



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

MICHAEL F. LOPEZ,

Charging Party,

v.

CITY OF MILPITAS,

Respondent.

Case No. SF-CE-6-M

PERB Decision No. 1641-M

June 14, 2004

Appearances: Law Offices of Helen Jennings by Helen Jennings, Attorney, for Michael F. Lopez; Meyers, Nave, Riback, Silver & Wilson by Laura Lee Briggs, Attorney, for City of Milpitas.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by Michael F. Lopez (Lopez) to a proposed decision (attached) of the administrative law judge (ALJ). Lopez alleged that the City of Milpitas (City) violated the Meyers-Milias-Brown Act (MMBA)¹ by retaliating against him for his protected activities. The ALJ's proposed decision dismissed the complaint finding that Lopez failed to meet his burden of proof.

The Board has reviewed the entire record in this matter, including the ALJ's proposed decision, Lopez' exceptions and the City's response. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts the proposed decision as the decision of the Board itself.

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

ORDER

The unfair practice charge and complaint in Case No. SF-CE-6-M are hereby
DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



MICHAEL F. LOPEZ,

Charging Party,

v.

CITY OF MILPITAS,

Respondent.

UNFAIR PRACTICE
CASE NO. SF-CE-6-M

PROPOSED DECISION
(3/11/03)

Appearances: Helen Jennings, Attorney, for Michael F. Lopez; Meyers, Nave, Riback, Silver & Wilson, by Arthur A. Hartinger and Laura Lee Briggs, Attorneys, for City of Milpitas.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

Michael F. Lopez initiated this action by filing an unfair practice charge against the City of Milpitas (City) on July 23, 2001. Following its investigation of the charge, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on December 20, 2001.¹ The complaint alleges that the City retaliated against Lopez by postponing his promotion to battalion chief because he exercised rights guaranteed by the Meyers-Milias-Brown Act (MMBA).² By this conduct, the complaint alleges, the City violated section 3506³ and PERB

¹ The general counsel dismissed a portion of the charge, and there was no appeal of that order.

² MMBA is found at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

³ Section 3506 reads as follows:

Regulation 32603(a).⁴

The City filed its answer on January 22, 2002, denying the material allegations of the complaint and asserting a number of affirmative defenses.

Settlement conferences held before a PERB agent on March 19, and April 25, 2002 failed to resolve the dispute. The undersigned conducted a formal hearing in Oakland on September 10, and October 22, 2002. With the receipt of post-hearing briefs on February 24, 2003, the matter was submitted for decision.

FINDINGS OF FACT

Lopez is a “public employee” within the meaning of section 3501(d). The City is a “public agency” within the meaning of section 3501(c).

The City maintains a fire department (Department) and employs its own fire fighting force. The ranks in the Department’s force are, in ascending order, firefighter, fire engineer, fire captain, battalion chief, division chief, assistant chief, and fire chief. As will be discussed below, fire lieutenants, just below the rank of fire captain, existed prior to 1998. There are also classifications of paramedic/firefighter and paramedic/engineer. During his employment with the City commencing in 1982, Lopez successfully promoted through the firefighter ranks. The

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.

⁴ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32603(a) provides it shall be an unfair practice for a public agency to:

(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.

City's firefighters up to and including the rank of captain are included within a bargaining unit exclusively represented by the Miplitas Firefighters, IAFF Local 1699 (Union). The Department's "command team" consists of the fire chief, assistant fire chief, five battalion chiefs, fire marshal and assistant fire marshal.

Fire protection services in the Department fall into two categories: fire suppression and fire prevention. The firefighters engaged in fire suppression respond to emergency calls (i.e., fight fires, respond to medical calls, etc.). These firefighters work in 24-hour shifts, and have a 56-hour work week. The fire prevention personnel within the Department's Inspection Services Division perform other services, such as inspections related to fire prevention, hazardous materials, and building plans. These employees, who are supervised by the fire marshal, have a regular 40-hour week. Fifty-six-hour positions accrue enhanced vacation and sick leave benefits, the most important of which translates into a 6 percent pay increase. The 40-hour positions do not have enhanced benefits. However, when a 56-hour employee is temporarily assigned to a 40-hour position, the employee retains the enhanced benefits pursuant to a provision of the memorandum of understanding (MOU) between the City and the Union.

Lopez became a captain in 1991. In 1997 an opportunity presented itself for Lopez to transfer to the position of Public Education/Public Information Officer (Pub Ed/PIO), a 40-hour position, at the captain's rank.

The Pub Ed/PIO Position and the Three-Year Commitment

The Pub Ed/PIO came about as a result of the elimination of an assistant fire chief position in 1997. The elimination of this position was accompanied by the creation of a new position at the fire captain level and the demotion of an incumbent assistant fire chief. There

were already 12 regular fire suppression fire captain positions. The Department has four stations, with one fire captain per station crew for each of three shifts. Because the existing captains were equally distributed among the four stations, former Fire Chief Vern Hamilton determined that the public would best be served by utilizing the thirteenth fire captain position as a 40-hour, public information officer with public education and fire inspection responsibilities.⁵ The creation of a new captain position was intended to avoid a cascade of downward bumping as a result of the demotion of the assistant fire chief to battalion chief.

The City's announcement of the reduction in force was followed by negotiations between the Union and City regarding selection procedures and terms and conditions of the new fire captain position. The parties' agreement led to the signing of a side letter dated March 17, 1997. The parties agreed that the Pub Ed/PIO position would be a separate classification with the official title of Fire Captain/Public Information Officer. This was to be a 40-hour position in the Inspection Services Division, reporting to the fire marshal. The parties agreed that the Pub Ed/PIO would have primary program management responsibilities for the Department's public education program, serve as the Department's primary public information officer, and conduct fire inspections. Key for purposes of this case was the following provision in the agreement:

The appointment to this position shall be for a minimum of three years, including one year of probation. Incumbents may not promote or transfer within that three year minimum commitment period.

