STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ERIC M. MOBERG, Charging Party, v. MONTEREY PENINSULA UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-3002-E PERB Decision No. 2530 June 19, 2017

Appearances: Eric Michael Moberg, on his own behalf; Lozano Smith by Mark K. Kitabayashi, Attorney, for Monterey Peninsula Unified School District.

Before Gregersen, Chair, Banks and Winslow, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Eric M. Moberg (Moberg) from the dismissal (attached) by the PERB Office of the General Counsel (OGC) of his unfair practice charge against the Monterey Peninsula Unified School District (MPUSD or District). The charge alleged that the District violated the Educational Employment Relations Act (EERA)[1] by retaliating against Moberg and interfering with his protected rights when it allegedly conspired with other public school employers to prevent him from obtaining or keeping a job.

The Board has reviewed the case file in its entirety and has fully considered the relevant issues and contentions on appeal. Based on this review, the Board finds the dismissal letter

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

accurately describes the allegations included in the unfair practice charge, as amended. The dismissal letter is well reasoned and in accordance with applicable law.

We therefore adopt the dismissal letter as the decision of the Board itself, as supplemented by the discussion below.

SUMMARY OF FACTUAL ALLEGATIONS

Moberg was employed by the District as a probationary certificated employee in the 2009-2010 school year. In the middle of that school year the District determined to not re-elect him as an employee for the following school year and also initiated mid-year dismissal procedures for cause, pursuant to Education Code section 44948.3.[2] Moberg filed an unfair practice charge against the District in March 2010, alleging that it was motivated to dismiss him because of his protected activities, which included filing grievances.[3] The Board dismissed this charge in *Monterey I*, *supra*, PERB Decision No. 2381, which concluded that Moberg had failed to establish a nexus between his protected activity and the adverse action.

After his employment with the District ended, Moberg worked in three other school districts: Hartnell Community College District (Hartnell), Cabrillo Community College District (Cabrillo), and West Valley-Mission Community College (West Valley-Mission). The theory of Moberg's unfair practice charge, as amended, alleges that the District, through its agents and attorneys of the firm Lozano Smith, conspired with various administrators and attorneys representing the districts employing him after MPUSD to cause his dismissal from

[2] As did the OGC, we take notice of PERB's own records, including but not limited to *Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381 (*Monterey I*). (*County of Riverside* (2012) PERB Decision No. 2280-M.)

[3] Moberg also appealed his for-cause termination to the superior court and to the Court of Appeal for the Sixth District. He was not successful in overturning the District's termination of his employment.

those districts. In short, Moberg alleges that MPUSD and its agents blacklisted him in retaliation for his protected activity while employed at MPUSD.

The unfair practice charge, as amended, also alleges that an attorney from Lozano Smith, Matthew Hicks (Hicks) interfered with protected rights when on November 10, 2014, he directed Moberg not to communicate with any employee of MPUSD.

THE DISMISSAL

1. Standing to Pursue a Charge Against MPUSD

At the time this charge was filed, Moberg's litigation against the MPUSD in Case No. SF-CE-2830-E had not ended, since the Board's decision did not issue until June 27, 2014 (*Monterey I, supra,* PERB Decision No. 2381.) Thus, there was a question as to whether he was an "applicant for re-employment" within the meaning of EERA section 3543.5, subdivision (a).[4] The OGC noted that seeking reinstatement as a remedy in an unfair practice case does not make one an applicant for employment.

Nevertheless, the OGC concluded that Moberg did have standing to pursue his allegations of blacklisting. Because EERA protects applicants for employment, and PERB Regulation 32602, subdivision (b) does not state that unfair practice charges may only be filed against an employee's current employer, the OGC reasoned that Moberg articulated a viable theory in support of his legal standing to file this charge.

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[4] EERA section 3543.5 provides in pertinent part:

> "It is unlawful for a public school employer to . . . (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, 'employee' includes an applicant for employment or reemployment."

(Emphasis added.)

2. Blacklisting

Relying on precedent established by the National Labor Relations Board (NLRB),[5] the OGC agreed with Moberg that EERA's protection against reprisals, discrimination and interference prohibit blacklisting. In order to establish a violation, according to the OGC, it must be shown that the respondent interfered with the employment process by causing or attempting to cause the potential employer not to hire the applicant because of his or her protected activities. (Dismissal letter, pp. 7-8.)

However, the OGC concluded that Moberg had failed to allege facts sufficient to support his allegation that MPUSD had interfered with his employment at any of the post-MPUSD districts. The only allegation of contact between MPUSD and a subsequent employer occurred when Moberg asked MPUSD to provide him with written verification of employment so he could present it to West Valley-Mission. MPUSD refused, insisting on providing the verification directly to West Valley-Mission. Moberg did not allege facts that MPUSD did anything other than provide the verification. With respect to Moberg's allegations of a conspiracy by and between the attorneys representing MPUSD and the subsequent districts, the OGC determined that there was nothing more than speculation, which is not sufficient to establish a prima facie case. (Dismissal letter, pp. 8-10.)

3. Unlawful Directive

The OGC dismissed this allegation concerning Hicks's November 10, 2014 e-mail message directing Moberg not to have direct communications with current or former employees of MPUSD. Although the Board's decision in *Los Angeles Community College*

[5] When interpreting EERA, it is appropriate for PERB to derive guidance from court decisions interpreting the National Labor Relations Act and parallel provisions of California labor relations statutes. (See, e.g., *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 12-13; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

District (2014) PERB Decision No. 2404 (*Los Angeles*) held that an employer's directive to an employee under investigation for alleged wrongdoing prohibiting him from communications with employees or students was an unlawful restriction on protected activity, the OGC concluded that this principle did not apply to Hicks's directive. At the time the e-mail was sent, Moberg was not an employee of MPUSD, so the District had no ability to enforce the directive, and there could be no implied threat in the e-mail, according to the OGC.

