

**VACATED by Fresno Irrigation District
(2004) PERB Decision No. 1565a-M**

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



FRESNO IRRIGATION DISTRICT EMPLOYEES
ASSOCIATION,

Charging Party,

v.

FRESNO IRRIGATION DISTRICT,

Respondent.

Case No. SA-CE-29-M

PERB Decision No. 1565-M

December 16, 2003

Appearance: Sagaser, Franson & Jones by Howard A. Sagaser, Attorney, for Fresno Irrigation District.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Fresno Irrigation District (District) to a proposed decision of the administrative law judge (ALJ). The proposed decision found that the District violated the Meyers-Milias-Brown Act (MMBA)¹ by refusing to allow the Fresno Irrigation District Employees Association (FIDEA) use of the District's maintenance meeting room for a FIDEA membership meeting. The ALJ found that the District's refusal constituted: (1) a denial of FIDEA's protected rights; (2) an unlawful unilateral change in the terms and conditions of employment; and (3) unlawful discrimination for the exercise of protected rights. The District excepts to all of these findings.

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

After reviewing the entire record in this case, including the proposed decision and the District's exceptions², the Board declines to adopt the decision of the ALJ. Instead, the Board will issue its own decision below.

BACKGROUND

Jurisdiction

The parties stipulated that FIDEA is a recognized employee organization and that the District is a public agency within the meaning of the MMBA.

Employer-Employee Relations Policy

Following the passage of Senate Bill 739 (Solis, Ch. 901, Stats. of 2000), the District began drafting a set of Employer-Employee Relations Policies (EER policies) to ensure compliance with the MMBA. On or about June 5, 2001, the District wrote to FIDEA seeking a response to its proposed EER policies.³ On June 11, 2001, FIDEA's attorney sent a letter to the District memorializing twenty-one objections to the proposed EER policies. FIDEA based many of its objections on the anticipated effect of SB 739 which vested PERB with jurisdiction over various aspects of the MMBA. On June 25, 2001, FIDEA's attorney sent another letter to the District asking for a response to the objections set forth in the June 11, 2001, letter. On June 27, 2001, the District responded to FIDEA's objections in writing. The District disputed many of FIDEA's objections, agreed with some, and requested more information on others.

²The District's request for oral argument is denied. The record and briefs in this matter adequately present the issues and positions of the parties.

³The MMBA requires that a public agency consult in good faith with employee organizations over the adoption of any rules and regulations implementing the MMBA. (MMBA sec. 3507.)

That same day, the Board of Directors for the District provisionally adopted the EER policies with instructions to District staff to continue meeting and conferring with FIDEA. The Board of Directors requested that any proposed amendments to the EER policies be presented by the end of July 2001. After a series of letters and extensive bilateral discussions, most of FIDEA's concerns were eventually resolved. On August 29, 2001, the Board of Directors formally adopted the EER policies.

FIDEA Affiliation With Local 3

On August 21, 2001, FIDEA members voted to affiliate with the Operating Engineers Local Union No. 3 (Local 3). On August 28, 2001, Kurt Benfield, a Business Agent for Local 3, wrote to Gary Serrato (Serrato), Chief Administrative Officer for the District, to inform Serrato of the affiliation. On September 13, 2001, Serrato responded with a letter stating that, "to the extent that [Local 3] is attempting to replace FIDEA as the employee's [sic] official representative, that request is rejected." On September 20, 2001, both Local 3 and FIDEA responded by explaining that Local 3 was not substituting itself as the exclusive representative, but was merely operating as a service provider in much the same manner as the District's attorney acts as a resource and spokesman for the District. These letters apparently clarified the situation for the District which began dealing with Local 3 as the service provider for FIDEA.

