STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DONNA BARTLETT-MAY, ET AL., Charging Parties, v. OTAY WATER DISTRICT, Respondent.	Case No. LA-CE-9-M PERB Decision No. 1634-M May 19, 2004

Appearances: Gattey Baranic, by James M. Gattey, Attorney, for Donna Bartlett-May, et al.; Burke, Williams & Sorensen, by James R. Lynch, Attorney, for Otay Water District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Donna Bartlett-May, et al. (Charging Parties), to a proposed decision (attached) on a compliance proceeding of an administrative law judge (ALJ). The issue before the ALJ was whether there was compliance with the stipulation of the parties that Charging Parties were to be made whole for all lost back pay and benefits suffered by reason of their layoffs, less any amounts received in mitigation. The ALJ found that the Otay Water District (District) fully complied with the Order of the Board in Otay Water District (2002) PERB Decision No. HO-U-818-M and dismissed the Notice of Objection.

The Board has reviewed the entire record in this matter, including the ALJ's proposed decision, Charging Parties' exceptions, the District's response, post trial briefs and supplemental documents. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts the proposed decision as the decision of the Board itself.

ORDER

The Charging Parties' Notice of Objection, dated January 28, 2003, to the District's alleged compliance with PERB Decision No. HO-U-818-M, is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Neima and Whitehead joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

DONNA BARTLETT-MAY, ET AL., Charging Parties, v. OTAY WATER DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-9-M PROPOSED DECISION (1/14/04)

Appearances: Gattey Baranic, LLP by James M. Gattey, Attorney, for Donna Bartlett-May, et al.; Burke, Williams & Sorensen, LLP by James R. Lynch, Attorney, for Otay Water District.

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

On August 7, 2001, Donna Bartlett-May (Bartlett-May), Clarence L. Cassens (Cassens), James K. Clements (Clements), Michael Coleman (Coleman), Mona Favorite-Hill (Favorite-Hill) and City Employee Association (CEA) (collectively called Charging Parties) filed an unfair practice charge alleging that the Otay Water District (District) retaliated against Bartlett-May, Clements and Favorite-Hill because of their protected activities and interfered with the rights of each of the Charging Parties by eliminating the positions of the individual Charging Parties and laying them off in February and March 2001 without providing CEA prior notice or opportunity to meet and confer. The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on January 15, 2002, alleging that by the above conduct, the District violated the Meyers-Milias-Brown Act (MMBA) sections 3503 and 3506.[1]

[1] The MMBA is codified at Government Code section 3500 et seq.

Prior to formal hearing, the parties filed stipulations stating, in effect, that the District violated the MMBA as alleged, and that it be ordered, inter alia, to "[M]ake all individual Charging Parties whole for all lost back pay and benefits suffered by reason of their layoffs, less any amounts received by them in mitigation." On October 2, 2002, the undersigned issued a Proposed Order (Order) based on the parties' stipulations. No exceptions having been filed, on November 4, 2002, PERB issued Decision No. HO-U-818-M declaring the Order final.

By letter of January 15, 2003, the District notified PERB that it had fully complied with the Order. However, on January 28, 2003, counsel for Charging Parties filed a Notice of Objection and on February 5, 2003 filed a Supplement #2 to Notice of Objection, claiming that the District had failed to pay the individual Charging Parties certain amounts due to them pursuant to the Order.[2]

An informal conference held on June 2, 2003, failed to resolve the matter. Formal hearing was held in the Los Angeles office of PERB on November 4, 2003, before the undersigned. After the filing of post-hearing briefs, the matter was submitted for decision on December 22, 2003.