Moreover, the e-mail was sent during or in the context of an administrative hearing concerning Moberg's fitness to hold a teaching credential in which he represented himself. As the OGC reasoned: "Rather than an employer's directive to an employee, Hicks's directive would be more accurately characterized as a communication between opposing counsel, as Hicks and Charging Party effectively were in Charging Party's CTC matter."[6] (Dismissal letter, p. 11.)

MOBERG'S APPEAL

The appeal takes issue with the OGC's analysis of his blacklisting allegations, claiming that it rewards the District and its lawyer-agents for the ongoing conspiracy to keep Moberg from obtaining and maintaining employment.

Moberg also asserts that the dismissal of the interference charge regarding the Hicks directive against contacting MPUSD employees is not consistent with PERB precedent, and argues that the order, issued in the context of a credential revocation hearing, is so broad as to apply to PERB cases. Because pursuing and litigating unfair practices is protected conduct, Moberg argues that the directive interfered with EERA-protected activity.

Moberg also objects to the OGC's failure to address "new facts" from Cabrillo as alleged in the Fifth Amended Charge, and its failure to address his repeated allegation that

[6] "CTC" refers to the Commission on Teacher Credentialing.

Lozano Smith failed to properly verify its position statements because the verification pre-dated when the position statement was completed.

DISCUSSION

Moberg's appeal generally reiterates facts alleged in the unfair practice charge, as amended, and restates arguments made to the OGC, failing to explain why the OGC was in error in concluding that Moberg's conspiracy allegations were wholly speculative. Before considering the merits of the appeal, we consider Moberg's request to present new evidence.

Request to Present New Evidence

On June 28, 2016, after the filings in this appeal were complete, pursuant to PERB Regulation 32635, subsection (b), Moberg submitted to the Board a request to present new evidence in the form of a November 1, 2012 e-mail from Cabrillo Dean of Health, Athletics, Wellness, and Kinesiology, Kathleen Welch (Welch) to Cabrillo Human Resources Director Loree McCawley (McCawley). The e-mail says that Welch learned that Moberg's (then employed by Cabrillo) transcript/degrees needed to be verified and instructed: "Please call your counterpart at Hartnell. He no longer is a faculty member at Hartnell, but they went through threats of lawsuits . . . so we need to do this carefully."

Under PERB Regulation 32635, subdivision (b),[7] Moberg alleges he has good cause to present the new supporting evidence on appeal because he did not become aware of the document until June 21, 2016, during the administrative hearing of his unfair practice complaint against Cabrillo. Moberg asserts that this e-mail is relevant because it demonstrates union animus and intent by Hartnell to conspire with Cabrillo to continue Hartnell's retaliation against him.

[7] PERB Regulation 32635, subdivision (b) provides: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence."

Our cases have found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503; *American Federation of State County and Municipal Employees (McGuire)* (2012) PERB Decision No. 2286-S, p. 3.) Moberg was not aware this e-mail existed until after this charge had been dismissed, and he could not have reasonably learned of it before the administrative hearing in his unfair practice case against Cabrillo because of the lack of discovery rights in PERB proceedings (except under extraordinary circumstances). We conclude that there is good cause to present this evidence.

Upon consideration of this new evidence, we conclude that it has no bearing on the issues of this case. The e-mail contains no facts that even remotely show any wrongdoing or improper motive by respondent in this case, MPUSD. Nor does the e-mail support Moberg's speculative allegation that Lozano Smith was "stalking" him on behalf of MPUSD. The e-mail is therefore irrelevant to the allegations against MPUSD contained in the unfair practice charge, as amended.

Blacklisting Allegations and Standing

The OGC correctly concluded that an employee has standing to file an unfair practice charge against a former employer to allege that such employer interfered with the employee's attempt to obtain and/or retain subsequent employment. (Dismissal letter, p. 7.)

We agree with the OGC's determination in the dismissal letter that although EERA does not explicitly prohibit blacklisting by an employer, EERA's prohibition against interference, discrimination and reprisals logically encompasses a former employer's efforts to prevent a charging party from obtaining subsequent work because of the charging party's protected activity while employed by the former employer. Thus, a charging party may

establish a prima facie violation on the basis of blacklisting by showing that a respondent interfered with the employment process by causing or attempting to cause a potential employer to refuse to hire the applicant because of the applicant's union activities or other conduct protected by EERA. (*Towne Ford, Inc.* 1998) 327 NLRB 193; *NLRB v. Mount Desert Island Hospital* (1st Cir. 1982) 695 F.2d 634, 642; *Madison S. Convalescent Center* (1982) 260 NLRB 816, 823.)

As the OGC correctly noted, however, Moberg did not allege any facts that showed MPUSD interfered with his attempts to obtain or maintain subsequent employment by informing subsequent employers of Moberg's protected activity, or by any other means. The only purported contact was between MPUSD and West Valley-Mission, but there was no allegation that MPUSD conveyed any information about Moberg besides verifying his employment. In *Hartnell Community College District* (2015) PERB Decision No. 2452, the Board held that insisting on providing employment verification directly to a potential employer was not sufficient to establish a prima facie violation. We also agree with the OGC that Moberg's claim that MPUSD conspired with other districts to prevent him from keeping or obtaining employment is wholly speculative and therefore does not support issuance of a complaint. For these reasons, we reject Moberg's assertion that the OGC erred in dismissing the blacklisting allegations.