⁵ The background information regarding staffing configuration is taken from my earlier decision in Lopez v. Milpitas Firefighters, IAFF Local 1699 (Case No. SF-CO-9-M), which was entered into evidence in this case.

There are currently two other fire department positions with minimum time commitments: hazardous materials inspectors, with a five-year commitment, and paramedics, with either a two- or five-year commitment. The MOU does allow for an early escape by paramedics, but only with six months written notice and a requirement for reimbursement of one month's salary and City-incurred training costs up to \$4,500. The MOU also has specific restrictions on promotions of paramedics seeking to promote into specified positions. The Union recently requested a waiver of the commitment for paramedics seeking to promote out of their position to a captain's position. The City refused.

Selection of the First Pub Ed/PIO Captain

Hamilton was successful in obtaining the right to select the first Pub Ed/PIO officer "at his discretion," without regard to civil service rules, in exchange for the promise that any subsequent officer would be chosen through competitive examination.⁶

Shortly after the side letter was executed, Lopez applied for the position. But Hamilton selected Jack Eggleston, on the basis of his higher seniority. On March 26, 1997, Lopez e-mailed Hamilton to object to the selection on the basis of seniority rather than by competitive examination because it violated the City's affirmative action guidelines and because the seniority bid process was biased against minorities. Lopez claims Native American heritage. Hamilton responded by explaining that a competitive, promotional examination process was

⁶ The side letter provided in pertinent part:

Appointment to the position will initially be from among incumbent Fire Captains at the discretion of the Fire Chief. Subsequent vacancies shall be filled by a promotional process. In the event there are no sufficient qualified candidates from within the Department to fill such vacancies, an open recruitment will occur.

rejected because it would have opened up the possibility of the installation of a non-incumbent captain and the demotion of the most junior incumbent captain; and the original purpose of the negotiated agreement was to avoid the domino-effect bumping. This was not Lopez's first work-related complaint; he had filed complaints on numerous work-related matters predating this issue.⁷ There is no evidence that Hamilton considered a competitive examination limited to incumbent captains to accommodate Lopez's interest. But this assumes such a possibility under the City's civil service rules and there was no evidence presented by Lopez on that point.⁸

On June 12, 1998, Lopez filed a civil complaint in Santa Clara County Superior Court against the City alleging racial discrimination based on the selection of Eggleston over himself. The Union was also a defendant as to claims of racial discrimination and breach of the duty of fair representation. On March 8, 2000, the trial court granted the defendants' motion for summary judgment. The judgment was upheld on appeal in an unpublished decision issued by the Court of Appeal, Sixth Appellate District, on February 14, 2002.

Eggleston remained in the position until April or May 1998, when he took an early retirement. The vacancy created by Eggleston's retirement was not immediately filled. For a short period of time, the duties of the position were temporarily assigned to a fire lieutenant before a formal recruitment was undertaken.

For reasons never explained, the City delayed in developing formal job specifications for the Pub Ed/PIO position until March 2000. When they were adopted, the position was

⁷ Many of these involved claims of race discrimination. The City began to keep a log of Lopez's complaints in 1992, but Lopez acknowledged complaints prior to that year.

⁸ The City's personnel rules and regulations provides for recruitment by one of two options, promotional and open.

confirmed to be a 40-hour per week position, accruing 40-hour benefits “per IAFF MOU,” and having a three-year minimum commitment.

The 1998 Side Letter Relating to the Upgrading of Lieutenants

In approximately September 1998, the City announced the Pub Ed/PIO vacancy, to be filled by competitive examination. There were four candidates, including Lopez. Lopez was the only one at the captain’s level. Lopez was selected and began service on October 11, 1998.

In the meantime, Jeffrey Lee, a Union shift representative, with 22 years of seniority currently, and Ralph Moss, the current Union president with 20 years of seniority, were involved in the negotiations of a September 1998 side letter concerning the upgrade of the Department’s five lieutenant positions to fire captain positions.⁹ Among the various provisions, several are pertinent here. As to the Pub Ed/PIO position, paragraph 5 stated:

As a result of prior agreement, the position of Fire Captain/Public Education officer is not subject to the bid process until the incumbent vacates the position. In the event that the position becomes vacant, it will be a third 40-hour week position to be filled from among incumbent personnel. . . .

Paragraph 9 stated:

While temporarily assigned to 40-hour week administrative positions, Fire Captains shall be entitled to the terms and conditions of MOU section 38.01. For purposes of section 38.01, temporary assignment shall be of a single bid cycle duration, or less. [¹⁰]

⁹ Lee explained that the Milpitas lieutenant position was unique in the Bay Area and the upgrade was to achieve pay comparability.

¹⁰ Section 38.01 of the MOU provides in part:

40-hour workweek: Shift employees temporarily assigned to a 40-hour workweek shall maintain the same benefits (leave accrual and holiday pay) as those individuals assigned to 24-hour shifts subject to the following conditions: . . .

Paragraph 10 stated that the fire chief had sole discretion to assign the new captains to the 40-hour administrative assignments “to be filled until the next regular bid occurs.” The side letter was formally adopted by the city council on September 1, 1998, and memorialized in a written resolution.

Lopez’s Complaints While Serving in the Pub Ed/PIO Position

When Lopez was selected for the Pub Ed/PIO position, he was expecting a pay increase, but his pay was in fact lowered, as a result of the loss of the 56-hour accruals.¹¹ Lopez claims that he was the only captain not receiving 56-hour benefits, while three other captains in the Inspection Services Division, Captains Jeffrey Maxwell, Americo Silvi and Michael Wells, were. Lopez did not establish precisely when these captains received the higher accruals, but it appears this was after the 1998 side letter. Lopez identified Maxwell as the training officer. Lopez also had been informed by Eggleston that he had been receiving 56-hour benefits when he served as the Pub Ed/PIO captain. Lopez testified that he only “believed” Silvi was receiving 56-hour accruals.