FINDINGS OF FACT

This compliance proceeding presents no disputed issues of fact. On November 8, 2002, the District paid to the individual Charging Parties lump sums ranging from approximately $22,000 to $157,300, representing their lost back pay and benefits less amounts in mitigation, plus 7 percent annual interest. However, the tax liability on these lump sums was greater than

[2] The Order also required the District to cease and desist its unlawful conduct, offer reinstatement to the individual Charging Parties, and post copies of the Order. It is undisputed that the District complied in these respects, and that only Clements accepted the offer of reinstatement. The exact date(s) of the offers of reinstatement is not reflected in the record. I therefore assume they were made at some time between the Order on October 2, 2002, and the District's payment of back pay on November 8, 2002.

it would have been had the individuals remained employed by the District and received the amounts in incremental paychecks. Charging Parties contend that the District should reimburse them for the additional tax liability, amounting to an aggregate sum of $67,699. The District contends that there is no federal or state precedent awarding such damages. Further, the District argues that the individual Charging Parties themselves created the damage by requesting that the District issue the back pay checks jointly to themselves and to their attorney. As the individuals would in turn use a portion of these amounts to pay their attorney fees, the District argues that it was therefore required to report these amounts on 1099 tax forms (non-employment income) rather than on W-2 tax forms (employment income). The District suggests that if it is found to have erroneously filed 1099 forms instead of W-2 forms, it could appropriately be ordered to file amended W-2 information. The individual Charging Parties admit that they did not consult a tax professional prior to receiving their lump sum awards.

Charging Parties also contend that the individuals incurred certain expenses in obtaining interim employment which should be set off against the amounts credited to the District for mitigation.[3] Relevant facts are as follows:

Cassens

Cassens was employed by the District for 14 years, the last 3 of which were as an engineering technician and the prior 11 as a public affairs officer. After his layoff from the

[3] In their Notice of Objection and Supplement #2, Charging Parties also argued that the District should reimburse Clements for certain medical expenses and that his reimbursement for medical premiums should not have been reported on a 1099 form as income; that Coleman should be reimbursed for the loss of his wife's salary and the cost of certain medical deductibles; and that the District erroneously reported on 1099 tax forms the full amount of back pay as income to both the Charging Parties and to their attorney. No evidence or argument was presented at the hearing to support these contentions and Charging Parties did not raise them its in post-hearing brief. I therefore assume that Charging Parties no longer object on the basis of these contentions and I shall disregard them.

District, Cassens applied for work in public affairs and engineering, restricting his search to government agencies in south San Diego County. He submitted approximately two dozen applications but received no response. He then expanded his search to the southwestern states; the only response to approximately three dozen applications came from Lake Havasu City, Arizona. Cassens accepted a position as that city's Public Information Officer and began employment in September 2001; his family joined him in Arizona in November 2001.

In San Diego, Cassens' wife Kathy had been employed for 15 years as special projects coordinator for the Mission Federal Credit Union (MFCU). Since approximately 1994, Kathy had performed this work at home, via MFCU's new telecommuting program, and by early 2001 she was earning approximately $47,000 per year. Anticipating the move to Arizona, Kathy perused local newspapers for possible jobs and made inquiry to the Lake Havasu Credit Union, but was told they had no marketing positions outside their headquarters in Los Angeles. After the move, she applied for a part-time job as a receptionist and, according to Cassens, has "kept an eye open for jobs in the financial fields where she has experience," but has been unable to find work. As the District correctly points out, no explanation was offered as to why Kathy could not have kept her job with MFCU by continuing to telecommute from Lake Havasu City.

Kathy's work at home in San Diego and her desire for part-time work in Lake Havasu City was due in part to the Cassens' 20-year old daughter Molly, born with hydrocephalus, able to feed herself but dependent on others for everything else. The Cassens had long ago decided not to institutionalize her but to keep her at home. In both California and Arizona, Molly has been provided public medical assistance. However, in California she received $812

per month in Social Security Disability payments, which were reduced to $545 per month in January 2002 after the move to Arizona.[4]

Charging Parties contend that the District's mitigation credit should be offset by Kathy's loss of salary and by the reduction in Molly's disability benefits, which Charging Parties characterize as expenses incurred as a result of Cassens taking the job in Arizona. The District argues that these losses are damages, not mitigation expenses, and are therefore not covered by the Order. The District also argues that neither Cassens nor his wife adequately mitigated their damages, as they limited their job searches, and that in any case, the District's liability for their losses was terminated by its offer of reinstatement which Cassens rejected. Cassens, however, claims that to accept the offer and move his family back to California would have been financially and emotionally unreasonable.