The OGC dismissed Moberg's allegation that MPUSD had provided Hartnell with information about his court litigation against MPUSD, finding that Moberg had mischaracterized a memorandum written by a Hartnell administrator that referred to court records regarding Moberg's dismissal from MPUSD. The memorandum did not state that the records were obtained from MPUSD or their attorneys. Even if MPUSD had divulged such information, it would not necessarily have informed Hartnell of Moberg's protected activities.

According to the OGC "Charging Party's individual resort to judicial remedies to challenge his dismissal is not an EERA-protected activity." (Dismissal letter, p. 9.) We agree that under the facts alleged here that Moberg's court case against MPUSD challenging his for-cause termination was not protected conduct. The facts alleged here differ from those in *Jurupa Unified School District* (2012) PERB Decision No. 2283, where employees were acting as a group to enforce workplace rights through administrative and judicial means.

At the time of the dismissal, the OGC did not have the benefit of the Board's recent decision in *Walnut Valley Unified School District* (2016) PERB Decision No. 2495 (*Walnut Valley*). Nevertheless, the dismissal remains correct after applying *Walnut Valley* to the facts alleged here. In *Walnut Valley*, the charging party was allegedly retaliated against after she questioned certain management directives concerning curricular matters during staff meetings. The Board held that even though the charging party was the only employee opposing the management directives in these meetings, her criticism "represent[ed] an attempt to enlist the support of her fellow employees for mutual aid and protection and/or to protect the employment interests of the entire group." (*Id.* at p. 9.) These activities therefore were protected by EERA section 3543, subdivision (a), which guarantees employees the right to "form, join, and participate in the activities of employee organizations . . . for the purpose of representation on all matters of employer-employee relations."

Walnut Valley, *supra*, PERB Decision No. 2495 further noted that the charging party's activities may have been protected under the portion of EERA section 3543, subdivision (a) that gives employees the right to represent themselves individually in their employment relations with the public school employer. (*Walnut Valley* at pp. 18-19.) Consequently, the Board directed that in future cases in which speech or conduct by an individual is alleged to be

protected, PERB must analyze the claim under both the "form, join, and participate" language and the self-representation guarantee of EERA 3543, subdivision (a). (*Walnut Valley* at p. 19.)

Walnut Valley, *supra*, PERB Decision No. 2495 cautioned that the right of self-representation was not unlimited and must be "tethered to 'employment relations,' which means those matters which are within the scope of negotiations pursuant to EERA section 3543.2 or which are related to the formulation of educational policy, in the case of certificated employees." (*Walnut Valley* at pp. 19-20.)

We agree with the OGC that Moberg's lawsuit against MPUSD was not protected activity for reasons explained in the dismissal letter, which concluded that the litigation was not an activity in which Moberg had joined with other employees to enforce workplace rights. (Dismissal letter, p. 9.) Nothing in the unfair practice charge, as amended, referred to or can be fairly interpreted as alleging that Moberg sought to join with other employees to enforce collective rights. Unlike the charging party in *Walnut Valley*, *supra*, PERB Decision No. 2495, Moberg did not seek to represent interests other than those pertaining only to himself.

Neither can Moberg's court litigation against MPUSD be deemed protected under the right of self-representation discussed in *Walnut Valley*, *supra*, PERB Decision No. 2495. This individual law suit challenging the statutory dismissal proceedings MPUSD initiated against Moberg did not touch on a matter within the scope of negotiations under EERA.[8]

Directive Not to Communicate with Former Employees

We affirm the OGC's conclusion that the allegations concerning the Hicks e-mail should be dismissed because we agree with the characterization that "Hicks's directive would be more accurately characterized as a communication between opposing counsel, as Hicks and

[8] EERA section 3543.2, subdivision (4)(b) excludes from the scope of representation causes and procedures for dismissal of certificated employees.

Charging Party effectively were in Charging Party's CTC matter." (Dismissal letter, p. 11.) In light of this, we need not address Moberg's contention on appeal that the order is overbroad.

The dismissal letter notes at page 11: "It does not appear that this statement can be considered an unlawful directive, because the statement did not threaten any consequences if Charging Party attempted to contact MPUSD employees, and Charging Party was neither an applicant for employment nor an employee of MPUSD at the time." As we noted in *Los Angeles*, *supra*, PERB Decision No. 2404, p. 8: "The law does not require that a rule [prohibiting employees from communicating with each other] contain a direct or specific threat of discipline in order to be found unlawful." To the extent the quoted portion of the dismissal letter conflicts with *Los Angeles*, we reaffirm that *Los Angeles* remains the law.[9]

"New Facts" in the Fifth Amended Charge

Moberg asserts that the OGC failed to address in the dismissal letter allegations concerning Cabrillo in his Fifth Amended Charge. These allegations concern what appear to be e-mails between administrators at Cabrillo regarding Moberg's educational qualifications. According to the Fifth Amended Charge, the e-mails "reveal that Cabrillo had already clearly decided to terminate Moberg on any pretense available."

Although not discussed specifically, the OGC summed up Moberg's various allegations:

> The only other specific allegations regarding conduct by agents of MPUSD concern Charging Party's CTC hearing. These allegations do not demonstrate any attempt by MPUSD to interfere with Charging Party's employment by Hartnell, Cabrillo, West Valley-Mission. . . ."