Prior to the creation of the Pub Ed/PIO position, two of the Department’s five lieutenants rotated into 40-hour, non-fire-suppression positions for an 18-month period to deal with public education and safety inspections. While on this administrative rotation, the lieutenants accrued the enhanced benefits attendant to the 56-hour positions because they were considered to be temporarily assigned from fire suppression positions. All 56-hour personnel, including those on administrative rotation, were entitled to bid on station and company assignments at the end of the three-year bid cycle.

¹¹ It was not made clear why a lateral transfer would have been accompanied by a pay increase.

In December 1998, Lopez claimed that the Pub Ed/PIO position was a temporary, biddable position, based on language of the 1997 side letter, and therefore he was entitled to 56-hour accruals. Lopez relied on the fact that the normal bid-cycle was three years and the 1997 side letter reference to the Pub Ed/PIO position's three-year commitment coincided with this time period. He also relied on the side letter's use of the word "transfer" ("... incumbents may not promote or transfer. . .") because he assumed such a term logically applied only to biddable positions. At the time, then-City Human Resources Director Julie Yuan-Miu, advised Lopez that the 1997 side letter did not establish the position as a temporary, biddable position. The City's position was that the Pub Ed/PIO position was a permanent position and thus separate from the bidding process. Yuan-Miu asserted that the term "transfer" from the paragraph setting forth the three-year commitment did not refer to a rotational bid transfer. She noted that the agreement stated that subsequent vacancies would be "filled by a promotional process," which would have been inconsistent with replacement by bid. Lastly, Yuan-Miu noted that the 1997 side letter described the position as a 40-hour position reporting to the fire marshal and that other 40-hour positions under the fire marshal do not receive 56-hour benefits.¹²

¹² The side letter provided:

.....
(2) The position will be assigned a 40 hour week in the Inspection Services Division of the Fire Department.
.....

(9) Compensation for the position shall be Regular Fire Captain wages (firefighter + 22%) and the incumbent shall maintain EMT-D certification and shall be entitled to EMT-D

Later, Lopez raised this issue under a theory of racial discrimination. On February 3, 1999, Lopez filed a complaint with the Department of Fair Employment and Housing (DFEH), claiming that his pay reduction was racially discriminatory and retaliatory. In the course of the DFEH investigation, the City produced Eggleston's personnel action form showing his pay rate. Lopez claims that the form proved that the City was discriminating against him. Eggleston's form, dated January 5, 1998, does show that the City paid him more than Lopez, but it does not demonstrate that Eggleston was receiving 56-hour accruals. The January 5, 1998, form shows that Eggleston was paid at the rate of \$6,835.53 monthly, but this was due to his new position being designated a fire inspector rather than a fire captain. Lopez was paid at the rate of \$6,767.85 monthly, or \$67.68 less than Eggleston. The same form shows that the City ordered Eggleston's accruals be at the 40-hour week rate. DFEH later provided Lopez with a second Eggleston personnel action form dated January 12, 1998, indicating that Eggleston's pay rate was corrected to the \$6,767.85 rate. Both forms showed an "effective" date of January 1, 1998, approximately seven months after Eggleston assumed the position. The DFEH complaint was dismissed for lack of evidence.

Nevertheless, current Fire Chief William Weisgerber acknowledged that Eggleston did receive 56-hour accruals for a period of time due to an administrative oversight before the error was corrected. As previously noted, Lopez testified that at some unspecified time, Eggleston informed him that he was receiving 56-hour benefits. Lopez did not testify over what period of time Eggleston claimed he received 56-hour benefits. I find that Eggleston received 56-hour benefits for at most eight months (i.e., from his selection until the January 1998 personnel

specialty pay. Other benefits are as defined in the current MOU for forty-hour week employees. [Emphasis added.]

form). Lopez testified that Eggleston received 56-hour accruals for 33 months, without citing the source of that information.¹³

As to Wells, the City produced a settlement agreement indicating that he had sued the City for racial discrimination and had been awarded a reassignment from a 56-hour fire suppression position to a position in fire prevention with 56-hour benefits. This award was in exchange for a compromise and release by Wells of his legal claims.¹⁴ I find that Wells did not receive such benefits due to any custom or practice of the Department.

Maxwell was one of the converted lieutenants who was in the Inspection Services Division training officer position. That was position was identified as a 40-hour position with 56-hour benefits pursuant to the 1998 side letter and section 38.01 of the MOU.

No substantial evidence was provided establishing that Silvi received 56-hour accruals. If Silvi informed Lopez of this, it would constitute uncorroborated hearsay.¹⁵

On April 3, 2000, Lopez filed an internal race discrimination complaint with the City based on the higher pay rate received by Eggleston revealed in the first personnel action form. By letter dated June 28, 2000, City Manager Thomas Wilson, in affirming the human resource director's decision to reject the grievance, asserted that Eggleston's salary was an error that

¹³ At one point, Lopez testified that Eggleston began his position near the end of May 1996, which is incorrect because the position was not created until March 1997. Assuming Lopez claims that Eggleston was earning the enhanced benefits from March 1997, even this does not lead to 33 months because Eggleston left the position in the summer of 1998.

¹⁴ The City requested that the document be viewed in-camera and not disclosed to the charging party on grounds of privacy of employee records. This request was granted.

¹⁵ The City also presented a matrix of employees as of a later point in time, July 2001, showing only two employees Captains Tsudama and Shattock working 40-hour weeks and receiving 56-hour benefits. Both of these were working temporary assignments within the meaning of the MOU.

was corrected within days after the first transaction form. Wilson provided Lopez with a copy of Eggleston's January 12, 1998, personnel action form, showing the correction.

