that there would be some employees who would have ***cuts to their pay rates***?
>
> A. No.
>
> Q. Did [Respondent's Chief Negotiator] Diane Fiero give that information, state that to the Union?
>
> A. Not to my recollection, no.
>
> Q. Did anyone else on the College of the Canyons or bargaining team say that to the Union on October 7, 2020 before the bargaining agreement was signed? Excuse me, before the tentative agreement was signed?
>
> A. No.

(Tr.III, 109:3-109:16 (emphasis added).)

Equally as important, the Administrative Law Judge assumed that the COC Salary Schedule is a *comprehensive* explanation of the application of the Hold Harmless Provision. This is reversible error. Without faculty *placement* information (which the Union demanded and received after the Tentative Agreement was signed), the Union could not evaluate the District's (unlawful, unilateral) application of the Tentative Agreement; and the Administrative Law Judge therefore committed reversible error by charging the Union with constructive knowledge of wage cuts, based solely on the COC Salary Comparison

and the Administrative Law Judge's derived percentages (which were not disclosed in bargaining to the Union by Respondent). Again, the COC Salary Schedule compares the 2017-18 and 2019-20 salaries, but does not provide information about which faculty will be placed on the salary schedule. As Heaton testified:

> There are over three thousand people in the [bargaining unit] pool, three to six hundred of them teaching a semester. We would have no way of knowing. But we also -- The Union doesn't keep records of the years of teaching service or their level of education. So, we would have no way of knowing which individuals would end up in which cell. And that information was not shared with us.
>
> Let me rephrase; that information was not shared with us during bargaining.

(Tr. II 43:17-44:4.) It is undisputed that the faculty *placement* on the New Salary Schedules was necessary to interpret the Hold Harmless Provision – and could not be deduced from a *salary schedule comparison* – because the salary schedule (and a comparison of schedules) cannot demonstrate a person's *placement* on the schedule. (CP Ex. 7 at CP0146.) While the Proposed Decision fails to address the import of faculty *placement* information, Respondent did not miss its import. Fiero was so concerned with the timing of when the Union received placement information, that she openly misrepresented at trial when the Union received it. Fiero originally testified that she had provided the "placement information" to the Union before President Portillo signed the Tentative Agreement. (Tr. III 172:6-15.) It was not until cross-examination when Fiero that she conceded her statement was false. (Tr. III 130:23-131:1, 137:15-20, 187:3-188:9.) To summarize: two pieces of data were required for the Union to be able to interpret the effect of the Hold Harmless Provision: (1) an accurate salary schedule comparison, and not the COC Salary Comparison, which has so many errors as to be incomprehensible and should be disregarded by PERB; and (2) the District's *placement* of faculty on the New Salary Schedules, which the Union did not receive until *after the Tentative Agreement was signed*.[6]

[6] The Parties do not dispute that the first time faculty placement information was sent to the Union was after the Tentative Agreement was signed by the Union at 8:09 p.m. on October 8, 2020. (CP Ex. 5 at CP0138 (e-signed by Dan Portillo at "October 8, 2020 20:09 PDT").) Shortly thereafter, at 9:23 p.m., Fiero emailed Heaton the New Salary Schedules in addition to – for the first time – "placement

The Parties do not dispute that Charging Party's Exhibit 10B, the revised (unlawful) salary placement information which was presented to and approved by Respondent's Board of Trustees, was never presented in advance to the Union. As Heaton testified, the errors that he identified in the COC's placement of faculty under the Tentative Agreement were never corrected before approval by the COC Board of Trustees:

> A: . . .And so I immediately e-mailed Diane to tell her that it looked like the District was applying the hold-harmless clause improperly.
>
> Diane responded that she agreed and that they would fix it when they placed the adjuncts on the salary schedule.
>
> Q: . . . And to your recollection, did the District send back a corrected document? . . .
>
> A: . . . They never indicated to me that they sent – that they were posting or sending a corrected version. The version that went to the Board was still wrong.

(Tr. II 127:15-128:12.) Heaton expressly testified that: "no corrected version [of the faculty placement data] was ever sent to me or brought to my attention." (Tr. II 129:25-130:1.) The first time Charging Party learned of Respondent's unilateral change was when bargaining unit members complained; and the Union's response was to immediately notify the COC that there was an error in faculty placement data. (CP Ex. 11 at CP0227; CP Ex. 13A at CP0232.) Given this evidence, the Union therefore cannot be viewed as given constructive notice of Respondent's hidden, actual wage cuts as of July 1, 2020, which the COC failed to state at the bargaining table on October 7, which are not included in the October 7 Proposal, and which cannot be logically inferred from the COC Salary Comparison or any other documents provided to the Union before it signed the Tentative Agreement. In summary, even were the COC Salary Comparison a useful interpretive tool to analyze the Tentative Agreement (which the document's grievous errors and

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information" for faculty on the New Salary Schedules. (CP Ex. 7 at CP0146; Tr. III 130:23-131:1, 137:15-20, 172:6-15, 187:3-188:9.) The Union then immediately noted the COC had failed to properly place adjunct faculty. On October 9 at 1:35pm, Charing Party wrote to Respondent and stated: "[the COC] does not seem to be placing adjuncts on step that gives the adjunct at least a 1% increase as is required by Article 10.L." (CP Ex. 7 at CP0146 (emphasis added).) For the COC, Hinkle conceded this error, and Fiero agreed to correct the faculty placement information. (CP Ex. 7 at CP0144.) But Fiero never provided the Union with an opportunity to review corrected placement information.