[9] We make no determination on whether Moberg had a right to contact potential witnesses under the California Discovery Act or similar administrative procedures, as those matters are outside PERB's jurisdiction.

(Dismissal letter, p. 8.) To the extent the above-quoted passage cannot be construed to dispose of Moberg's allegations against Cabrillo in the Fifth Amended Charge, we consider this a harmless error. Cabrillo was not named as a respondent in this charge, or any of its amended versions. There was therefore no need for the OGC to explicitly analyze or dispose of such allegations.

Respondent's Verifications

MPUSD filed position statements in response to the various amended unfair practice charges. On at least two occasions, the date of the verification signed by Judy Durand, MPUSD's executive director for human resources, predates the date appearing on the actual statement prepared by Lozano Smith. The warning letter sent to Moberg on May 22, 2015, addressed his claim as to the first three position statements by summarily stating that the verifications were in compliance with PERB Regulation 32360. Moberg argues on appeal that the OGC erred by failing to address a discrepancy between the dates of MPUSD's position statements and the verifications filed in response to the Fifth Amended Charge. This argument is raised in the context of Moberg's assertion that the OGC erred by not addressing the nexus factors applied to determine animus in a discrimination case. According to Moberg, the discrepancy in dates between the verification and the position statements demonstrate glaring inconsistencies in MPUSD's "narrative." (Appeal, p. 6.)

The OGC did not err by failing to address this issue or in failing to discuss the nexus factors at all, because it properly concluded that Moberg failed to assert that MPUSD had taken any adverse action against him. As noted above, we agree with the OGC's conclusion that there were no facts alleged that MPUSD caused or attempted to cause other employers not to hire or retain Moberg as an employee because of his

protected activity, whether by informing other employers of his protected activity or providing inaccurate information about Moberg because of his protected activity, or by any other means. Instead, there was only speculation. To the extent the discrepancy between verification and date of the position statement is part of Moberg's nexus theory, it is not legally relevant because of the determination that there was no adverse action.

To the extent Moberg's assertion regarding the verification discrepancy can be interpreted as an independent ground for appeal, we reject such claim. MPUSD verified its position statement by its executive director of human resources. There is nothing extraordinary about the fact that the verifications were signed one day before the position statements were finalized and filed with PERB. To assume and assert that this proves some dishonesty, or that the position statements were altered after Durand signed them is pure speculation. We agree with the OGC's determination that the verifications complied with PERB regulations.

ORDER

The unfair practice charge in Case No. SF-CE-3002-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Gregersen and Member Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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March 21, 2016

Eric Moberg

Re: *Eric M. Moberg v. Monterey Peninsula Unified School District*
Unfair Practice Charge No. SF-CE-3002-E
DISMISSAL LETTER

Dear Mr. Moberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 11, 2013. Eric M. Moberg (Moberg or Charging Party) alleges that the Monterey Peninsula Unified School District (MPUSD or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by retaliating against him for his protected activity and interfering with his right to engage in protected activity.

Charging Party was informed in the attached Warning Letter dated May 22, 2015, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, he should amend the charge. Charging Party was further advised that, unless he amended the charge to state a prima facie case or withdrew it on or before June 12, 2015, the charge would be dismissed.

An extension of time was granted, and a timely third amended charge was filed on June 29, 2015.[2] On January 27, 2016, a fourth amended charge was filed. On March 4, 2016, a fifth amended charge was filed.

[1] EERA is codified at Government Code section 3540 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

[2] Previous amended charges were filed on September 24, 2013, and January 2, 2015.

FACTUAL SUMMARY[3]

Charging Party was first employed by MPUSD for the 2009-2010 school year. Prior to that, Charging Party was employed by the San Mateo County Office of Education (SMCOE). He filed four unfair practice charges (UPCs) against SMCOE, one of which, Case No. SF-CE-2744-E, resulted in a complaint issued by PERB's Office of the General Counsel. Charging Party settled the case with SMCOE, entering into a settlement agreement that included a confidentiality clause. SMCOE was represented by attorney Eugene Whitlock (Whitlock) in these cases.

Employment by MPUSD

During the 2009-2010 school year, MPUSD decided not to re-elect Charging Party for the following school year. He was later dismissed by MPUSD. Among the reasons cited was dishonesty based on Charging Party's failure to disclose his reasons for leaving SMCOE, which MPUSD learned of after SMCOE provided the settlement agreement to MPUSD. Charging Party filed a UPC challenging his non-reelection and dismissal by MPUSD, Case No. SF-CE-2830-E. The Board ultimately upheld the dismissal of that charge for failure to state a prima facie case. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381.) As discussed in the Board's decision, Charging Party also unsuccessfully challenged his dismissal through the courts. (*Ibid.*) MPUSD was represented by the law firm Lozano Smith throughout these administrative and judicial proceedings.

Post-MPUSD Employment

In 2010, Charging Party was hired as an adjunct faculty member at Hartnell Community College District (Hartnell).

In January 2012, Charging Party was hired to teach at Cabrillo Community College District (Cabrillo) for the Spring 2012 semester. He was subsequently hired for the Fall 2012 semester.

On September 7, 2012, a Hartnell administrator sent an e-mail message regarding the November 2012 elections. The message contained guidelines as to the types of election-related activities that were permitted and prohibited on campus. Another instructor responded to the e-mail message asking whether it would be appropriate to discuss "the economic impact of these ballot initiatives" in class. Ann Wright (Wright), identified in the charge as "union president," responded:

[3] This summary includes information contained in the original charge and five amended charges, as well as information from PERB's own records. (See *County of Riverside* (2012) PERB Decision No. 2280-M [PERB may take official notice of its own records].)