In November 2000, Lopez took issue with the City's intention to change the flex-scheduling of work hours. Lopez applied for the Pub Ed/PIO position in part because he could have a work week consisting of four, ten-hour days. Forty-hour personnel in the Fire Inspection Services Division had been afforded the "4/10" schedule. These personnel were responsible for building and plan inspections, and needed to be available to the public (i.e., building contractors and construction companies) in order to review architectural plans. When the City decided to eliminate the 4/10 option and offer only a "9/80" schedule (nine days, 80 hours every two weeks), Lopez complained and then grieved the change. The change was prompted by city council members, the city manager, and the fire chief, who had received complaints from the public using the Fire Inspection Services Division that the services were often unavailable on Mondays and Fridays due to the 4/10 schedule. In addition, the fire prevention office often lacked coverage when employees were sick or on vacation. The City proposed the change to the Union in the 2001-2005 MOU negotiations.¹⁶ The agreement was memorialized in a side letter to the 2001-2005 MOU.

Lopez's grievance was rejected at all levels, including at the third level by Wilson on February 5, 2001. Specifically, Wilson rejected Lopez's argument that the Labor Code prohibited the change. In his response, Wilson also noted "extensive correspondence" indicating that Lopez had previously raised the 9/80 issue and had been rejected, and warned

¹⁶ The background information regarding the impetus for the change is taken from my earlier decision in Lopez v. Milpitas Firefighters, IAFF Local 1699 (Case No. SF-CO-9-M).

that the current grievance could be considered frivolous and an “abuse of a City administrative process” in violation of a provision in the MOU.

In the course of pursuing the 9/80 issue, Lopez met with Weisgerber on December 18, 2000. In a follow-up e-mail on January 2, 2001, Lopez reminded Weisgerber of the fire chief’s statement that the 1998 side letter “superseded” the 1997 side letter. Lopez also asked Weisgerber if he was bound by a three-year commitment in the Pub Ed/PIO position. As to the supersession issue, Weisgerber responded that he thought he was simply conveying his view that new MOU provision as to the 9/80 schedule would now cover all 40-hour positions previously identified. As to the three-year commitment, Weisgerber indicated he intended to hold Lopez to it. Weisgerber noted that the three-year commitment was included in the March 2000 Pub Ed/PIO job description. In a follow-up e-mail, Weisgerber cited both the 1997 side letter agreement and the March 2000 job description.

Lopez filed a grievance on January 18, 2001, challenging Weisgerber’s statement of intention to hold him to the three-year commitment. Fire Marshal Patricia Joki rejected the grievance on February 1, 2001, agreeing with Weisgerber. Weisgerber received the grievance at the second level and rejected it in a memorandum dated February 20, 2001, in which he reiterated his earlier position. With regard to the three-year commitment he wrote:

Your 3-year commitment does not preclude you from competing in promotional opportunities for which you are qualified. If you successfully compete for a promotion and are placed on an eligibility list, you could be considered for promotion upon fulfillment of your minimum commitment.

Lopez appealed to Wilson. Wilson rejected the grievance on March 14, 2001, adopting Weisgerber’s rationale.

Lopez also complained to management about former Union President Dan Getreu being allowed to sleep at the firehouse during his off hours, while Lopez was on duty. Lopez objected because Getreu often came to the firehouse intoxicated and on occasion would try to discuss situations at other fire houses with him. Lopez objected to this. Lopez felt that the City owed him a “hostile-free” work environment. Lopez also had “issues” with Getreu related to his civil suit against the Union. Five or six complaints by Lopez did not result in any remedial action. Sometime later, in late 2001 or 2002, following additional complaints by others, but after Lopez left for the Pub Ed/PIO position, the policy on off-duty sleeping in the firehouse was changed. Now prior approval of the firehouse captain is required.

Promotion to Battalion Chief and Further Acts of Alleged Disparate Treatment

Lopez applied for the battalion chief position on three occasions before succeeding in promoting. On the first two occasions he achieved a qualifying score on the examination, but was not selected. After taking the second examination in 1999, Lopez informed human resources that he had discovered a discrepancy in the score given to one question. Lopez claims the City did not respond. Human Resources Director Cherie Rosenquist testified that Lopez sought review of the examiners’ testing notes, which she could not provide according to policy. Her office informed Lopez that he was only permitted to review his own submitted materials. Lopez offered no rebuttal to this point, and he offered no evidence substantiating the basis for the scoring error. I find that the City did not fail to respond as Lopez asserts, but at worst failed only to respond with the answer desired by Lopez.

Lopez was the most senior employee competing in the 1999 examination. He believes seniority afforded him no benefit in the examination, in contrast to when Eggleston was chosen

on the basis of seniority. But there is no evidence that seniority should have been a factor in this competitive examination.

In early 2000, after his second battalion chief examination, Lopez requested the opportunity to participate in the City's acting battalion chief program. This program allowed eligible firefighters to serve in the capacity of a battalion chief in order to gain out-of-class work experience. According to Lopez, the program had been very informal in the past, with the prerequisite being only limited on-the-job training. However, when Lopez applied, in December 1999, Weisgerber informed him that he would have to complete a formal training regimen before being allowed to participate.

Weisgerber testified that due to increased technical knowledge requirements for the position, he directed his staff to develop the formalized training program. Lopez was the first applicant subject to the new program.

Lopez felt this was unfair because the previous program had been so casual and because he had passed the battalion chief eligibility test on two occasions. To him the timing was suspicious. Then, too, development of the formal training program encountered unexplained delays. Eventually Weisgerber directed the assistant fire chief to start Lopez on whatever training was at hand, including the informal aspects. Weisgerber testified that one reason for the delay in getting Lopez into the program was that acting battalion chiefs are assigned to a platoon and assume the acting position only when there is minimum staffing so as not to cause overtime. Lopez was in the Inspection Services Division on a 40-hour schedule.

The formal training program was not ready to be implemented until June 2001. Lopez testified without contradiction that the training program required knowledge not demanded by the battalion chief competitive examination.

One of the components of the training was the Incident Command System (ICS) “400” certification program. Lopez requested the ICS 400 course, but he was initially denied permission to take the course. He complained about it. Weisgerber testified that he never refused Lopez the right to attend the class, but only ordered that it be postponed due to Lopez’s conflicting schedule as a 40-hour employee. Only one firefighter, Kevin Taylor, has completed the full training program since its installation, and several have dropped out. The reasons for this are not in evidence. Weisgerber never told Lopez that he could not be an acting battalion chief because of any hardship on the Department. Lopez never served as an acting battalion chief. The Department did allow Lopez to serve as an acting fire marshal at the battalion chief level.