Coleman

Shortly after his layoff from the District, Coleman accepted a job with the California Department of Water Resources in Sacramento. He rented a small apartment there and returned to his home in San Diego on weekends. As this was a temporary position, he continued to seek permanent employment, and in July 2002 he accepted a permanent job with the Santa Clara Valley Water District in San Jose. He then took an apartment in San Jose and put his house in San Diego up for sale. On weekends either he went back to San Diego or his wife joined him in San Jose to search for a new house. At an unspecified time thereafter, Coleman began leasing a house in Santa Cruz, 40 miles from San Jose. The San Diego house finally sold in March 2003 and the Colemans, unable to find an affordable house in San Jose, purchased the Santa Cruz house. In San Diego, Coleman had only a 5-minute commute between his home and his job with the District.

[4] Arizona, unlike California, does not provide a supplement to the federal benefit.

Charging Parties contend that the District should reimburse Coleman for costs of $26,800 incurred in selling the San Diego house and $8,718 in purchasing the Santa Cruz house, and for his cost of commuting between the house in Santa Cruz and the job in San Jose. In its closing brief, the District argues that the San Diego house was not sold nor the Santa Cruz house purchased until after Coleman rejected its offer of reinstatement, therefore the District is not liable for the costs incurred. Coleman testified that his family had already moved to Santa Cruz and his daughter was already enrolled in a new school prior to the reinstatement offer, thus it would have been unfair to "drag [them] all the way back to San Diego . . . ." Coleman also postulated that if he moved back to San Diego, he might have incurred penalties on the lease of the Santa Cruz house, as well as moving costs.

ISSUES

1. Is the District obligated to reimburse the individual Charging Parties for their increased tax liability?

2. Is the District obligated to reimburse Cassens for his wife's lost salary and his daughter's reduced disability benefits?

3. Is the District obligated to reimburse Coleman for costs in selling his San Diego house and purchasing his Santa Cruz house, and for his costs commuting between Santa Cruz and San Jose?

CONCLUSIONS OF LAW

1. Tax Liability

The standard remedy for unlawful layoff or discharge, in cases under PERB's jurisdiction as well as those previously before the courts under the MMBA, is to require the employer to "make whole" the discriminatee for any losses suffered as a result of its unlawful

conduct. The losses typically consist of back pay, but may also include medical expenses, retirement benefits and other benefits formerly provided by the employer. (Regents of the University of California (1997) PERB Decision No. 1188-H; San Diego Community College District (1983) PERB Decision No. 368; Fugitt v. City of Placentia (1977) 70 Cal.App.3d 868 [139 Cal.Rptr.123].)

However, there is no precedent for the reimbursement of additional tax liability. Neither PERB nor the California courts have dealt with this issue, although it has been addressed by the National Labor Relations Board (NLRB). In its Casehandling Manual, NLRB regional directors are instructed to inform discriminatees of their responsibility for the tax consequences of their back pay awards, and to caution them that large awards may result in increased tax liability, which may be reduced by federal income averaging procedures. Thus in Laborers Local 282 (Austin Co.) (1984) 271 NLRB 878 [117 LRRM 1083] (Austin),[5] the NLRB overruled the administrative law judge's remedial order and held that the availability of income averaging plus the agency's duty to inform discriminatees of their tax responsibilities was sufficient to "meet the [judge's] concerns" that the discriminatees were forced into higher tax brackets. And in Hendrickson Bros. (1985) 272 NLRB 438 [118 LRRM 1144], citing both Austin and the Casehandling Manual, the NLRB held that ordering an employer to pay the wronged employee's increased taxes "is contrary to settled Board policy." Since income averaging was abolished in 1986, the NLRB has not changed its position or expanded its

[5] When interpreting the MMBA, it is appropriate to take guidance from NLRB cases interpreting similar provisions. (Firefighters v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

remedial scope. However, in Bouille Clark Plumbing, Heating, and Electric, Inc. (2002) 337 NLRB 743 [____LRRM____], the NLRB indicated it would consider such a change "after a full briefing by all affected parties."[6]

Charging Parties argue that because the tax increases resulted from the District's unlawful conduct, are fixed and ascertainable amounts which the District has not rebutted, and as there is no statute or regulation prohibiting reimbursement, the District should be held liable. Charging Parties also argue that the tax increases could not have been avoided even if a tax professional had been consulted, thus the District failed its burden to show that the individual Charging Parties did not take reasonable steps to mitigate their losses.