> All,
>
> I have asked CTA legal for guidance on this. I think some of these guidelines, which were developed by Lozano Smith, might be too restrictive. I know some colleges have actually developed curriculum for classroom use on these issues. I will share promptly what I have learned.

Charging Party himself responded to Wright's message by providing the text of a news article regarding a case where sanctions were imposed on Lozano Smith and one of its attorneys.

On September 24, 2012, Charging Party was terminated by Hartnell after invoking his right to union representation and threatening to file a UPC. Charging Party filed a UPC regarding that termination.[4] The law firm of Liebert Cassidy Whitmore represents Hartnell in that case.

On October 2, 2012, Terri Pyer (Pyer), a Hartnell administrator, issued a memorandum explaining the reasons for Charging Party's termination. Among them were:

- States that he was never dismissed from any job, and never resigned to avoid being dismissed, but court records for a subsequent dismissal (from MPUSD) show that he executed resignation settlement with San Mateo County Office of Education in early 2009.
- Certified that his application was complete, but he omitted the San Mateo job from his application, despite explicit instructions to include every job in last 15 years. . . .

On October 24, 2012, the Commission on Teacher Credentialing (CTC) informed Charging Party that it was withdrawing, for lack of jurisdiction, a letter of inquiry to him regarding allegations of misconduct by MPUSD.

On November 4, 2012, Charging Party's immediate supervisor at Cabrillo, James Weckler (Weckler) learned that Charging Party had filed UPCs against MPUSD and Hartnell.[5] Two days later, November 6, 2012, Charging Party was placed on administrative leave.

On November 7, 2012, Cabrillo Human Resources Director Loree McCawley (McCawley) told Charging Party's union representative that he had a reputation of being litigious.

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[4] The Board ultimately reversed the dismissal of that UPC and remanded for issuance of a complaint. (*Hartnell Community College District* (2015) PERB Decision No. 2452 (*Hartnell*).)

[5] According to Charging Party's subsequent UPC against Cabrillo, Case No. SF-CE-2994-E, Charging Party sent an e-mail message to Weckler, among others, that referred to the Hartnell charge and included it as an attachment.

Weckler attempted to schedule an investigatory meeting with Charging Party for November 14, 2012. However, Charging Party reminded Weckler that he had arranged for a substitute instructor to teach his class that day, in part to prepare for an oral argument before the Court of Appeal, Sixth Appellate District, in his civil case against MPUSD. Charging Party also requested that Cabrillo have its attorney, Vincent Hurley (Hurley) state "whether or not he has any attorney-client relationships with (a) SMCOE, (b) MPUSD, (c) Hartnell College, or (d) Lozano Smith. Also, please inform me as to any contacts anyone at Cabrillo has had, relating to me, from Lozano Smith or Hartnell College."

During a meeting on November 13, 2012, Hurley refused to deny that he had a "attorney-client relations" with Lozano Smith.

On November 14, 2012, Weckler demanded another meeting with Charging Party for November 15, 2012, despite Charging Party's previous notification that he would be at oral argument in his civil case against MPUSD that day.

On December 13, 2012, Cabrillo informed Charging Party that he would not be offered future employment there.[6] Charging Party filed a UPC against Cabrillo.[7]

On February 19, 2013, Cabrillo informed Charging Party that it was continuing to share information about Charging Party with its own attorney, Hurley.

On March 5, 2013, Hurley filed a position statement on behalf of Cabrillo in Case No. SF-CE-2994-E. Hurley did not deny that he had ties to Lozano Smith.

On March 19, 2013, Hurley sent a letter advising Charging Party to "seriously consider the consequences" of pursuing various actions against Cabrillo. Hurley refused to divulge information received from Lozano Smith. Hurley also stated that he had reviewed "many public records of the case reports of [Charging Party's] litigation over the past years."

On August 21, 2013, Charging Party was hired by the West Valley-Mission Community College District (West-Valley Mission). Charging Party later filed a UPC, Case No. SF-CE-3060-E, against West Valley-Mission after it declined to offer him teaching assignments for the Fall 2014 term. West-Valley Mission is represented by Liebert Cassidy Whitmore in that case.[8]

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[6] Charging Party later received copies of internal e-mail messages regarding his termination suggesting that Cabrillo's reasons for terminating him were pretextual.

[7] The Board reversed the dismissal of that UPC and remanded for issuance of a complaint. (*Cabrillo Community College District* (2015) PERB Decision No. 2453.)

[8] Charging Party specifically alleged in that case that West Valley-Mission retaliated against him for engaging in protected activity, issued an overbroad directive that interfered with his rights to communicate with his co-workers, and was conspiring, through its legal counsel, with other employers to deny him employment. PERB's Office of the General

On December 12, 2013, Charging Party sent a letter to a Lozano Smith attorney requesting that MPUSD provide him with a written employment verification that he could then provide to West Valley-Mission, which would eliminate the need for direct contact between MPUSD and West Valley-Mission. MPUSD, however, insisted on providing the information to West Valley-Mission directly.

On March 20, 2014, an attorney from the law firm of Atkinson, Andelson, Loya, Ruud, and Romo, representing West Valley-Mission, refused to provide information to Charging Party regarding attorney-client relationships between West Valley-Mission and various law firms representing MPUSD, Hartnell, and Cabrillo.