During this time, Lopez also took the examination for the position of fire marshal. He scored third but was not offered an interview. Lopez claims that the top three qualifying candidates are always offered an interview, but cited nothing specifically to substantiate that claim. According to Weisgerber, under the City’s “rule of the list,” Weisgerber as appointing officer is entitled to interview and select any one of the qualified candidates, regardless of their actual ranking. The individual chosen for the fire marshal position had less seniority than Lopez. Lopez suggested that that individual also had lesser credentials for fire suppression work, but that the Department authorized fire suppression duties for the position after the individual was installed.

In 2001, there was a recruitment to fill a battalion chief position through internal promotion. There were four applicants, including Lopez. All four achieved qualifying scores on the examination. Lopez was ranked second on the list. On May 11, 2001, Weisgerber announced that he was promoting Captains Silvi and Lopez to the level of battalion chief. The

announcement indicated that the Silvi's appointment was effective on May 20, 2001 and Lopez's on October 21, 2001. Silvi had 13 years of seniority compared to Lopez's 19. Lopez complains that in the event of a reduction in force, he loses out to Silvi, though they were selected on the same day and Lopez's greater overall seniority would result in a tie-breaker in his favor had his appointment not been delayed by five months as a result of the three-year commitment.

Around the time of Lopez's selection for battalion chief, Weisgerber consulted with Rosenquist regarding whether to hold Lopez to the three-year commitment. Rosenquist advised Weisgerber that he should.

On July 5, 2001, Lopez wrote to Weisgerber demanding that he be released from his three-year commitment, citing the invalidity of the 1997 side letter due to lack of proper city council approval. Lopez bases this claim on the fact that there was no written resolution issued by the city council reflecting approval of the side letter, and section 15.13 of the City's personnel rules and regulations provide:

If Agreement is reached by representatives of the City and a recognized employee organization, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the City Council for determination.^[17]

I reject this argument. Section 15.13 does not state that the city council must issue a written resolution, only that the parties must memorialize their agreement in writing and present it to

¹⁷ Lopez also relies on the fact that, in contrast, the 1998 side letter regarding the conversion of lieutenants to captains was adopted by a written resolution and on the fact that the Pub Ed/PIO position was not identified specifically as a position in subsequent MOUs. Neither of these arguments is persuasive as to the claim that the 1997 side letter was invalid. The Union officers assumed that the 1997 agreement was binding and were never led to believe otherwise.

the city council for approval.¹⁸ According to the uncontradicted testimony of Hamilton, who signed the side letter for the City, he met with the city council about the agreement and obtained their approval for it after a vote in closed session.¹⁹ The city council's March 18, 1997, minutes reflect announcement of the adoption of the agreement regarding "implementation of a new fire captain position."²⁰

Lopez claims that the agreement can be interpreted to allow escape from the three-year commitment through promotion based on statements allegedly made by Hamilton and others, to that effect. Lopez testified that Hamilton told him this in a conversation they had, but he conceded his recollection of that conversation was "fairly fuzzy" and that the conversation itself was "general and vague." Lopez was more clear in recalling Hamilton's deposition testimony to that effect, and the deposition testimony admitted into evidence provides support for Lopez's claim. Although acknowledging his deposition testimony in Lopez's civil suit

¹⁸ Section 15.13 is a reiteration of the requirement of MMBA section 3505.1.

¹⁹ Rosenquist, in response to a request by Lopez, investigated whether a formal resolution had issued and found it was not. The city clerk was unable to confirm from city records that the side letter had been adopted with a resolution.

²⁰ The City argues that Lopez's attack of the three-year commitment based on the invalidity of the 1997 side letter challenges his credibility because he earlier relied on that three-year commitment in arguing that his position conformed to the definition of a temporary assignment for purposes of claiming 56-hour accrual rates. Lopez's rebuttal was that his position changed in light of subsequent events: his discovery that no formal city council resolution accompanied the 1997 side letter and Weisgerber's statement which he construed as establishing that the 1998 side letter superseded the 1997 side letter. Lopez viewed the Department to be the revisionist historian, changing the interpretation of rules only when convenient to disadvantage him. For example, Lopez took issue with the 9/80 change because of the lack of mutuality of obligation (the City demanded a three-year commitment from him while not adhering to the past practice of the 4/10 schedule) and relying on seniority (for Eggleston) only when it was to another's advantage. He testified: "[W]hatever appears to benefit them, that's the rule that is always going to be in force." I find that Lopez held these beliefs in good faith, regardless of their merit.

which might be construed in that fashion, Hamilton denied that that was his interpretation of the agreement.²¹ Hamilton also denied that he ever told Lopez that one way to leave the position prematurely was through promotion. Lopez admitted that he knows of no one ever released from a minimum commitment early.²² I find Hamilton's explanations are credible. Hamilton testified confidently and without hesitation. In addition, there was no writing, City

²¹ The June 15, 1999, deposition testimony was as follows:

Q [Counsel for Lopez] Okay. Also we talked about your understanding of the public information officer position being a minimum three years commitment. And we also talked about what that meant to you.

And if I understood that, that meant that the person would either have to be promoted, they'd have to retire or leave the fire department in order to leave that position, is that correct? Is that a correct –

A [Hamilton] Those would be included in the list of reasons that they might be able to vacate the position.

Q Anything else?

A Sure. They could – illness, they could be – there could be some kind of a special catastrophic event happen to them that would preclude them from continuing. The City Council could – at the succeeding budget session could eliminate the position out of the budget. Certainly that wouldn't have been a foreign experience.

So there's any number of things that could cause that to occur. Those would be ones that one would likely anticipate.

As to the also-cited May 14, 1999, deposition testimony of Hamilton, I accept Hamilton's explanation of that testimony regarding promoting out of the position to reflect the Union's position, not his interpretation of the side letter as executed.