Request to Use Meeting Room

According to Mark Cardoza (Cardoza), President of FIDEA, for the last few years prior to 2001, FIDEA had been able to hold membership meetings in the District's maintenance

meeting room⁴ every one or two months. The procedure for requesting the use of the maintenance meeting room, for at least the last five years, was to submit a request to management approximately one week prior to the anticipated meeting date. Before August 21, 2001, access to the room had been denied only once, when the room was previously scheduled. During that instance FIDEA merely had to reschedule its meeting for the following week.

Shortly after affiliating with Local 3 – sometime after September 20, 2001, but before September 26, 2001 – Cardoza requested to use the District’s maintenance meeting room for a FIDEA meeting. The District responded to the request through Regina Davis (Davis), the District’s human resources director. Davis had begun working for the District just a few weeks earlier on August 13, 2001. On September 26, 2001, Davis denied Cardoza’s request in writing to use the maintenance meeting room. The denial states, in its entirety:

I informed Gary Serrato of your request to use the Maintenance Meeting Room for your October 1, 2001 meeting. As I understand, your association’s use of the room was previously granted because you had no other site in which to meet. Now that you are affiliated with Operating Engineers Union Local 3, you now have access to their local facility in which to hold your meetings. Therefore, your request to use the Maintenance Meeting Room is denied.

Please contact me with any questions.
(Resp. ex. 18.)

On October 16, two FIDEA representatives approached Serrato seeking an explanation and/or a reconsideration of the denial. Serrato said he would think about it and get back to them. On October 19, FIDEA received a second letter from Davis, which states in its entirety:

Jim Ellison and Robert Armas spoke with Gary Serrato on Tuesday, October 16, 2001 regarding reconsideration of the use

⁴The maintenance meeting room houses employee lockers, both locked and unlocked, time clocks and cards, and a display board with keys to all of the District vehicles, both on- and off-road, i.e. bulldozers, skip loaders and other heavy equipment.

of the Maintenance Meeting Room. Mr. Serrato and I have discussed this request again and have agreed that the original decision is still valid. The use of the meeting room is denied.

Please contact me with any questions.
(C.P. ex. B.)

FIDEA did not make any further contacts with Davis on this matter, but filed the instant charge on December 12, 2001. On December 21, 2001, PERB issued a complaint against the District alleging violations of MMBA sections 3503, 3505 and 3506⁵, as well as PERB Regulation 32603(a), (b) and (c)⁶. On January 22, 2002, Davis wrote to Cardoza offering to meet and confer over the allegations in the complaint. The letter states in its entirety:

⁵MMBA section 3503 states, in pertinent part:

Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies.

MMBA section 3505 states, in pertinent part:

The governing body of a public agency . . . shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations . . . and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

MMBA section 3506 states:

Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502.

⁶PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq. PERB Regulation 32603 states, in pertinent part:

It shall be an unfair practice for a public agency to do any of the following:

On January 17, 2002, representatives of the Fresno Irrigation District met with representatives of Operating Engineer's Local 3 regarding the outstanding dispute stemming from the District's denial of your request to use the facilities of Fresno Irrigation District for a union meeting on October 1, 2001. As set forth in our letter dated September 26, 2001, it was and remains the District's position and belief that you have alternative facilities available for such meetings through Operating Engineer's Local Union No. 3. You have not responded to the September 26, 2001, letter except for the filing of an unfair labor practice charge on December 7, 2001. At no time have your representatives informed us that you believe that the alternative meeting facilities were inadequate, nor have you requested to meet and confer on this issue.

By this letter, I wish to confirm that the Fresno Irrigation District is willing to meet with the FIDEA to discuss this issue and see if a resolution acceptable to both parties can be reached through the meet and confer process. As set forth in our communications to PERB and to your designated representative, the District does have security concerns stemming from the September 11, 2001, Twin Towers attack and therefore any request to use the District facilities must take into mind the security concerns of the District.

If you wish to schedule a meet and confer session over the issue of the use of the District's facilities, please feel free to call me so we can set up a meeting.

