STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO AREA FIRE FIGHTERS, LOCAL 522, and JED KIRCHER, Charging Parties, v. CITY OF SACRAMENTO, Respondent.	Case No. SA-CE-915-M PERB Decision No. 2642-M May 1, 2019

Appearances: Mastagni Holstedt by Isaac S. Stevens, Attorney, for Sacramento Area Fire Fighters, Local 522 and Jed Kircher; Brett M. Witter, Supervising Deputy City Attorney, for City of Sacramento.

Before Banks, Shiners, and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to a proposed decision by an administrative law judge (ALJ). Charging Parties are an employee organization and a former union officer. The employee organization, Sacramento Area Fire Fighters, International Association of Firefighters Local 522 (SAFF), represents a bargaining unit of fire prevention and suppression employees who work at the Fire Department (Department) of Respondent City of Sacramento (City). The former SAFF official, Jed Kircher (Kircher), has at all relevant times worked as a Firefighter-Paramedic in the Department.

The unfair practice complaint (complaint) in this matter alleged that the City violated the Meyers-Milias-Brown Act (MMBA)[1] and PERB Regulations[2] by discriminating and retaliating against Kircher, as well as by interfering with his employee rights and SAFF's employee organization rights. The ALJ found no merit to any of the claims alleged in the complaint. Charging Parties excepted to some of the ALJ's factual findings and legal conclusions. The City filed no exceptions and urges us to affirm the proposed decision.

Having reviewed the record and considered the parties' arguments in light of applicable law, we dismiss the complaint and underlying charge for the reasons explained below.

FINDINGS OF FACT[3]

The City is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). Charging Party SAFF is an exclusive representative within the meaning of MMBA section 3501, subdivision (a), and PERB Regulation 32016, subdivision (b). Kircher is a public employee within the meaning of MMBA section 3501, subdivision (d).

Kircher has held several offices within SAFF. Between 2006 and 2008, he served as an Executive Board Member, and he served an overlapping term as Vice President of the union's chapter covering City employees, between 2007 and 2009. Kircher ran for Shop Steward in 2014, and he ran for President in 2015, but he lost both races. Kircher has also served on

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise specified, all statutory references herein are to the Government Code.

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[3] Our factual findings are largely drawn from the ALJ's proposed decision. Except where noted *post*, in footnotes 6 and 8, neither party filed exceptions to the ALJ's factual findings.

SAFF's bargaining team, and he signed the 2008-2010 memorandum of understanding (MOU) between SAFF and the City. Even while not holding office, Kircher has filed grievances and advised bargaining unit employees regarding their rights. Other Department employees holding union offices during relevant times include: Fire Captain Christopher Andrew, who has served as SAFF's City Vice President and City Director; Fire Captain Paul Coggiola (Coggiola), who has served as a shop steward; and Firefighter-Paramedic Paolo Nardi (Nardi), who has served as a shop steward and in other capacities. Attorney Isaac Stevens (Stevens) represented Kircher in both investigatory interviews and grievance proceedings, as described further below.

As of the time of hearing in December 2016, Departmental management included supervisor-Fire Captain Mark Allen (Allen), Battalion Chief Craig Weidenhoeft, Assistant Chief Scott Williams (Williams), and Fire Chief Walter White (White). In December 2015, Michael Bartley (Bartley) retired as Department Deputy Chief.

At the time of hearing, Gerriee Giffin (Giffin) served as Human Resources Director and Patrick Hansen (Hansen) served as a Department Investigator, as part of the Professional Standards Unit.

Other City personnel as of the time of hearing included Patrick Taylor (Taylor), a Supervising Arson Investigator; John Parker (Parker), who had been an Investigator with the City Human Resources Department, Labor Relations Division, for over five years; Mary Lota (Lota), who had served as a Labor Relations Officer in the Labor Relations Division since 2013; Chris Costamagna (Costamagna), who had been Deputy Chief since March 2015; and Beverly Coleman (Coleman), who had been a Department Administrative Analyst for ten and one-half years.

Applicable MOU Language, Rules and Policies

Except as noted below, the following relevant provisions were in effect at all relevant times.