²² Lopez asserted that Jim Shattock, listed as a fire prevention inspector, had a 24-month maximum commitment, which was extended. Since there was no evidence for the rationale for maximum commitments, I have no reason to conclude that situation to be analogous to minimum commitments.

practice, or other witness confirming the interpretation that a promotion was one means of escape, and such an interpretation contradicts the express language of the side letter (“incumbents may not promote or transfer. . .”).

Lopez claims that Getreu, who was Union president at the time of the 1997 side letter, and Ralph Moss, the current Union president, also told him that he could promote out of the position. Getreu’s statement was really a question: “Why do you need to wait?” Since this was uncorroborated hearsay, it cannot be accepted as to the truth of the matter asserted (by implication), namely, that the commitment was unenforceable.²³ Moss testified credibly that he never told Lopez that the three-year commitment was unenforceable. He acknowledged having a brief, informal conversation with Lopez in which he asked Lopez why he was not moving into the new position. Lopez told him of the three-year commitment. Moss later went unsolicited to Weisgerber to ask if Lopez needed to be held back. Weisgerber responded that he was going to hold Lopez to the commitment. Lee and Moss both credibly testified that it was never the Union’s belief that the 1998 side letter superseded the 1997 side letter as to the Pub Ed/PIO position’s three-year commitment. Again, Lopez reaches in attempting to draw an inference where one is not justified.

Hamilton and Weisgerber testified that the reason for the three-year commitment was for the City to obtain a return on the training invested in the incumbent. This training included knowledge and skills that a fire-suppression fire captain would not typically develop, including technical data pertinent to fire prevention, public speaking skills, and the ability to develop

²³ I do not believe that the mental state hearsay exception under Evidence Code section 1251 would allow admission of this statement for the limited purpose of showing Getreu’s mere belief or opinion that the provision was invalid. Belief, and assertion of fact are one in the same in this instance.

information presentations to the public. Dissemination of public information required special skills for speaking to the press and citizens of all ages from children to seniors. Weisgerber emphasized the acquired on-the-job experience developed by this specialist as being even more valuable than the resources actually spent on front-end training.

Lopez filed the instant unfair practice charge on July 23, 2001. Lopez contends that it was Weisgerber who harbored the unlawful animus toward him and was responsible for delaying his promotion. Weisgerber denied that he was motivated to retaliate against Lopez for his protected activities and that he simply adhered to the terms of the side letter agreement. He noted two recommendations he made which resulted in special public commendations being issued to Lopez. Weisgerber also graded Lopez highly in a performance evaluation for the period of October 12, 1998 through March 17, 2000. At the hearing, Weisgerber described Lopez as a “good employee” and “thorough” employee, who also filed a lot of complaints.

ISSUE

Did the City retaliate against Lopez because of his protected activities when it delayed his promotion to battalion chief?

CONCLUSIONS OF LAW

The complaint in this case alleges that the City delayed Lopez’s promotion to battalion chief “because of” his exercise of activities that were protected under the MMBA. Section 3506 of the MMBA and PERB Regulation 32603(a) prohibit such conduct. To establish a prima facie case of discrimination under these provisions, the charging party must show that: (1) the employee exercised rights under MMBA; (2) the public agency had knowledge of the exercise of those rights; and (3) the public agency discriminated, or threatened to discriminate, 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]; San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 [127 Cal.Rptr. 856].)

To prove this violation, Lopez bears the initial burden of showing evidence that he engaged in protected activity, that the City knew of the activity, and that the protected activity was a “motivating factor” in its decision to postpone his promotion. (California State University, Hayward (1991) PERB Decision No. 869-H; Novato Unified School District (1982) PERB Decision No. 210.) Motivation may be proven by either direct or circumstantial evidence, or a combination of both. (Carlsbad Unified School District (1979) PERB Decision No. 89.) The charging party may rely on such circumstantial evidence as a departure from standard procedures (Campbell Municipal Employees Assn. v. City of Campbell, supra, 131 Cal.App.3d 416, 424), disparate treatment of those engaged in protected activity (San Leandro Police Officers Assn. v. City of San Leandro, supra, 55 Cal.App.3d 553, 557-558; Los Angeles County Employees Assn. v. County of Los Angeles (1985) 168 Cal.App.3d 683, 688 [214 Cal.Rptr. 350]), inadequate justification given for the retaliatory act (Campbell Municipal Employees Assn. v. City of Campbell, supra, 131 Cal.App.3d 416, 424), the closeness in time of the retaliatory act to the protected activity (Santa Clara Unified School District (1985) PERB Decision No. 500), inadequate investigation prior to the retaliatory act (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S), and animosity towards activists (Marin Community College District (1980) PERB Decision No. 145).

Once protected activity is established to be a motivating factor, the burden shifts to the respondent to demonstrate that it would have taken the same action even in the absence of the protected conduct. (Novato Unified School District, supra, PERB Decision No. 210; see

Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 730 [175 Cal.Rptr. 626].)

Lopez has established that he engaged in protected activity. By his own count, he filed complaints concerning at least 17 different matters over a period of approximately 20 years of employment with the City.²⁴ These complaints include, but are not limited to, those about the denial of 56-hour accruals in the Pub Ed/PIO position, Eggleston's higher pay rate revealed in the personnel action form, the 9/80 schedule change, Getreu's harassment of him, and the alleged scoring error in the battalion chief examination. Weisgerber admitted he was aware of these complaints. The disputed issue is whether Weisgerber's decision to enforce the three-year requirement was motivated as a response to Lopez's protected activity.

Lopez contends that the City has engaged in a pattern of disparate treatment against him, as evidenced by denying him 56-hour benefits in the Pub Ed/PIO position, disregarding the past practice regarding the 4/10 schedule, threatening him with discipline for filing grievances, instituting the formal acting battalion chief training program just when he showed interest, holding him to the three-year commitment when it no longer applied to him, disregarding seniority when it was to his benefit, and rejecting other legitimate complaints of his, including demands to have pay discrepancies rectified.