conflicting data render impossible), ***it is an incomplete analysis of the October 7 Proposal***. Throughout the Proposed Decision, the Administrative Law Judge commits reversible error by discounting undisputed testimony regarding the importance of faculty "placement" to evaluate the Hold Harmless Provision, versus a mere comparison of salary schedules. Of course, Respondent's unlawful, unilateral wage cuts remain best illustrated by the District's simple failure to propose wage cuts. As Silverman testified:

> Q: . . . [D]id the District say how the hold-harmless provision would be applied as to bargaining unit members [who] would be impacted?
>
> A: Yes, it would apply to the 2020 to 2021 academic year, so that when adjunct are ***placed on [the] new salary schedule***, they would get at least a salary increase instead of a salary decrease or an increase that is at least one percent.
>
> Q: At any point at the bargaining table, did the District say that . . . it was going to apply a one percent increase over the 2017-2018 salary range irrespective of whether this caused a decrease from 2019-2020?
>
> A: No.
>
> Q: Did the District say that there might be a reduction in pay . . . for any employee based on how they were paid prior to July 1, 2020 as compared to how they were paid after July 1, 2020?
>
> A: No.

(Tr. I. 88:17-89:25 (emphasis added).)

For all of these reasons, the Proposed Decision commits reversible error by charging the Union with constructive knowledge of wage cuts which were never proposed or discussed at the bargaining table, based upon the Administrative Law Judge's inferred percentages under the COC Salary Comparison which the Proposed Decision finds Union representatives "would have known," notwithstanding that these percentages were never communicated to the Union at the bargaining table. The Proposed Decision also fails to account for the evidence that the COC Salary Comparison provides for 7.81 percent "base" or ongoing (actual) wage increase to the bargaining unit, creating inherent contradictions in this document which render it worthless as an interpretive tool. In addition, the Proposed Decision commits reversible

error by finding that Respondent may implement actual wage cuts under the Tentative Agreement as of July 1, 2020, even though Respondent failed to propose or communicate to the Union at the bargaining table that it intended to impose such (hidden, unlawful, unilateral) wage cuts on that date. PERB should reverse the Proposed Decision and hold that the Respondent unilaterally imposed wage cuts on July 1, 2020, in violation of EERA. PERB should further hold that, under the Tentative Agreement, that 5.71 percent wage increases were ongoing as of July 1, 2020 and therefore that the Hold Harmless Provision must be applied in addition to such increases, when placing faculty on the new salary schedules effective on July 1, 2020.

VI. CONCLUSION

For the above reasons, Charging Party respectfully requests that PERB reverse the Proposed Decision and hold that Respondent unilaterally imposed wage cuts on July 1, 2020, in violation of EERA. Specifically, PERB should hold that Respondent unilaterally changed the Parties' Tentative Agreement in violation of EERA "without regard for whether this resulted in an increase or decrease in wages from the 2019-20 contract year," without notice or an opportunity to bargain being granted to the Union; and the change resulted in "wage cuts for certain faculty for the 2020-21 contract year (i.e., in actual wages from the 2019-20 to 2020-21 contract years)." (Compl. ¶ 5.) Charging Party further requests that PERB find that Respondent has "failed and refused to bargain in good faith" with Charging Party, (Compl. ¶¶ 6-7), "interfered with the rights of bargaining unit employees to be represented by Charging Party" and "denied Charging Party its right to represent bargaining unit employees" in violation of EERA, (Compl. ¶¶ 8-9).

As remedy for these statutory violations, Charging Party requests that PERB order, in addition to standard cease-and-desist and notice posting remedies for interference with the bargaining representative, restoration of the prior status quo including back pay and benefits, and interest thereon for all bargaining unit employees who have suffered loss as a result of Respondent's unlawful conduct. Specifically, Charging Party requests that PERB order that: (1) Respondent pay all affected bargaining unit an "ongoing," retroactive wage increase of 5.71% over 2017-2018 wages into the 2020-2021 fiscal year,

beginning on July 1, 2020, and that (2) as of July 1, 2020, for any bargaining unit member placed on Salary Schedules 10, 11, and 12 who receives "less than their current rate of pay" ("current rate of pay" defined as each member's 2019-2020 actual salary including ongoing 5.71 percent, individual wage increases), that Respondent place these bargaining unit members "on a step that will ensure at least a 1 percent pay increase."

DATED: August 18, 2022

GILBERT & SACKMAN
A LAW CORPORATION

By _____
Joshua Adams
Attorneys for Charging Party American Federation of Teachers Local 6262

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 3699 Wilshire Boulevard, Suite 1200, Los Angeles, California 90010.

On August 18, 2022, I served the following document(s) described as **STATEMENT OF EXCEPTIONS OF CHARGING PARTY AFT LOCAL 6262** on the interested parties in this action addressed as follows:

Alex Wong
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☒ **BY ELECTRONIC MAIL:** I caused said document(s) to be transmitted by electronic mail (e-mail) pursuant to Rule 2.251 of the California Rules of Court. The e-mail address of the sender was sguadron@gslaw.org. The name(s) and e-mail address(es) of the person(s) served are set forth in the service list. The document was transmitted by electronic mail, and the sender saw messages confirming that the e-mail was sent without error.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 18, 2022, at Los Angeles, California.

Sofia Guadron