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3508(c) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

FIDEA did not respond to this letter. Cardoza testified that prior to the January 22, 2002, letter, the District had never mentioned security as one of the reasons for its refusal to allow FIDEA the use of the maintenance meeting room.

At the hearing, Davis testified that she discussed FIDEA's request with Serrato. Davis testified that she and Serrato denied FIDEA's request primarily because of security concerns following the terrorist attacks of September 11, 2001. Although Davis testified that security was the District's primary concern, it is undisputed that Davis failed to mention security concerns in her September 26, and October 19, 2001, letters. When asked if she thought it would have been prudent to provide FIDEA with the reason for the District's denial, Davis responded, "No, I do not always give the reasons."

Serrato testified that after the District first denied FIDEA's request, two FIDEA representatives came to speak with him in person. The representatives asked Serrato to reconsider the decision to deny FIDEA the use of the maintenance meeting room. Serrato did not recall whether he informed the FIDEA representatives of the District's security concerns. Serrato testified that he informed the FIDEA representatives only that he would reconsider the decision. Serrato then testified that he discussed FIDEA's request with Davis. Serrato stated that he and Davis had security concerns over FIDEA's use of the room. Serrato admitted that he never asked Davis to inform FIDEA of the District's security concerns. Serrato also admitted that he never discussed his security concerns with FIDEA.

Despite the fact that the District never conveyed its security concerns to FIDEA, the District insists that it was legitimately concerned about security in the wake of the September 11, 2001, terrorist attacks. The District notes that the meeting room is in the same building that contains the District's computer room. The computer room controls the District's

telemetry system. Any individual with access to this system is capable of opening the head gates for all of the District's 800 miles of canal systems. However, such access requires knowledge of confidential computer access codes. The District also notes that when it holds the after-hours public meetings of its Board of Directors, it hires outside security guards to monitor the meeting attendees.

Further, the District contends that its denial of the use of the room had nothing to do with FIDEA's affiliation with Local 3. Instead, the District maintains that its primary reason for denying the use of the room was security. In any event, the District argues that it has complete discretion to allow or deny FIDEA's use of the room under the recently enacted EER policies. Specifically, the District cites to Rule 23 of the EER policies which provides, in pertinent part:

23. USE OF FRESNO IRRIGATION FACILITIES

FID facilities shall be available to Certified Employee Organizations as follows:

- (a) FID. Certified Employee Organizations may be granted the use of FID facilities for meetings composed of FID employees provided such meetings are held outside regularly scheduled working hours for the group which is meeting and provided space can be made available without interfering with FID operations. Certified Employee Organizations wanting to use FID facilities for meetings must secure the written permission of the FID official who schedules the use of FID facilities.
(Resp. ex. 13.)

This particular rule was not the subject of one of FIDEA's twenty-one objections conveyed to the District. No mention of the rule appears in the correspondence between the District and FIDEA. Cardoza testified that his understanding was that Rule 23 merely codified the existing policy and practice regarding use of the maintenance meeting room. Cardoza's understanding was that the use of the room would continue to be granted subject to scheduling.

Finally, the District contends that FIDEA failed to exhaust its administrative remedies under the District's local rules. Rule 33 of the EER policies states:

33. RULES AND REGULATIONS

Subject to the requirements of the Meyers-Milias-Brown Act, the General Manager is authorized to establish rules and procedures to carry out the intent of these Rules. He shall also have the authority to administratively interpret these Rules.

Interpretations made by the General Manager are subject to appeal to the Board of Directors and subject to review under Government Code Section 3509, to the extent permitted by law. (Resp. ex. 13.)

The District argues that pursuant to Rule 33, FIDEA was required to appeal the denial to the District's Board of Directors. The District further contends that a negative decision by the District's Board of Directors may be appealed to an impasse procedure pursuant to EER Rules 26 and 27. Since FIDEA has not filed such an appeal, this charge is defective argues the District.