While I find Charging Parties' arguments persuasive, I cannot find the authority to honor them. In this case of first impression within PERB's jurisdiction, I find no guidelines, either in statute, regulation, or case law, to support Charging Parties' contentions, other than the general principle that a respondent is liable for all losses resulting from its unlawful conduct. However, I do not find this case appropriate for an expansion of PERB's remedies based on that general principle, as the Order was derived solely from the parties' stipulations, which sought only "back pay and benefits," and the District issued back pay awards based on Charging Parties' own calculations, which did not reflect any increased tax liability.

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[6] Charging Parties cite Gelof v. Papineau (USDC, Del. 1986) 648 F.Supp. 912, where the plaintiff's lump sum back pay award, arising from the employer's violation of federal age discrimination laws, put him into a higher tax bracket which could no longer be ameliorated by income averaging; thus the lower court ordered the employer, inter alia, to reimburse the plaintiff for his increased tax liability. Charging Parties note that this portion of the ruling was "not disturbed on appeal." However, in its appeal, the employer conceded its liability for the increased taxes and contested only the calculated amount. Thus, the appellate court specifically declined to "address the question of whether such an award should be made in all back pay cases." (Gelof v. Papineau (3d Cir. 1987) 829 F.2d 452, at fn. 2.) Accordingly, I do not find this case persuasive.

Accordingly, I conclude that the District is not liable for the individual Charging Parties' increased tax liability arising from their lump sum back pay awards.[7]

2. Cassens

A respondent may offset from its back pay liability any amounts the discriminatee received in mitigation, typically "interim earnings" from other employment between the time of layoff and the time of the offer of reinstatement. Although the discriminatee must be forthcoming regarding the amount of his interim earnings, the respondent bears the burden of proving its entitlement to an offset. (Fresno County Office of Education (1996) PERB Decision No. 1171; California School Employees Association v. Personnel Commission (1973) 30 Cal.App.3d 241 [106 Cal.Rptr. 283]; NLRB v. Brown & Root, Inc. (8th Cir. 1963) 311 F.2d 447 [52 LRRM 2115].) This mitigation may in turn be reduced by any necessary and reasonable expenses incurred by the discriminatee in searching for and obtaining interim employment, e.g., transportation and moving expenses, expenses commuting to the new job. The discriminatee bears this burden of proof. (Hansen Brothers Enterprises (1993) 313 NLRB 599 [146 LRRM 1133]; Baddour, Inc. (1991) 304 NLRB 681 [139 LRRM 1064].)

Here, Cassens' wife's salary was lost and his daughter's disability benefits were reduced as a direct result of the family's move to Arizona. I find these losses were not damages caused directly by Cassens' layoff but were rather expenses incurred by his obtaining employment with Lake Havasu City. However, only scant details were provided as to what Kathy Cassens' search for employment consisted of. Nor was any explanation given as to why she could not continue to telecommute for the MFCU, or for any other company, from their

[7] As Charging Parties have not contended that the District erroneously reported the back pay awards on 1099 forms instead of on W-2 forms, I make no finding or order thereon. I assume, however, that the District's offer to file amended W-2 information is still open, and that could reduce the individual Charging Parties' tax consequences.

home in Arizona. Thus, I find Charging Parties have not sustained their burden of proving that Kathy's lost salary was a reasonable expense. As to Molly, I am not convinced by the evidence that Cassens could not have found a job in a state which would supplement Molly's federal disability benefit. Thus, while I do not question the wisdom of Cassens' decision to take the job with Lake Havasu City, I find Charging Parties have not sustained their burden of proving that Molly's reduced disability benefits was a reasonable expense.