On November 10, 2014, Matthew Hicks (Hicks), a Lozano Smith attorney representing MPUSD, sent Charging Party the following e-mail message:

> Dear Mr. Moberg:
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> Without reference to any other statement in your email below, in response to your inquiry about the PERB matter you reference, please transmit any email or documentation with respect to that matter to Lozano Smith attorney Ashley Amerzian [*sic*] and cc Mr. Kitabayashi.
>
> Also, and in follow up to my earlier email today regarding the CTC matter, please be advised that you shall not have any direct communications with current or former employees of [MPUSD]. If you have an email regarding the CTC matter and MPUSD employees, please transmit that to me and cc Mr. Kitabayashi.
>
> Thank you.

In December 2014, MPUSD, represented by Lozano Smith attorney Mark Kitabayashi (Kitabayashi), requested to join as a "party of interest" in an administrative hearing involving the CTC. The administrative law judge (ALJ) denied the request. MPUSD also moved to quash a subpoena requested by Charging Party. The ALJ denied that motion. Kitabayashi attended the hearing, interrupted the ALJ, and "accost[ed]" Charging Party.

In its closing brief to the ALJ, the CTC argued:

> Respondent has had more than his day in court. Clearly, disciplinary action had no chilling effect upon his constitutional rights to file grievances[,] PERB claims[,] or lawsuits. As to other teachers and staff, rather than an adverse effect, action against respondent's credentials will vindicate the horrible

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Counsel issued a complaint on the first two allegations after Charging Party withdrew the third one.

> experiences Monterey staff have endured for the last five years as respondent continued, and continues to challenge his justifiable dismissal for being unfit to teach.

In March 2015, the ALJ issued a proposed decision rejecting CTC's case against Charging Party. The CTC subsequently adopted the proposed decision and issued Charging Party's credential.

On November 10, 2015, Charging Party filed an unfair labor practice charge with the National Labor Relations Board (NLRB), alleging that Menlo College, a private employer, terminated him in retaliation for his efforts to form a union there.

On an unspecified date, Charging Party filed an NLRB charge against the University of San Francisco (USF), a private employer, alleging that it "blacklist[ed]" Charging Party.

On January 7, 2016, Napa Valley Community College District (Napa Valley) terminated Charging Party's employment, citing his 2009 settlement agreement with SMCOE. Charging Party filed Case No. SF-CE-3166-E. Charging Party alleges that Napa Valley is represented by a Liebert Cassidy Whitmore attorney.

On January 14, 2016, Charging Party filed Case No. SF-CE-3167-E against San Mateo Community College District (SMCCD), based on its refusal to interview him for a position and its threat to sue him for breaching the SMCOE settlement agreement. According to Charging Party, Whitlock is now an SMCCD employee.

DISCUSSION

I. Standing

The Warning Letter questioned whether Charging Party had standing to pursue this charge against MPUSD, because he was neither an employee of MPUSD nor an applicant for employment by MPUSD at the time of the events alleged.[9] As discussed in the Warning Letter, Charging Party maintains that he was an "applicant for employment" within the meaning of EERA section 3543.5(a), during the time his prior UPC against MPUSD was pending, because he was seeking reinstatement to his previous position. PERB has determined that in order to be considered an "applicant," an individual must have taken some action, such as applying for a position, or be on a re-employment list. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221.) Merely seeking reinstatement as a remedy in a UPC case does not make one an applicant for employment.

Nevertheless, it is arguable that Charging Party does have standing to file this charge, despite the fact that he was not an employee of, or an applicant for employment by, MPUSD during

[9] To the extent Charging Party was challenging MPUSD's conduct toward him when he was an employee, the Warning Letter concluded that those allegations would be untimely.

the relevant time period. EERA defines "Public school employee" or "employee" as "a person employed by a public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees." (Gov. Code, § 3540.1, subd. (j).) EERA section 3543.5(a), which is at issue in this case, makes it unlawful for an employer to

> [i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

The protections of section 3543.5(a) expressly extend to "an applicant for employment or reemployment." (*Ibid.*)

On its face, EERA is not limited to prohibiting an employer from interfering with the rights of its own employees, as opposed to those employed or seeking employment elsewhere. Moreover, PERB Regulations do not specify that an unfair practice charge by an employee may be filed only against his or her own employer. (PERB Regulation 32602(b).) And such a narrow interpretation of EERA's protections would be inconsistent with the National Labor Relations Board's (NLRB) cases prohibiting "blacklisting," discussed below.

Although Charging Party was not an employee or an applicant for employment with MPUSD, it does appear that at the relevant times alleged in the charge, he was either an employee or an applicant for employment of various other public school employers. As a result, there is at least a viable legal theory that Charging Party has standing to maintain this charge against MPUSD.

II. Blacklisting

Charging Party alleges that MPUSD has "blacklisted" him, i.e., prevented or attempted to prevent him from obtaining or maintaining employment with other employers. Charging Party acknowledges that EERA does not expressly prohibit blacklisting, but argues that it is encompassed in EERA's prohibitions against interference, discrimination, and reprisals.