After the denial of the use of the meeting room, FIDEA held its meetings twice on the grounds just outside the District's property line and once at Brook Ranch, a nearby restaurant. Meetings are usually held after work at 4:35 p.m., but during the summer they are delayed until after 7:00 p.m., when the employees finish their workdays. According to Cardoza, FIDEA considered and rejected using Local 3's facilities because it would have entailed a 20 to 30 minute drive. Cardoza testified that FIDEA's members live much closer to the District's headquarters than Local 3's office in central Fresno. The District counters that Cardoza's testimony is based on speculation and argues that the majority of its employees live in the direction of Local 3's office.

PROPOSED DECISION

The proposed decision first addresses the issue of whether the District violated the MMBA by denying FIDEA the use of the maintenance meeting room. Analogizing to the other public sector statutes administered by PERB, the ALJ held that an implicit right of access to the employer's premises exists under the MMBA. (See State of California (California Department of Corrections) (1980) PERB Decision No. 127-S (Corrections).) PERB has held that restrictions on the right of access must be narrowly drawn. (The Regents of the University of California, University of California at Los Angeles Medical Center (1983) PERB Decision No. 329-H.) The ALJ concluded that the District's denial of FIDEA's request did not meet this standard. Thus, the ALJ found that the District violated MMBA section 3503 and PERB Regulation 32603(b).

The ALJ further concluded that the District's denial was not a one-time event, but intended to implement a change in policy. Since the change in policy was within the scope of representation, the District should have provided FIDEA notice of the change and an opportunity to request negotiation. Since it did not, the ALJ found that the District also violated MMBA section 3505 and PERB Regulation 32603(c).

Finally, the ALJ found that the District denied FIDEA's request because of FIDEA's recent affiliation with Local 3. Since FIDEA's affiliation was protected activity, the District's denial was unlawful discrimination. Accordingly, the ALJ also found that the District violated MMBA section 3506 and PERB Regulation 32603(a).

EXCEPTIONS

The District vigorously challenges the ALJ's findings. Specifically, the District argues that its denial of FIDEA's request was legitimately motivated by security concerns in the wake

of the terrorist attacks of September 11, 2001. Further, the District argues that the ALJ's finding that a right of access exists under the MMBA is flawed. To the contrary, the District contends that the MMBA allows right of access to be determined by local rule. Under the District's local rule, the District maintains the complete discretion to grant or deny use of its facilities. Thus, according to the District, it had an absolute right to deny FIDEA's request.

DISCUSSION

ISSUE I: Denial of Employee Organization Rights (Right of Access)

Right of Access Under Local Rules

The MMBA provides that a public agency may adopt reasonable rules and regulations governing access to work locations by employee organization officers and representatives. (MMBA sec. 3507(f).) Pursuant to this authority, the District adopted Rule 23 of its EER policies. The District argues that the intent of Rule 23 was to reserve to the District the complete discretion to grant or deny use of the District's facilities by FIDEA. In essence, the District argues that under Rule 23, it may grant or deny requests for any reason or no reason at all. The evidence does not support such a position.

Cardoza's undisputed testimony is that the intent of Rule 23 was to codify the District's long-standing practice and policy regarding the use of its facilities by FIDEA. According to Cardoza, the past practice was for FIDEA to provide the District at least one week's notice for any request to use the District's meeting room. The District's practice was to grant such requests if there was no scheduling conflict. It is undisputed that in the past five years, FIDEA's requests have only been denied once. In that instance, there was a scheduling conflict for the date requested by FIDEA. The situation was resolved by FIDEA simply moving its meeting to the following week at the same location.

The plain language of Rule 23 confirms that it was intended to codify past practice. Although the first part of Rule 23 provides that the District “may” grant requests by FIDEA for the use of the District facilities, the remainder of Rule 23 imposes two conditions on the District’s exercise of its discretion. Those conditions are that: (1) the meeting take place outside of normal work hours; and (2) the meeting not interfere with the District’s operations.