The parties' MOU contains a grievance procedure ending in binding arbitration. Pursuant to the MOU, a grievance is a good faith complaint of one or a group of employees, or disagreement between the City and SAFF, over the interpretation, application, or enforcement of express contract terms, as well as Department directives and provisions of the City's ordinances, resolutions, and civil service rules that fall within the scope of representation.

MOU Article 13, entitled Shift Trading, allows employees to trade shifts, or four-hour parts of them, under specified conditions. In a typical shift trade, an employee will have another employee work his or her scheduled shift, or part of that scheduled shift. The Department requires employees to enter shift trades in Telestaff (Department software used to record and track scheduled work hours) before the trade. Shift trades are to be reviewed by the immediate supervisor. The employee who works the shift does not get paid by the City. Rather the employee who was scheduled to work the shift is paid. Generally, an employee who trades a shift "pays back" the employee who covered the shift, in kind, by covering a shift. TeleStaff shows when an employee pays back a shift. Article 12 of the 2008-2010 MOU required shift trades to be fully repaid within one year of initiation, but allowed employees owed time to waive repayment if approved by the Fire Chief; this language is not in Article 13 of the 2014-2018 MOU. Firefighters formerly worked 24-hour shifts but by the time of hearing had moved to 48-hour shifts.

Under the MOU, when the City investigates a member of the bargaining unit, the City must conduct the interview or factfinding in compliance with procedural safeguards. These

contractual safeguards include advising the subject employee regarding his or her right to representation, providing a reasonable amount of time to obtain representation, and scheduling the interview at a reasonable time while the employee is on duty. The employee must be informed of the nature of the investigation or factfinding part of the interview so that s/he may prepare for it. The MOU recognizes that the Fire Fighters Procedural Bill of Rights Act, which is codified at Government Code section 3250 et seq., applies to Firefighters, Fire Engineers, and Fire Captains.

MOU Article 27, entitled Miscellaneous, includes section 27.1, entitled Non-Discrimination. Under this provision, SAFF and the City agree not to discriminate against any employee for Union activity, race, color, age, sex, or national origin.

The City's Charter, article VIII, section 98, entitled Firefighters, states that a Department member shall not be allowed to receive money, gratuity, or compensation for firefighter service without the consent of the City Council, and shall not engage in other employment that is inconsistent, incompatible, in conflict with, or adversely affects the performance of official duties.

The City's Civil Service Board Rules and Regulations (Civil Service Rules) include Rule 13, entitled Restriction Upon Officers and Employees, and its section 13.2, entitled Supplemental Employment. This provision prohibits officers or employees holding a City position from accepting further employment for which they are compensated in any form unless permission is obtained from the appointing authority on a prescribed form. The appointing authority must decide whether performance of the requested other employment will be allowed, and the rule lists five specified activities that cannot be approved. After investigation, the employer may approve a request for supplemental employment during non-

regular hours of City employment. Copies of all applications approved or denied must be filed in the Personnel Department. Any employee whose request is denied has the right to appeal to the Civil Service Board, whose decision is final. Under Appendix B to the Civil Service Rules, entitled Policy on Supplemental Employment (Appendix B Policy), supplemental work permits should not be approved for more than one year. After approval of such a permit, if the approved supplemental employment is determined to be detrimental to City employment, the appointing authority must cancel it and notify the Civil Service Board. The appointing authority has discretion to take disciplinary action for violation of Rule 13, the Appendix B Policy, or any condition of the work permit. An employee receiving such discipline may file an appeal with the Civil Service Board under Civil Service Rule 12, entitled Disciplinary Actions, Appeals, and Hearing Procedures.

The Departmental Operations Manual includes Section I, Subject 2.3, entitled Directives. Under this provision, the Department Chief or a designee may issue temporary directives, including to change or to add Operations Manual procedures. Directives expire on the date indicated, or one year from issuance date, whichever comes first. Directives are maintained in a specified Primary Library folder, numbered, and used as a guide to develop required subjects for the manual. A Directives Log is maintained in the Chief's office. Ultimately, the Chief may re-issue a directive, incorporate it into the manual, or allow it to lapse.