The National Labor Relations Act (NLRA) has been interpreted to prohibit blacklisting.[10] To establish such a violation, it must be shown "that the respondent interfered in the employment process by causing or attempting to cause a potential employer not to hire the applicant because

[10] Charging Party asserts that "section 704" of the NLRA prohibits blacklisting. The NLRA does not have a section 704, and does not otherwise expressly prohibit blacklisting. Rather, this appears to be a reference to New York Labor Law section 704, which makes it unlawful, among other things, for an employer "[t]o prepare, maintain, distribute or circulate any blacklist of individuals for the purpose of preventing any of such individuals from obtaining or retaining employment because of the exercise by such individuals of any of the rights guaranteed by" the statute.

of the applicant's union or other protected concerted activities." (*Towne Ford, Inc.* (1998) 327 NLRB 193, 196, Member Brame, dissenting.)[11] Thus, a violation has been found where the respondent directly informs a potential employer of the applicant's protected activities. (*Springfield Manor* (1989) 295 NLRB 17, 30 [informing subsequent employer that employee was terminated because of union activity]; *Madison S. Convalescent Ctr.* (1982) 260 NLRB 816, 823 [employee described as "union agitator]; *NLRB. v. Mount Desert Island Hosp.* (1st Cir. 1982) 695 F.2d 634, 642 [employee described as a "troublemaker"].)

In this case, Charging Party alleges no facts to support the allegation that MPUSD has interfered with the employment process at Hartnell, Cabrillo, West Valley-Mission, SMCCD, Napa Valley, USF, or Menlo College by informing those employers of his protected activity. Charging Party's allegations against MPUSD largely consist of the same allegations made in the charges against the other employers.

The only allegation of contact between MPUSD and a subsequent employer is when, in December 2013, Charging Party requested that MPUSD provide him with a written employment verification that he could then provide to West Valley-Mission, but MPUSD insisted on providing the information directly to West Valley-Mission. However, there is no allegation that MPUSD did anything but provide the information requested. Further, the Board has specifically held that a similar allegation—that Hartnell refused to provide Charging Party with employment verification, insisting on contacting Charging Party's subsequent employers directly—was not sufficient to establish a prima facie case. (*Hartnell, supra*, PERB Decision No. 2452.)

The only other specific allegations regarding conduct by agents of MPUSD concern Charging Party's CTC hearing. These allegations do not demonstrate any attempt by MPUSD to interfere with Charging Party's employment by Hartnell, Cabrillo, West Valley-Mission, SMCCD, Napa Valley, USF, or Menlo College.[12]

Charging Party's claim that his treatment by his subsequent employers is suggestive of a conspiracy involving MPUSD appears to be based on nothing more than speculation. Speculation is not sufficient to establish a prima facie case. (*State of California (Department of Food and Agriculture*) (1994) PERB Decision No. 1071-S (*Food and Agriculture*); see also *State of California (Department of Forestry & Fire Protection)* (2004) PERB Decision No. 1690-S [unsupported allegations of the existence of a conspiracy not sufficient].)

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[11] Two NLRB blacklisting cases were discussed in the proposed decision adopted by the Board in *Los Angeles Unified School District* (2001) PERB Decision No. 1469, but neither the proposed decision nor the Board decision found an unfair practice based on a blacklisting theory.

[12] Nor, contrary to Charging Party's claims, is the statement in CTC's closing brief evidence of conduct by MPUSD. In any event, Charging Party mischaracterizes the statement as an acknowledgment of an attempt to chill the exercise of his protected rights. Based on the context, however, the statement appears to be a legal argument that the proposed action against Charging Party's credential will *not* chill his exercise of protected rights.

For instance, Charging Party contends that the October 2, 2012 memorandum from Pyer provides evidence of contact between Hartnell and MPUSD, arguing that the memorandum "refer[ed] to information and documents supplied to Hartnell from MPUSD by Lozano Smith." This is not an accurate characterization of the memorandum. The memorandum refers to "court records for a subsequent dismissal (from MPUSD)" and to the SMCOE settlement agreement. It does not state that these records were obtained from MPUSD or Lozano Smith, and court records, although not covered by the California Public Records Act (Gov. Code, § 6250 et seq. [CPRA]), are nevertheless public records. (*Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 111.)

Even if MPUSD did provide Hartnell with information from Charging Party's court cases against MPUSD, this would not necessarily inform Hartnell of Charging Party's protected activities. This is because Charging Party's individual resort to judicial remedies to challenge his dismissal is not an EERA-protected activity. (Cf. *Jurupa Unified School District* (2015) PERB Decision No. 2420 [attending a court hearing regarding the termination of another employee was not, in itself, protected activity]; cf. also *Jurupa Unified School District* (2012) PERB Decision No. 2283 [protected activity includes "*with one or more other employees*, seeking to enforce workplace rights through administrative or judicial means" (emphasis added)].) Therefore, Charging Party's allegation regarding the Pyer memorandum relies on two-fold speculation, that: (1) MPUSD was the source of the court records; and (2) MPUSD disclosed, in addition to the court records, Charging Party's participation in protected activity. As with the other speculation contained in the charge, this speculation is not sufficient to state a prima facie case. (*Food and Agriculture*, *supra*, PERB Decision No. 1071-S.)

Charging Party also asserts that the September 7, 2012 e-mail message from Wright "reveal[s] manipulation by Hartnell of [Wright] to intimidate Moberg by informing Moberg that Lozano Smith was advising both MPUSD and Hartnell." This assertion, too, is based entirely on speculation. (*Food and Agriculture*, *supra*, PERB Decision No. 1071-S.) Even to the extent Charging Party would use Wright's e-mail message more narrowly, as evidence that Lozano Smith provided legal guidance to Hartnell regarding election-related activities on campus, this fact does not support the conclusion that MPUSD and Hartnell were "conspiring" against Charging Party.