The District argues that even where those two conditions are met, it has the complete discretion to grant or deny FIDEA’s request. The Board disagrees. The District’s interpretation of Rule 23 would render superfluous the language discussing the two conditions. If the District had intended to reserve to itself such complete discretion, there would have been no need to impose conditions regarding work hours and operational needs. The District could have simply stated that use of the maintenance meeting room would be granted at its discretion. Instead, the District drafted Rule 23 to imply that use of the room would be granted if the two conditions were satisfied. The undisputed testimony of Cardoza confirms this interpretation. Accordingly, based on the evidence presented in the record, the Board finds that the District’s intent in enacting Rule 23 of its EER policies was to codify its past practice regarding the use of its facilities by FIDEA. The record further establishes that the District’s past practice was to allow FIDEA use of the District’s meeting room provided that meeting was held outside of normal work hours and there was no scheduling conflict.

Violation of Right of Access and District’s Defenses

Having found that the District intended to codify its past practice in Rule 23, the Board must now turn to the question of whether the District violated Rule 23 when it denied FIDEA’s request to use the room for an October 1, 2001, meeting. It is undisputed that the only reason publicly proffered by the District for denying FIDEA’s request was the purported availability

of alternative facilities. However, there is absolutely no evidence that the availability of alternative facilities was ever considered a factor by the District in the past. The District responds that it was not until FIDEA affiliated with Local 3 that alternative facilities became available. While perhaps true, FIDEA's affiliation with Local 3 did not alter the meaning of Rule 23. Rule 23 was intended to codify past practice and nothing in the District's past practice allowed it to deny FIDEA access because of the availability of alternative facilities. If the District believed that FIDEA's affiliation with Local 3 warranted a change in its policy, it could have sought to amend Rule 23. It did not.

The District also argues that FIDEA's request was properly denied because of security concerns following the terrorist attacks of September 11, 2001. This contention must be rejected. It is undisputed that the District never once mentioned security as a concern prior to the filing of this unfair practice charge. Security was not mentioned in the two letters of denial sent to FIDEA by Davis. There is also no evidence that Serrato ever mentioned security as a concern in his meeting with FIDEA's representatives on October 16, 2001. Instead, FIDEA was repeatedly informed that the denial was based on the fact that they had alternative facilities available. Despite these facts, both Serrato and Davis testified that, in reality, security was their "primary" concern in denying FIDEA's request.

The Board does not find the District's assertion that security was its primary concern to be credible. The District would have the Board believe that despite being its primary concern, neither Serrato nor Davis saw fit to mention their security concerns to FIDEA. Instead, the District repeatedly emphasized the availability of alternative facilities, a secondary concern. The District's credibility is further strained by the fact that FIDEA's request occurred only a week or two after September 11, 2001. During that time the indelible events of that day were

undoubtedly first and foremost on most people's thoughts. It is simply inconceivable that the District would have failed to mention security if it were in fact the District's "primary" concern.

Additionally, it is not clear why security would have been a concern to the District. The testimony in the record is that the FIDEA meeting would have been attended by 30 to 35 members. There is no evidence in the record that non-employees would have been in attendance. All of FIDEA's members were employees of the District and had access to the District's meeting room. The District does not explain why its employees – who already had access to the meeting room during work hours – would constitute any more of a security concern at a FIDEA meeting.

Lastly, the District argues that the Board lacks jurisdiction to consider this charge because FIDEA failed to exhaust its administrative remedies. Citing to Social Services Union v. Board of Supervisors (1978) 82 Cal.App.3d 498, 507 [147 Cal.Rptr. 126], the District asserts that "a general principle of California law is that administrative remedies must be exhausted before resorting to formal litigation." Under Rule 33 of the District's EER policies, FIDEA could have appealed the denial to the Board of Directors. FIDEA's failure to file such an appeal, argues the District, constitutes a failure to exhaust its administrative remedies.