²⁴ The City's list of complaints by Lopez beginning in 1992 showed 38. At the hearing, Lopez disputed that figure, but offered no specific rebuttal to the list. In his post-hearing briefing, he acknowledged complaints involving 17 matters, over 20 not 10 years. I note that PERB has held that complaints with anti-discrimination agencies are not protected activity under PERB's jurisdiction. (See Regents of the University of California (1987) PERB Decision No. 615-H [also assuming, without deciding, that a discrimination complaint filed with employer's internal process is protected].) Some of Lopez's race discrimination complaints were internal. I am not required to reach this issue here because of Lopez's other cognizable protected activity based on complaints other than ones involving racial discrimination.

The City contends that the 1997 side letter was clear and unambiguous in granting it the right to obtain the benefits of the three-year commitment from each incumbent in the Pub Ed/PIO position and that the 1997 side letter remained valid and binding throughout the period of time relevant here. In addition, the City contends that Lopez's other claims of disparate treatment fail to raise an inference of unlawful intent.

Denial of 56-hour Benefits

Lopez claimed in his testimony that he was the only fire captain not to have received 56-hour benefits while working a 40-hour position in the Inspection Services Division. He cites Eggleston, Maxwell, Wells and Silvi as those who received 56-hour benefits. I find there is insufficient evidence that the City consciously departed from its established procedure with respect to affording these captains 56-hour benefits, or was otherwise lacking in justification for granting them.

Eggleston received 56-hour benefits briefly through an administrative oversight. When it was brought to the City's attention, his benefits were changed to conform to that established for the Pub Ed/PIO position. Lopez claims that even if the error was corrected, the corrective action was only taken after Eggleston had begun negotiating for his retirement and thus had no adverse financial impact on him. Lopez claims this is evidence of disparate treatment.²⁵ I do not find this to be the case. The fact is that the City corrected the error, a matter separate from Eggleston's motivations for leaving the Department.

²⁵ Lopez also filed a grievance against the City for loss of holiday in-lieu pay, which applies to employees working 24-hour shifts and not the 40-hour personnel. Both of Eggleston's personnel action forms show that the City had ordered this benefit deleted.

Maxwell served in the training officer position under the fire marshal as one of the rotating assignments. Under the MOU and the 1998 side letter, that position is identified as a 40-hour position with 56-hour benefits.

Wells was awarded 56-hour benefits as a result of the settlement of his racial discrimination lawsuit. His treatment is not evidence of a practice of providing 56-hour benefits to regular 40-hour positions.

There was insufficient evidence to establish that Silvi received 56-hour benefits.

The City's most recent roster suggests that it has maintained a consistent practice thereafter with respect to awarding 56-hour benefits.²⁶

The 1997 side letter is also clear evidence that the City and Union agreed to establish a position that would not be entitled to 56-hour benefits. Paragraph 9 of the agreement states that apart from base wages, the position's "[o]ther benefits are as defined in the current MOU for forty-hour week employees." This was later confirmed in the formal job specifications in March 2000.

Significantly, there was no deception on the City's part. Lopez offered no evidence that he inquired as to the terms of the position before he accepted the position and was somehow misled by the City. The 56-hour benefits for firefighters were due to the inconvenience of the 56-hour shift. The permanent 40-hour shifts had offsetting benefits of their own.

Change From the 4/10 Schedule

In addition to his perception that the City selectively changed the policy on 56-hour benefits for the Pub Ed/PIO position when he assumed it, Lopez also appears to contend that

²⁶ This evidence is only corroborative as it was presented as hearsay.

the change from the 4/10 schedule was aimed at depriving him of a legitimate expectation with respect to the position. In addition, in the course of challenging this action, Lopez claims he was threatened for engaging in protected activity.

The evidence does not support the claim that the 4/10 schedule change was part of a pattern of disparate treatment of Lopez. There is no evidence that the City targeted the change so as to adversely affect only Lopez, as opposed to implementing a schedule demanded by the City's constituencies.

In connection with this issue, Lopez claims that the city manager threatened him with discipline, citing Wilson's February 5, 2001, grievance response warning about a possible "abuse of a City administrative process." I do not find this to be evidence of unlawful animus. The warning was limited to one instance of an alleged repeat filing of a grievance. Wilson's response was not unreasonable under the circumstances. Also it did not refer to Lopez's high frequency of complaints in general. And according to the City's log of Lopez's complaints, Lopez had filed repetitive complaints on other occasions.

The Acting Battalion Chief Program

Lopez claims that the timing of the implementation of the acting battalion chief program was suspicious. Weisgerber explained that the timing of the implementation had to do with increased requirements for technical knowledge associated with the position, but he was not particularly specific in this regard. In his view, the timing was purely coincidental. Lopez countered that the requirements for the program were higher than those demanded by the qualifying examination. Weisgerber did not attempt to rebut this point.

However, Weisgerber did instruct his staff to allow Lopez to begin whatever informal training was available, despite the delay in developing the formal training program. He

asserted that Lopez's schedule as a 40-hour employee was the cause of Lopez's inability to complete the training for the acting battalion chief program in a more timely fashion. Lopez did not attempt to rebut this point or Weisgerber's claim that he was offered the next available ICS 400 training.

While the timing of the formal training requirements is somewhat suspicious, I find this only marginal evidence of unlawful intent. Lopez was not serving in a fire suppression position at the time he sought to participate in the acting battalion chief program. The City did allow him to serve as an acting fire marshal in the Inspection Services Division, where he was assigned, at the battalion chief level. Moreover, I believe that the implementation of the formal training requirements is only material to the extent that Lopez establishes that the City engaged in an ongoing pattern of disparate treatment, which I have not found. I now turn to what I consider the most relevant issue with respect to unlawful intent: the justification for the three-year commitment.

Enforcement of the Three-Year Commitment

Lopez admitted that he believed he was bound by the three-year commitment when he applied for the position, and he in no way claims that the City attempted to conceal this condition of the position. As noted above, I find that the three-year commitment was enforceable despite the city council's failure to pass a written resolution adopting the 1997 side letter. I have found that the city council considered the side letter and approved its adoption.