Charging Party appears to suggest a connection between MPUSD and Cabrillo by relying on Weckler's attempts to schedule meetings on days on which Charging Party would either be preparing for or participating in oral argument in a civil case against MPUSD. Charging Party's speculation that this means Cabrillo was trying to assist MPUSD is insufficient to establish a prima facie case. (*Food and Agriculture*, *supra*, PERB Decision No. 1071-S.)

In the absence of any specific facts showing that MPUSD attempted to influence Charging Party's subsequent employers, Charging Party relies heavily on the statements, or non-statements, of the attorneys representing MPUSD and other employers. Charging Party cites numerous instances where he has accused, in unfair practice charges, those employers or their attorneys of conspiring or collaborating to deny him employment. According to Charging

Party, those accusations have not been specifically denied in the employers' position statements.

A respondent's failure to deny an allegation in a UPC is not an admission of its truth. The filing of a position statement is optional. (PERB Regulation 32620(c) ["The respondent . . . *may* state its position on the charge during the course of the inquiries" (emphasis added)].) This is in contrast with an answer to a complaint issued by the Office of the General Counsel. An answer must contain a "specific admission or denial of each allegation contained in the complaint," and the failure to file an answer may be found to "constitute[] an admission of the truth of the material facts alleged in the charge and a waiver of respondent's right to a hearing." (PERB Regulation 32644, subds. (b)(5), (c).) As a result, the failure of various respondents to specifically deny Charging Party's conspiracy allegations does not assist Charging Party in stating a prima facie case.

Charging Party also cites instances where he has requested that employers or their attorneys provide information regarding their attorney-client relationships. According to Charging Party, those requests have been met with refusals, citing attorney-client privilege. The refusal to provide such information to Charging Party also does not assist in stating a prima facie case. Private law firms representing public school employers are not under any obligation to provide information to an individual employee. Moreover, public school employers do not have a duty under EERA to provide information to individual employees, applicants for employment, or former employees. (*Orange Unified School District* (2004) PERB Decision No. 1670.) While they may have a duty to do so under CPRA, a possible violation of that statute is not prima facie evidence of a conspiracy.

Finally, no inference of a conspiracy can be drawn from the admission of Hurley, Cabrillo's attorney, to having reviewed public records regarding Charging Party's various administrative and civil actions against MPUSD. It does not follow from this fact that MPUSD was the source of this information, or even if it was, that it provided the information before Cabrillo terminated Charging Party's employment.

Because the factual allegations in the charge are insufficient to establish any attempt by MPUSD to interfere with Charging Party's employment by other employers, the allegation that MPUSD and its agents have attempted to "blacklist" him is hereby dismissed.

III. Unlawful Directive

Charging Party also alleges that MPUSD interfered with his rights under EERA through Hicks's November 10, 2014 e-mail message regarding contacting current or former MPUSD employees.

The Board recently reiterated that the test for whether a respondent has interfered with the rights of employees under the EERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. (*Los Angeles Community College District* (2014) PERB Decision No. 2404 (*Los Angeles*).) In *Los Angeles*, the Board adopted the NLRB's standards regarding employer directives regarding protected activity.

Under those standards, directives that explicitly restrict protected activity are unlawful. (*Ibid.*) In the absence of an explicit restriction, the directive may still be unlawful if: "'(1) employees would reasonably construe the language to prohibit [protected] activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of [protected] rights.'" (*Ibid.*, quoting *Lutheran Heritage Village-Livonia* (2004) 343 NLRB 646, 647.)

The Board in *Los Angeles*, *supra*, PERB Decision No. 2404, held that the employer unlawfully interfered with employee rights by placing an employee under investigation and advising the employee, "You are hereby directed not to contact any members of the faculty, staff or students." The Board further made clear that a directive may be unlawful even if it does not "threaten any discipline or other consequence for failure to comply."

This appears to be consistent with the Board's case law regarding implied threats. For instance, in *Los Angeles Unified School District* (1988) PERB Decision No. 659, the Board found an implied threat where a school principal directed employees to talk to her before talking to the union, based on the manner of the statement and the surrounding circumstances, which included the employees' belief that the principal could eliminate their jobs. As the Board explained in *City of Oakland* (2014) PERB Decision No. 2387-M, an employer's statements must be examined carefully to determine if they are an implied threat, because "an employer's words are not merely words; they are always, at least implicitly, backed up by the employer's power to control the terms and conditions of employment."

The directive in this case was: "Also, and in follow up to my earlier email today regarding the CTC matter, please be advised that you shall not have any direct communications with current or former employees of [MPUSD]." This statement was not accompanied by any direct threat toward Charging Party.

It does not appear that this statement can be considered an unlawful directive, because the statement did not threaten any consequences if Charging Party attempted to contact MPUSD employees, and Charging Party was neither an applicant for employment nor an employee of MPUSD at the time. Because of Charging Party's status, MPUSD had no ability to enforce Hicks's directive by taking an employment-related adverse action against Charging Party. As a result, no threat is implicit in Hicks's e-mail message. Although it is conceivable that MPUSD could have taken some other type of action to attempt to enforce Hicks's directive, the e-mail message did not contain any express threat to do so. Rather than an employer's directive to an employee, Hicks's directive would be more accurately characterized as a communication between opposing counsel, as Hicks and Charging Party effectively were in Charging Party's CTC matter.

Therefore, the charge fails to state a prima facie case that Hicks's e-mail message interfered with Charging Party's rights under EERA, and this allegation is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of

each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

J. FELIX DE LA TORRE
General Counsel

By _____
Joseph Eckhart
Regional Attorney

Attachment

cc: Ashley N. Emerzian, Attorney