The District's argument suffers from several flaws. First, this PERB proceeding is not "formal litigation." (Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 292 [109 P.2d 942].) To the contrary, this proceeding is exactly the type of "administrative remedy" that FIDEA is required to exhaust. Second, the plain language of Rule 33 provides that Serrato's decision is subject to appeal to the Board of Directors and subject to review by PERB.

Nothing in Rule 33 or the EER policies requires FIDEA to exhaust any appeal procedures prior to filing an unfair practice charge with PERB.

Right of Access Under MMBA

In addition to the right of access provided by Rule 23, the ALJ also considered whether an implied right of access exists under the MMBA. The Board has never addressed this question. As the ALJ noted, both the Educational Employment Relations Act (EERA)⁷ and the Higher Education Employer-Employee Relations Act (HEERA)⁸ both expressly grant to employee organizations the “right of access at reasonable times to areas in which employees work . . .” (EERA sec. 3543.1(b); HEERA sec. 3568.) Although the text of the Ralph C. Dills Act (Dills Act)⁹ does not contain such language, this Board has held that a similar right is implicit in the Dills Act because of its purpose and intent. (Corrections.) Finding that the MMBA has a purpose and intent identical to the Dills Act, the ALJ held that a similar right of access must exist under the MMBA.

The District vigorously challenges that ALJ’s holding. The District argues that the MMBA is distinct from the Dills Act because it expressly provides that a public agency may adopt reasonable rules and regulations governing “access of employee organization officers and representatives to work locations.” (MMBA sec. 3507(f).) Thus, argues the District, a right of access only exists under the MMBA if a public agency adopts such a rule.

⁷EERA is codified at Government Code section 3540 et seq.

⁸HEERA is codified at Government Code section 3560 et seq.

⁹The Dills Act is codified at Government Code section 3512 et seq.

While the question of whether an implied right of access exists under the MMBA is an important one, it is not a question that the Board must decide here. As discussed above, it is an unfair practice for a public agency to violate its own local rules adopted pursuant to MMBA section 3507. (PERB Reg. 32603(b).) The Board has already found that the District violated Rule 23 of its EER policies when it denied FIDEA the use of the District's meeting room for a membership meeting on October 1, 2001. By doing so, the District violated PERB Regulation 32603(b). Because of these findings, it is not necessary for the Board to decide whether an implied right of access also exists under the MMBA and the Board leaves that question to be answered another day.

ISSUE 2: Unilateral Change in the Terms and Conditions of Employment

Under the MMBA, the District is required to meet and confer in good faith with FIDEA over any changes to the terms and conditions of employment. (MMBA sec. 3505.) Refusal to meet and confer in good faith as required is an unfair practice. (PERB Reg. 32603(c).) In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.)¹⁰ Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980))

¹⁰When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with

107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Assn. v. City of Stockton (1984) 161 Cal.App.3d 813 [207 Cal.Rptr. 876]; Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant.)

The scope of representation under the MMBA includes:

. . . all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order. [MMBA sec. 3504.]

Although the language of MMBA section 3504 differs slightly from EERA, HEERA, and the Dills Act, all four statutes include within the scope of representation “wages, hours, and other terms and conditions of employment.” (MMBA sec. 3504; EERA sec. 3543.2; HEERA sec. 3562(q) and (r); Dills Act sec. 3516.) The Board has long held that the “terms and conditions of employment” include the right of access by employee organizations to employee work locations. (Woodland Joint Unified School District (1987) PERB Decision No. 628; Davis Joint Unified School District (1984) PERB Decision No. 474; Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375.) Accordingly, there can be little dispute that access by employee organizations to employee work locations is a subject within the scope of representation.