On August 25, 2009, Deputy Chief Leo Baustian issued to all Department personnel a Directive entitled Offering/Accepting Payment for Work Provided (2009 Directive). The 2009 Directive required all supervisors and managers to review with their subordinates the contents of City Charter article VIII, sections 98 and 103, as well as Civil Service Board Rule 13.1, and

article 13 of the SAFF-City MOU, regarding shift trades. The 2009 Directive also required all Departmental personnel to cease offering and/or accepting money or other compensation beyond official City compensation, for any hours worked. The 2009 Directive thereby outlawed the practice of exchanging money or compensation as part of shift trades. Chiefs and supervisors who became aware of such activities were required to report them in writing. The 2009 Directive indicated that failure to comply could lead to disciplinary action, including termination.

Kircher understood that the 2009 Directive disallowed straight payments for shift trades, and accordingly modified his practice to comply with that understanding. In Kircher's new practice, he re-characterized payments to other employees with whom he traded shifts as "deposits." Kircher would pay a "deposit" to a second employee who would then cover Kircher's shift. If Kircher reciprocated and covered the second employee's shift, the second employee would be required to return the "deposit." Kircher testified that he had never received a deposit back from any employee who worked his shift. Kircher's shift exchange practice became the subject of the investigatory interview here at issue.

The City's Investigation of Kircher, and His Resulting Grievance Regarding Allegedly Inadequate Notice and Related Issues

In late 2014, Bartley asked Hansen to investigate Kircher based on two different charges—one for insubordination and one for shift trade irregularities. On December 16, 2014, Hansen issued a notice of factfinding to Kircher. According to the notice, the factfinding meeting would take place on December 29, 2014, and would relate to insubordination. The notice indicated that Kircher was required to attend and participate, that the interview could lead to discipline, and that Kircher was entitled to representation.

On December 29, 2014, Hansen e-mailed Kircher, cancelling the appointment and advising that it would be rescheduled. Kircher e-mailed Hansen, acknowledging receipt of the cancellation notice and asking multiple questions. Among other things, Kircher asked for notice of the issue being interrogated, including relevant incident numbers, dates, times, and persons involved. Hansen responded by e-mail that there were allegations of insubordination and time reporting irregularities, and that they would be discussed more specifically during the meeting. Kircher asked Hansen to send a copy of future correspondence to his personal e-mail address. Later that day, Hansen issued a new notice of factfinding to Kircher, this time scheduling the meeting for January 21, 2015. The new notice otherwise mirrored the first notice. The new notice was only sent to Kircher's work e-mail address.

On January 21, 2015, Kircher did not appear for factfinding at the designated time. Hansen asked a Battalion Chief to get him. Kircher arrived with shop steward Coggiola and attorney Stevens 90 minutes later. Hansen informed Kircher and his representatives that he would be questioned on an additional charge of insubordination for failing to appear at the ordered interview time.

Hansen first questioned Kircher about a charge of alleged insubordination for refusing a mandatory overtime shift. Hansen then inquired about Kircher's shift trades, which Hansen referred to as "time reporting irregularities." At that point, the parties caucused at SAFF's request. After the caucus, Hansen asked Kircher about shift trades dating back to 2010. Kircher admitted paying money to other employees to work his shifts, or parts of his shifts, early in his career. Hansen lastly queried Kircher about alleged insubordination for arriving late for the factfinding earlier that day.

On February 9, 2015, Kircher filed a grievance regarding the January 21, 2015 factfinding. In the grievance, Kircher alleged violations of MOU articles 2.1 (Prevailing Rights), 26.1 (Discipline-Employee Rights), and 27.1 (Non-Discrimination). Kircher claimed the Department forced him to submit to interrogation without affording him adequate notice of the issues. Kircher referred to the December 16 and 29, 2014 factfinding notices, his December 29 e-mail exchange with Hansen, Hansen's failure to send the December 29 notice to Kircher's personal e-mail, and the questioning that occurred during the January 21, 2015 factfinding. Kircher mistakenly filed his grievance with Allen. Under the MOU, Kircher should have filed it with Bartley.

