

CLIENT NEWS BRIEF

PERB Upholds Union's Right to Receive Information Despite Employees' "Opt Out"

The Public Employment Relations Board (PERB) recently held that a school district violated the Educational Employment Relations Act (EERA) by failing to fully respond to a union's request for information despite the fact that some employees opted out of the release of their information and the union did not reassert its request when it did not receive all the information.

In *Los Angeles Unified School District* (2015) PERB Decision 2438, the District reassigned teachers who were being investigated for serious misconduct to one of its six educational service centers (ESC). The teachers were expected to work at the ESCs and earned their full compensation. The union demanded to bargain over the hours and duties of teachers assigned to the ESCs and requested their names and work locations. The union stated it needed this information to communicate with the teachers to see if they needed help and to develop proposals to change the working conditions in the ESCs.

The District asserted that teachers assigned to the ESCs had a privacy interest in that assignment and told the union that it would only comply with its request after it informed the teachers that they could "opt out" of having their information released. The District argued that providing names of teachers assigned to the ESCs would essentially disclose they were under a District or criminal investigation for serious misconduct. The union objected to the opt-out procedure emphasizing it was not seeking any discipline or investigation records from the District and the union also offered to enter into a confidentiality agreement requiring them to maintain the information as confidential. The District decided to inform all 276 teachers assigned to the ESCs of the union's request and allow them the opportunity to opt out from the release of their assigned information. After 15 teachers opted out, the District provided the union the names and work locations of 261 teachers. The union did not restate its request for the names and work locations of the 15 teachers who opted out. Instead, the union filed an unfair practice charge.

In considering a union request for information that implicates employees' privacy interest, PERB applies a balancing test, placing the burden on the employer to demonstrate whether this interest outweighs the union's need for information. In *Los Angeles Unified School District*, PERB found that the information the union requested was "necessary and relevant," but also agreed with the District that employees' had a privacy interest in their assignment to ESCs.

PERB held the District did not demonstrate that its employees' privacy interest outweighed the union's need for information. PERB specifically considered all of the following: 1) the union did not seek discipline or investigation records from the District; 2) the union offered to enter into a confidentiality agreement which the District refused to consider without any explanation; 3) the teachers did not experience a significant invasion of privacy because if they did not want to communicate with the union they could inform the union that or ignore the communication; and 4) the District had not always treated the information the union requested confidentially since it disclosed the identity of a teacher assigned to an ESC to the media. PERB found that even if the District assured

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employees their assignment to an ESC would be confidential, such assurance would not necessarily override the union's right to the information.

PERB also held that the union did not have to reassert its request for information after the District refused to provide it information about the 15 employees who opted out. PERB found that the District knew that the union wanted the names and work locations of *all* the employees assigned to the ESCs and that the union objected to the opt-out process so partial compliance was not sufficient. In addition, PERB held that the District was not entitled to implement an opt-out process without negotiating that process with the union. PERB also found it significant that the union was willing to enter into a confidentiality agreement with the District

This case demonstrates that the significant burden on employers in establishing that employees' privacy concerns outweigh a union's need for information, especially when a union is not seeking discipline or investigation records. Districts should be cautious when asserting employee privacy rights as basis for denying a request for information to ensure that such assertions will withstand PERB scrutiny. If the District elects to use an opt-out process, and employees opt-out, that opt-out alone may not provide the District a sufficient basis to withhold documents or information. Employers may also be liable for failing to provide a union requested information, even if the union does not reassert its request. Important to this case was that the union's request for information was clear and it objected to the use of the opt-out process. Lastly, employers should also be cautious when providing employees an opportunity to opt-out before responding to a union's request for information, without first negotiating such process with the union.

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