Next, overwhelming evidence supports a finding that the District unilaterally changed its policy on use of its meeting room without providing FIDEA an opportunity to negotiate. As discussed above, prior to October 2001, the District’s policy was to allow FIDEA use of the

parallel provisions. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

meeting room provided that any meeting occur outside of normal work hours, not interfere with the District's operations, and there was no scheduling conflict. By its actions in September and October 2001, the District unilaterally changed its policy to allow FIDEA use of the meeting room only when there were no alternatives available. The District's actions constitute an unlawful unilateral change.

The District responds that FIDEA was denied use of the meeting room only once. A one-time action cannot constitute an unlawful unilateral change, argues the District. It is true that a unilateral change is not unlawful unless it alters a policy that has a generalized effect or continuing impact. (Grant.) However, the District's denial was not intended as a one-time action. There is no evidence to suggest that the District would have granted any future requests while FIDEA remained affiliated with Local 3. To the contrary, the facts establish that the District's denial was intended to enact a policy whereby use of the meeting room would be contingent upon no alternatives being available. This is not a one-time action but a unilateral change in District policy.

The District also argues that there was no unlawful unilateral change because FIDEA failed to respond to the District's offer to meet and confer. The District's argument is specious. It did not offer to meet and confer with FIDEA until an unfair practice charge had been filed. Prior to that time, the District admitted that it refused to provide FIDEA with the reasons for the denial. Further, as discussed above, the evidence establishes that the District had made a final decision in October 2001.

Lastly, the District argues that any change was authorized by Rule 23 of the EER policies. Specifically, the District again asserts that it has complete discretion to grant or deny requests for use of the meeting room under the EER policies. In this matter, the District

contends that it merely exercised such discretion to deny permission to use the room. This contention has already been rejected. As previously discussed, Rule 23 was intended to codify the District's past practice and does not grant to the District unfettered discretion.

Based on the above, the Board finds that the District unilaterally changed its policy on use of its meeting room without providing FIDEA notice and an opportunity to negotiate. The District's actions violated MMBA section 3505 and PERB Regulation 32603(c).

ISSUE 3: Discrimination

It is an unfair practice to discriminate against employees for exercising rights guaranteed under the MMBA. (MMBA sec. 3506; PERB Reg. 32603(a).) To establish a prima facie case of discrimination in violation of MMBA section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employee because of the exercise of those rights. (Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416 [182 Cal.Rptr. 461] (Campbell); San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 [127 Cal.Rptr. 856] (San Leandro).)

MMBA section 3502 guarantees public agency employees the right to "form, join, and participate" in the activities of employee organizations "of their own choosing" for the purposes of representation on all matters of employer-employee relations. An integral part of this statutory language is the right to determine in what manner employees will effect such representation. Thus, the members of FIDEA had a protected right to select Local 3 as their service provider. They made their selection known to the District on August 28, 2001.

Accordingly, FIDEA has established that it exercised protected rights under the MMBA and that the District had knowledge of its protected activity.

Next, FIDEA must establish that the District discriminated against FIDEA members because of their selection of Local 3 as a service provider. To establish such nexus, FIDEA may demonstrate that adverse action was taken by the District shortly after FIDEA's selection of Local 3. Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action in protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following nexus factors should be present: (1) the employer's disparate treatment of the employee (Campbell, supra); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro, supra.); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro, supra.); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) employer animosity towards union activists (San Leandro, supra; Los Angeles County Employees Assn. v. County of Los Angeles (1985) 168 Cal.App.3d 683 [214 Cal.Rptr. 350].).

There is no question that the District's denial occurred in close temporal proximity to the selection of Local 3. Although the District was first notified on August 28, 2001, it initially questioned the legitimacy of the affiliation. On September 20, 2001, Local 3 and FIDEA sent additional letters to the District explaining the affiliation. Only days later, the

District denied FIDEA's request citing the availability of alternatives resulting from the affiliation.