On February 17, 2015, Bartley e-mailed Stevens regarding Kircher's grievance. Bartley indicated that after Step I review, the remedies were denied and Bartley would follow up this official notification by fax.[4] On February 20, 2015, Stevens e-mailed Bartley. Stevens had not received official notice of the Step I decision, and he requested it by e-mail or fax, to allow him to prepare an appeal. Stevens also asked for the official notice to include the completed Step I grievance form. Later that day, Bartley complied with Stevens' request and provided a statement responding to the grievance. While the City's response denied all remedies, the City found it had not properly noticed Kircher regarding the second insubordination charge (for failure to timely report to the January 21, 2015 factfinding) before questioning him about it, and the response indicated the second insubordination charge would not be investigated and would be removed from Kircher's file. The parties timely processed

[4] Bartley received the Step I grievance on February 17 and responded that day. The City's Step I response would have been due on February 16 had the grievance been filed correctly with Bartley on February 9.

the grievance through the remaining steps of the grievance procedure. As of the time of hearing, the parties had not yet scheduled arbitration dates.

The City's Cease and Desist Order to Kircher Regarding Shift Trades, and His Resulting Grievance

After the January 21, 2015 factfinding, Hansen briefed Bartley regarding Kircher's admission that he had paid for shift trades in the past. Bartley discussed the issue with White and informed him of the 2009 Directive prohibiting the practice. Bartley recommended barring Kircher from engaging in shift trades until the investigation concluded, and White concurred. On January 27, 2015, White issued a Cease and Desist Order (C&D Order), drafted by Bartley, to Kircher. The C&D Order directed Kircher to: (1) immediately cease and desist from engaging in shift trades until further notice, and (2) refrain from discussing any previous shift trade arrangements with other employees, except his labor representative, during the open investigation. The C&D Order also placed on hold any pending shift trades.

When Kircher received the C&D Order, he called Bartley and asked him to rescind the order, or at least modify it, and he requested a meeting with White. Bartley responded that shift trading was a privilege, not a contractual right, and that he would not rescind the order.

On January 30, 2015, Stevens wrote to White, seeking to clarify the C&D Order. Kircher was preparing to file a grievance, but completing the first step of the grievance procedure—informal discussion with Kircher's immediate supervisor—would require Kircher to mention prior shift trade arrangements in a discussion with his supervisor, thereby arguably violating the C&D Order's prohibition on discussing shift trades. Kircher assumed White did not intend to prohibit this discussion because Kircher believed such a prohibition would infringe upon his MOU rights, but the text of the order did not contain any exceptions. On February 3, White revised the C&D Order. The revised order continued to bar Kircher from

shift trades and from discussing past shift trades with other employees, except he could discuss past trades with his labor representatives, attorney, or immediate supervisor to comply with MOU grievance procedures. The revised order also advised Kircher that the City prohibited retaliation against employees for assisting in investigations, and that such conduct, or intentional attempt to influence the outcome of an investigation, could subject him to separate discipline, including termination.

On February 4, 2015, Bartley issued a Directive to all Department personnel, entitled Prohibition of Financial/Non-Financial Payment in Exchange for Shift Trades/Work Assignments, reinforcing City and Department policies and regulations prohibiting any exchange of payment for shift trades.[5]

On March 10, 2015, Kircher filed a Step I grievance alleging that the January 27 and February 3, 2015 directives prohibiting him from future shift trades and discussing past shift trades violated articles 2.1, 13 (Shift Trading), 26.1, and 27.1 of the MOU. On March 16, 2015, the Department issued its Step I response, rescinding the directives and allowing Kircher to engage in shift trades, if he did so under the governing rules. The Department acknowledged it had ordered Kircher, and no other employee, to cease and desist from all shift trades pending the investigation. Thereafter, Kircher withdrew the grievance. The C&D Order and communication ban remained in effect between January 27 and March 16, 2015, during which time Kircher turned down one request for a shift trade.

[5] Although the 2009 Directive had expired after one year, the underlying bases for the policy against paying for shift trades remained in effect: the SAFF-City MOU, Civil Service Board Rule 13.1, and City Charter, article VIII, sections 98 and 103.