Further, notwithstanding Charging Parties' argument that remedies should be tailored to each situation and that terminated employees, along with their families, often must move in order to take new jobs, there is no precedent for holding an employer liable for losses suffered by family members.

Accordingly, I conclude that the District is not liable for the loss of Kathy Cassens' salary or the reduction of Molly Cassens' disability benefits.

3. Coleman

Charging Parties seek reimbursement to Coleman for two types of losses: (1) commissions and other closing costs on the sale of his San Diego house and purchase of his Santa Cruz house in March 2003; and (2) costs of commuting 80 miles round trip from his house in Santa Cruz to his job in San Jose. There is no question that these are expenses arising directly from Coleman's acceptance of the job in San Jose. However, the closing costs on the two houses were not incurred until after the District's offer of reinstatement which, as noted above, presumably occurred some time in October or November 2002. As to commuting expenses, Coleman accepted the job in San Jose in July 2002. He first took a local apartment, then began leasing the house in Santa Cruz and moved his family there. However, the record does not reflect when Coleman first started commuting from Santa Cruz, or whether his

commute began prior to the offer of reinstatement. Thus, I cannot find that Coleman incurred any commuting costs prior to the offer of reinstatement.

Coleman rejected the District's offer of reinstatement, contending that it would have been unfair to "drag" his family from Santa Cruz back to San Diego. There is no contention that the offer of reinstatement was not valid.

Generally, the employer's liability is terminated by the discriminatee's rejection of a valid offer of reinstatement. (NLRB v. Ryder System, Inc. et al (6th Cir. 1993) 983 F.2d 705 [142 LRRM 2290].) Thus, in St. Regis Paper Company (1991) 301 NLRB 1236 [136 LRRM 1283], the employee's additional expense commuting to his new jobsite were no longer chargeable to the employer when he rejected its offer to return to his former jobsite. Similarly, in Continental Insurance Co. (1988) 289 NLRB 579 [131 LRRM 1202], the employee rejected reinstatement because she was afraid to ride the subway, which she would need to do to reach the employer's new location; she thereby ended her entitlement to back pay and expenses. Of particular relevance is the decision in Preterm, Inc. (1984) 273 NLRB 683, 698-99 [118 LRRM 1622) (Preterm). The discriminatee had moved to another state to accept interim employment; the employer argued she was not entitled to any back pay at all, as she had removed herself from the labor market. The NLRB disagreed, finding that it was only "speculative" as to whether she would accept reinstatement to her former job, thus she was entitled to back pay. However, her rejection of the reinstatement offer served to terminate the employer's liability.

Here, had Coleman decided, when he first took the job in Sacramento or the job in San Jose, that he would not return to San Diego, the reasoning in Perterm might lead to a finding that he had taken himself out of the job market at that time and was no longer eligible for any back pay. There is no evidence to sustain such a finding. However, notwithstanding

that a move back to San Diego would have disrupted Coleman's family, Charging Parties have not shown that it would have been impossible.[8] Coleman's concern that he might incur lease forfeiture payments and additional moving costs in accepting reinstatement would assumedly have been satisfied by the District's reimbursement for these additional expenses. Thus, there is no legal basis for finding that his rejection of the reinstatement offer did not terminate the District's liability.

Accordingly, I conclude that the District is not liable for Coleman's expenses in the sale and purchase of his two houses or his commuting costs.

PROPOSED ORDER

Upon the findings of fact and conclusions of law and the entire record in this case, it is found that the Otay Water District (District) has fully complied with the order of the Public Employment Relations Board (PERB or Board) in Otay Water District (2002) PERB Decision No. HO-U-818-M. It is hereby ordered that the Charging Parties' Notice of Objection to District's Alleged Compliance With PERB's Order, dated January 28, 2003, be DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

[8] Contrary to Charging Parties' contention, as the District's offer of reinstatement was valid, it is Coleman's burden to show why he was unable to accept it, rather than the District's burden to show that his rejection was unreasonable.

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Ann L. Weinman
Administrative Law Judge