Also supporting a finding of animus are the District's inconsistent explanations about why it denied use of the room. On September 26, 2001, Davis initially denied permission to use the room for an FIDEA meeting. Her letter cited FIDEA's recent affiliation with Local 3 and its resultant access to its facility in Fresno as the reason for the denial. There was no mention of security considerations in this letter. On October 16, two FIDEA representatives spoke to Serrato to request an explanation for, or reconsideration of, the District's denial. Although the men engaged in a conversation about the matter, Serrato did not rely on, or even mention, increased security concerns as a reason for the denial. On October 19, Davis sent a second letter denying permission to use the room for a FIDEA meeting. This letter also failed to cite security concerns as the reason for the District's denial.

It was not until an unfair practice charge had been filed that the District raised security as a reason for the denial. At the administrative hearing, the District's witnesses went even further by testifying that security was in fact their "primary" concern. As discussed above, the Board finds the District's defense unbelievable. Since the District's security defense is inconsistent with its previous explanations, it lacks credibility and supports an inference of unlawful animus.

Further supporting a finding of animus is the existence of disparate treatment. Specifically, the District denied FIDEA the right to use the room but permitted the general public to enter the same building for meetings of its Board of Directors, with the only additional precaution of a hired security guard. Certainly the District's employees, who have been screened by a pre-employment check, pose no greater threat than members of the general

public. This disparate District decision regarding after-hours visitors further supports an inference of unlawful motivation.

Having proffered no legitimate business reasons for its denial, the Board finds that ample evidence exists to establish that the District discriminated against FIDEA when it denied use of the meeting room. By doing so, the District violated MMBA section 3506 and PERB Regulation 32603(a).

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Fresno Irrigation District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3505 and 3506, and Public Employment Relations Board (PERB) Regulation 32603(a), (b) and (c), by denying the Fresno Irrigation District Employees Association (FIDEA) the right of access to the District's facilities for FIDEA meetings, failing to meet and confer in good faith over matters within the scope of representation, and discriminating against its employees because of the exercise of protected rights.

Pursuant to Section 3509(b) of the MMBA, it is hereby ORDERED that the District, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Denying to FIDEA any rights provided by local rule, including the right of access to the District's facilities;
2. Failing to meet and confer in good faith over matters within the scope of representation; and
3. Discriminating against employees for the exercise of protected rights.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Reinststate the prior practice of allowing FIDEA to use the District's facilities to conduct meetings with its members as long as the meetings take place outside of normal work hours and do not interfere with the District's operations.
2. Provide FIDEA notice and an opportunity to meet and confer over any proposed changes to the District's policy on the use of its facilities for FIDEA meetings.
3. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix.
4. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on FIDEA.

Members Whitehead and Neima joined in this Decision.



**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California**

After a hearing in Unfair Practice Case No. SA-CE-29-M, Fresno Irrigation District Employees Association v. Fresno Irrigation District, in which all parties had the right to participate, it has been found that the Fresno Irrigation District (District) violated the Meyers-Miliias-Brown Act (MMBA), Government Code sections 3505 and 3506, and Public Employment Relations Board (PERB) Regulation 32603(a), (b) and (c), by denying the Fresno Irrigation District Employees Association (FIDEA) the right of access to the District's facilities for FIDEA meetings, failing to meet and confer in good faith over matters within the scope of representation, and discriminating against its employees because of the exercise of protected rights.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Denying to FIDEA any rights provided by local rule, including the right of access to the District's facilities;
2. Failing to meet and confer in good faith over matters within the scope of representation; and
3. Discriminating against employees for the exercise of protected rights.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Reinstate the prior practice of allowing FIDEA to use the District's facilities to conduct meetings with its members as long as the meetings take place outside of normal work hours and do not interfere with the District's operations.
2. Provide FIDEA notice and an opportunity to meet and confer over any proposed changes to the District's policy on the use of its facilities for FIDEA meetings.

Dated: _____

FRESNO IRRIGATION DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.