Kircher Files a Third Grievance Protesting the Handling of his February 9, 2015 Grievance

On April 9, 2015, Kircher filed a third grievance regarding the processing of his February 9, 2015 grievance. Bartley held a Step I meeting with Kircher on April 16. On April 17, 2015, Bartley issued the Step I response, agreeing that as a remedy, designated Department managers would be trained on MOU Article 5 grievance procedures and protocol, including grievance hearing procedures. Bartley denied two other requested remedies.

On April 23, 2015, Stevens appealed the grievance to Step II. The Step II response, issued on May 7, 2015, denied the additional remedies. Both Kircher and Lota testified the grievance was resolved by the City's agreement to provide training to Department managers on labor relations and grievance handling. The City held such trainings starting in June 2015.

The Department Fails to Act on Kircher's Supplemental Employment Application

Each January, the Department reminds employees to submit supplemental employment requests to seek or renew permission to perform work outside of their regular duties for the City. On January 15, 2015, Kircher submitted a City Application to Accept Supplemental Employment under Civil Service Board Rule 13.2. He sought permission for one year from date of approval to accept secondary employment, less than ten hours a week on off-duty days, with a company he co-founded. Kircher certified that the service was not inconsistent, incompatible, or in conflict with assigned City duties, and did not require any duty during regularly scheduled work hours.

On March 10, 2015, Kircher inquired of Coleman whether there was any word on his request to work outside the Department. On March 12, Coleman replied that his request needed White's approval, and she would get back to him. Hearing nothing, Kircher inquired of Coleman again on April 16, 2015.

On April 28, 2015, after the Step II hearing on Kircher's third grievance, Kircher gave Costamagna a copy of his supplemental employment application.[6] Costamagna brought the form to White, who was newly-appointed and unfamiliar with the process and form. White forwarded Kircher's form to Giffin and asked her to verify the date and time it originally had been submitted. White also noted that there were at the time between 30 and 33 pending supplemental employment applications, including Kircher's. White asked Giffin to recommend how to handle those applications. Costamagna advised Kircher that White needed more time to consider whether to approve the application. On May 29, Costamagna e-mailed Kircher, responding that his request had not been processed for two reasons: (1) the application was impermissibly backdated to January 15, and (2) the Fire Chief or City Manager must sign the form; it could not be delegated to a subordinate. Costamagna relayed that White had agreed to sign the request, but that it could not be backdated. Costamagna also informed Kircher that he could schedule an appointment with White to discuss the matter. Kircher did not submit a newly dated application or make an appointment with White to discuss his supplemental employment request.

White testified that he did not deny Kircher's request, and had not denied any employee applications. As of the hearing, he had approved one of the 30 to 33 submitted forms, and for reasons not entirely clear from the record, all others—including Kircher's—remained pending review and recommendation from the Department's Human Resources staff.

The Department Misplaces Certain Files Related to Kircher

Kircher sought to schedule an appointment to review his personnel and workers compensation files maintained by the Department's Human Resources Division. On May 29,

[6] Contrary to the ALJ, we find Costamagna and White gained knowledge of Kircher's application on April 28, 2015, rather than on January 29, 2015.

2015, Bartley e-mailed Kircher to inform him that his Department personnel file and workers compensation files were missing. Bartley apologized and advised that Human Resources staff were taking the following actions: (1) continuing to search for Kircher's files until all leads were exhausted; (2) rebuilding a new personnel file for Kircher, including asking Kircher to furnish any certificates and relevant documents to copy and place in the new file, and apprising Kircher of the status of the investigation and welcoming any oversight from Kircher and his representative; and (3) making all procedural and security improvements required to prevent recurrence. Because the Department could not locate Kircher's Departmental file, Bartley told Kircher that his request to examine his personnel file was "moot" until the new one was built.

Bartley and Coleman testified about efforts to locate Kircher's personnel and workers compensation files. The Department's Human Resources division maintained employee personnel and workers compensation files in separate file cabinets, located in the same room in a secured area with access restricted to authorized individuals. Log-in sheets were used to record names and dates of employee inspections and removal of any file by authorized personnel. Bartley ordered a search of the areas where the Department's personnel and workers compensation files were maintained, and Bartley, Giffin, Coleman, and a Human Resources technician searched their offices and audited every file in both filing cabinets. Bartley also contacted Lota, who stated she had not accessed Kircher's files. In an effort to reconstruct Kircher's personnel file, Bartley directed either Giffin or Coleman to inspect Department training division records for certificates of training completed by Kircher. Bartley made recommendations to upgrade security and install electronic card access, and directed Human Resources staff to move the files to a more secure area until this was accomplished.

Upon Bartley's recommendation, White launched an internal investigation to determine responsibility for the lost files. White assigned Taylor to investigate in light of his forensic investigation skills and because Bartley thought it better if he did not handle the investigation personally as he had accessed Kircher's personnel file in directing Hansen to investigate the insubordination allegation. White directed Taylor to interview anyone with access to employee personnel files. Taylor verbally reported to White that the investigation was inconclusive in that he could not determine who last had possession of the files. Kircher's files were the only Department employee files determined to be missing.

Lota testified that all official personnel files of City employees are maintained by the City Human Resources Department, not by individual City Departments. Official personnel files are stored in both "hard copy" and electronic form. Official workers compensation files are housed in the Workers Compensation division of Human Resources. Lota authorized Human Resources staff to determine if Kircher's official personnel and workers compensation files were intact. Staff advised Lota that no documents were missing in either file. Lota's testimony was not controverted. Coleman testified that several categories of documents, such as commendations and training certificates, are kept in the Departmental personnel files, but she could not say whether such documents were also included in the official personnel files because she had "never seen one."[7] Similarly, Bartley testified that training certificates are kept in the Departmental personnel files. Bartley was not asked if the Departmental files contain documents not contained in the official personnel files.

[7] Coleman further testified, without rebuttal, that the Departmental workers compensation files are duplicates of the official files.

The City Halts the Shift Trading Investigation and Assigns Another Investigator to Redo It Without Referring to the January 21, 2015 Interview

During the first week of February 2015, following discussions between Bartley, Lota, and Hansen, White reassigned the Departmental shift trading investigation to Parker. Parker had performed a number of prior Departmental investigations, and Hansen agreed to "step back" because of the complexity of the issue, the number of employees involved, and his assessment, apparently shared by Lota and Bartley, that the January 21, 2015 interview went very poorly.

Parker met with White and Lota, and initiated a new investigation. He obtained basic information from Hansen, but did not discuss the January 21, 2015 interview, listen to the tape, or read the transcript. Parker met with Bartley and Williams, and obtained timekeeping records maintained in Telestaff. Parker interviewed 32 Department employees regarding their shift trading practices from February until his report issued in early December, 2015.

Parker provided Kircher with a written notice of factfinding on October 21, 2015. Between October 28 and November 10, 2015, Parker and Stevens exchanged e-mail concerning the upcoming factfinding, including scheduling, requests for information, focus and scope of the investigation, and immunity from criminal prosecution. Parker interviewed Kircher on November 18, 2015. Kircher was represented by Nardi and Stevens at that interview.

In the course of his investigation, Parker found that Department employees other than Kircher had paid co-workers to work their shifts. Parker was not aware of any employees terminated or criminally charged as a result of the shift trade investigation.

Although the Department reassigned the shift trading investigation to Parker, Hansen retained control of the investigations into Kircher's alleged insubordination by refusing to

work a mandatory overtime shift and late reporting to the January 21, 2015 factfinding interview. The Department closed both investigations, labeling them as "inquiry only," meaning there would be no further investigation and no disposition would be rendered. An "inquiry only" closure has neither a positive nor a negative connotation.[8] Parker did not notify Kircher that the Department closed the investigation into the alleged refusal to work mandatory overtime.

RELEVANT PROCEDURAL HISTORY

On May 24, 2016, the Office of the General Counsel issued a complaint alleging that Kircher engaged in protected activity by filing grievances on February 9, March 10, and April 9, 2015. The complaint further alleged that the City took the following adverse actions against Kircher in retaliation for Kircher's protected activities:

1. On January 21, 2015, the City conducted an investigatory interview in which the City failed to provide Kircher with adequate notice of the subject matter and interviewed Kircher about events that occurred up to four years prior, which fell outside the limitations period for discipline.
2. On January 29, 2015, the City denied Kircher's application for supplemental employment.

[8] Contrary to Charging Parties' argument, the record supports the ALJ's factual finding that the Department closed the insubordination investigations and labeled them as "inquiry only" without further investigation or disposition.

3. On or about February 20, 2015, the City failed to provide a timely formal "Step 1" response to Kircher's February 9, 2015 grievance, depriving Kircher of the full amount of time allotted for appeal.[9]

4. On or about June 3, 2015, the City informed Kircher that his Departmental personnel and Workers Compensation files had been misplaced, resulting in a loss of positive performance reviews, citations, accolades, and commendations.

In addition, the complaint alleged that on January 27, 2015, White issued an order indefinitely prohibiting Kircher from discussing previous shift trades with all Department employees, constituting interference with Kircher's protected rights and SAFF's right to represent its members.[10]

On June 23, 2016, the City answered the complaint, admitting certain factual allegations, denying all substantive claims, and asserting affirmative defenses.[11]

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[9] The ALJ dismissed this allegation, finding that filing a response to the grievance one day late did not constitute an adverse action. Neither party excepted to this determination, and it is binding only on the parties. (PERB Regs. 32215, 32300, subd. (c); *City of Torrance* (2009) PERB Decision No. 2004, p. 12.)

[10] The ALJ found this directive did not constitute unlawful interference because management subsequently modified it to allow Kircher to file a grievance, and soon thereafter rescinded it altogether. Neither party excepted to the ALJ's conclusion on this issue, and accordingly we do not address it further, except to note that: (1) the ALJ's ruling is binding on the parties only (PERB Regs. 32215, 32300, subd. (c); *City of Torrance*, *supra*, PERB Decision No. 2004, p. 12) and (2) the ALJ did not have the benefit of several of our recent decisions relating to "gag orders" and "no discussion" directives when she issued the proposed decision. (See *San Diego Unified School District* (2019) PERB Decision No. 2634, pp. 17-18; *County of Santa Clara* (2018) PERB Decision No. 2613-M, pp. 8 & 15; see also *Los Angeles Community College District* (2014) PERB Decision No. 2404, pp. 6 & 11.)

[11] The ALJ denied the City's motion to dismiss the complaint for lack of jurisdiction and to defer several matters to arbitration. Neither party excepted to the ALJ's conclusions regarding these issues and, accordingly, they are binding only on the parties. (PERB Regs. 32215, 32300, subd. (c); *City of Torrance*, *supra*, PERB Decision No. 2004, p. 12.)

DISCUSSION

Although the Board reviews exceptions to a proposed decision de novo, the Board need not address alleged errors that would not impact the outcome. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) Because we dismiss Charging Parties' retaliation allegations on different grounds than did the ALJ, we need not address all of the alleged errors asserted in Charging Parties' exceptions.

To demonstrate that an employer discriminated or retaliated against an employee in violation of MMBA section 3506 and PERB Regulation 32603, subdivision (a), the charging party must show that: (1) the employee exercised rights protected by the MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 7 (*Santa Clara*); *Novato Unified School District* (1982) PERB Decision No. 210, pp. 5-6 (*Novato*).)

Here, it is undisputed that Kircher engaged in protected activity by filing grievances on February 9, March 10, and April 9, 2015. The parties dispute, however, whether certain actions or inaction by the City constituted adverse actions, and whether those actions or inaction were unlawfully motivated by Kircher's protected activities.

In determining whether an employer's action is adverse, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586, pp. 24-25.) "The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the

employee's employment." (*Id*. at p. 25, quoting *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.)

Charging Parties except to the ALJ's conclusions regarding the January 21, 2015 investigatory interview, the City's failure to process Kircher's supplemental employment application, and the loss of his Departmental personnel files, claiming all three actions are adverse. An employer action can constitute adverse action absent discipline and even absent any threat of discipline. (See, e.g., *County of Riverside* (2009) PERB Decision No. 2090-M, pp. 28, 30 [action need not specifically threaten discipline if it otherwise has an adverse impact on the employee's employment]; *State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S, pp. 32-33 [adverse action found where employer demeaned employee by issuing a substandard rating for "relationships with people," and by imposing a documented requirement that a fellow employee had to review budget requests].) Here, however, we need not address whether the alleged actions are adverse because, even if they are, Charging Parties have failed to prove the actions were taken because of Kircher's protected activities.

The charging party has the initial burden of demonstrating the "because of" element, that is, a causal connection or "nexus" between the adverse action and the protected conduct. (MMBA, § 3506.5; PERB Regulation 32603, subd. (a); *Novato, supra*, PERB Decision No. 210, pp. 5-6.) Because "retaliatory conduct is inherently volitional in nature," where it is alleged that the employer has acted in reprisal against employees for participation in protected activity, evidence of unlawful motive is the specific nexus required to establish a prima facie case. (*Id.* at p. 6.)

While we consider all relevant facts and circumstances in assessing an employer's motivation, we have identified the following factors as being the most common means of establishing a discriminatory motive, intent, or purpose: (1) timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor; (2) the employer's disparate treatment of the employee; (3) the employer's departure from established procedures and standards when dealing with the employee; (4) the employer's inconsistent or contradictory justifications for its actions; (5) the employer's cursory investigation of the employee's misconduct; (6) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague or ambiguous reasons; (7) employer animosity towards union activists; and (8) any other facts that might demonstrate the employer's unlawful motive. (*Santa Clara, supra*, PERB Decision No. 2629-M, pp. 9-10; *County of Yolo* (2009) PERB Decision No. 2020-M, pp. 12-13; *Novato, supra*, PERB Decision No. 210, pp. 6-7.)

While some of the Department's allegedly adverse actions were in close temporal proximity to Kircher's protected activity, timing alone is not determinative. (*Adelanto Elementary School District* (2019) PERB Decision No. 2630, p. 9.) The record as a whole does not lead us to conclude that the City conducted the January 21, 2015 investigatory interview of Kircher, delayed processing his supplemental employment application, or lost his Departmental personnel files because he engaged in protected activity.

First, we do not find a nexus between White's failure to act on Kircher's supplemental employment application and Kircher's protected activities. At the time of the hearing, between 30 and 33 supplemental employment applications submitted by department personnel had yet to be acted upon. A breakdown in communications between a new Fire Chief and the

department's human resources department created this logjam. Charging Parties submitted no evidence suggesting that the Department was motivated, even in part, by Kircher's protected activity.

Second, although Kircher's departmental personnel files were the only ones missing, Charging Parties submitted no evidence suggesting that the Department was motivated, even in part, by Kircher's protected activity. Indeed, the record suggests that the Department had no motivation whatsoever, as the loss was purely an accident.

Further, the ALJ dismissed the allegations related to the City's conduct with respect to the January 21, 2015 investigatory interview, relying mainly on the fact that the interview pre-dated the first protected activity alleged in the Complaint. The ALJ reasoned the interview could not have been motivated by Kircher's subsequent grievance filings. (*Oxnard Union High School District* (2012) PERB Decision No. 2265, adopting warning letter at p. 4 [temporal proximity not established when adverse action precedes protected conduct].) We do not need to decide whether the ALJ improperly excluded evidence of Kircher's pre-interview protected activity alleged in the unfair practice charge but not included in the Complaint, for Charging Parties submitted no evidence suggesting the Department was motivated, even in part, by such earlier protected activity.

In sum, while Charging Parties devoted substantial efforts to proving that the proposed decision contained certain factual and legal errors, Charging Parties conspicuously failed to marshal any persuasive facts or arguments on the critical issue of nexus. In these circumstances, we affirm the ALJ's conclusion as to retaliation, albeit on different grounds.

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-915-M are DISMISSED.

Members Banks and Shiners joined in this Decision.