In the hearing, Lopez did contend that the 1998 side letter superseded the 1997 side letter as to the Pub Ed/PIO position and that his position was one of the upgraded lieutenant positions identified in the 1998 side letter. I find that the 1998 side letter cannot be read as affecting the already existing Pub Ed/PIO position under the theory that one of the five

lieutenants converted was the Pub Ed/PIO officer. The language in paragraph 5 of the 1998 side letter refers to the Pub Ed/PIO position as a distinct position established under “prior agreement.” Lopez attempts to refute this point by claiming the Pub Ed/PIO position was not formally established at the captain’s level until March 2000, with the adoption of the job specifications. I find no evidence to substantiate the claim the formal adoption of the job specifications was a condition precedent to the creation of the position at the captain’s level. Counsel for Lopez also noted the discrepancy in the 1998 side letter referencing the fire captain “Public Education Officer” rather than “Public Information Officer,” but I do not find this discrepancy compels Lopez’s reading.

Moreover, the weight of testimony is against Lopez on this point. Weisgerber testified that the five lieutenants included each lieutenant stationed at the three fire stations, the training officer, and the operations officer. Lee testified that he believed the operations officer performed public education duties, but “without the PIO component.” Moss stated that one of the lieutenants was the “assistant to the fire marshal for public education.”²⁷ Weisgerber testified that this position had no public education functions, at least during the time in question. Lee appears to corroborate him on this point, when referencing the absence of the “PIO” component.

More to the point, Weisgerber testified that the operations officer under the fire marshal did have public education functions under the 1995-1997 MOU, but those duties were transferred to the Pub Ed/PIO position when that position was created as a result of the March 1997 side letter. I credit Weisgerber since he was a management employee and had

²⁷ Moss repeated this twice before counsel for Lopez appeared to get him to agree that the position was the “Public Education position.” I do not believe Moss was conceding that one of the positions was the Pub Ed/PIO position that Lopez filled in September 1998.

responsibility for knowing the details of the assignment. Weisgerber presented himself well as a witness, and in the context in which I observed him, I judged him to be modest, patient, and dispassionate. Consistent with Weisgerber, Hamilton, Lee and Moss agreed that the 1998 side letter distinguished between the five lieutenants being converted to captain and the Pub Ed/PIO position, already at the captain's level. Lee, who signed both the 1997 and 1998 side letters, and Moss, who signed the 1998 side letter, testified that the 1997 side letter was not superseded by the 1998 agreement.²⁸

I also make this finding despite the fact that the Pub Ed/PIO position was filled by a lieutenant between Eggleston's retirement and Lopez's hiring, a period of not more than five months. Weisgerber and Lee testified without contradiction that Eggleston's position was filled temporarily while the City recruited for a permanent replacement. There was no evidence that the lieutenant achieved this position through competitive examination, which was stated in the 1997 side letter as the means for filling the position following the fire chief's initial selection. Only Lopez achieved the position through competitive examination.

Seizing on language of the 1998-2000 MOU's preamble, stating that the new MOU supersedes all "oral negotiations and prior writing in respect to the subject matter hereof," Lopez argues that the 1997 side letter lapsed by operation of the new MOU. Weisgerber was

²⁸ Lopez admitted that he understood he was buying into a three-year commitment when he first accepted the position, but claimed that he would have believed differently if he had seen the subsequent 1998 side letter. Lopez testified that he changed his opinion regarding the three-year commitment, sometime after April 1999 following his reading of the 1998 agreement. He based this on language from paragraph 9 defining a temporary assignment for purposes of 56-hour accrual rates to be a "single bid cycle duration, or less." As I have found, this section did not apply to the Pub Ed/PIO position but rather to the five newly converted captain positions. Also to the extent Lopez may be claiming that the requirements were void from the outset as a result of the adoption of the 1998 side letter, I find Lopez's argument illogical because the 1998 agreement could not have had any automatic retroactive effect.

never questioned as to whether or not, this language affected his interpretation of the three-year commitment. There may have been an innocent explanation. For example, the 1998-2000 MOU did not contain any language on the subject of the Pub Ed/PIO position. Therefore, that “subject” was not addressed in the new MOU and would not have posed any potential conflict with the earlier MOU. The 1998-2000 MOU’s preamble also contains this language:

Unless otherwise specifically amended by the terms of this MOU, any term or condition of employment previously known to and approved by the City (and not terminated by the City) remains as previously established.

This would have operated to preserve the terms of the 1997 agreement.

Another tack taken by Lopez is that the language of paragraph 5 of the 1998 side letter stating that the Pub Ed/PIO position “is not subject to the bid process until the incumbent vacates the position” establishes that once the incumbent (i.e., Eggleston) left the position it would be a biddable position. Counsel for Lopez elicited an admission from Moss that Lopez was not the “incumbent,” on the theory that the side letter preceded his appointment by a few weeks. I do not find this timing to be dispositive. Rather I find that the language is susceptible to an interpretation that the incumbent could have been the person who would fill that position (i.e., Lopez). Assuming the lieutenant was still temporarily filling the position, or it was vacant, there was no incumbent at the time the 1998 side letter was executed. Moreover, since the bid cycle was three years the minimum commitment language was not inconsistent. Since the inquiry here is discriminatory intent, all that is needed is a basis to conclude that Weisgerber’s interpretation of the agreements was plausible. I find that to be the case.

Lopez also contends that the City’s rationale for the three-year requirement was specious. He claims that the investment in the incumbent had already been recouped by Eggleston’s tenure as the first Pub Ed/PIO officer. The rationale for the requirement is

relatively unimportant because the decision to impose it was made at the time of the 1997 side letter, which predated Lopez's incumbency. Even so, after Lopez subsequently attained the position, he installed several notable programs which I believe can be attributed in part to his extended tenure in the position.²⁹

Further, Lopez claims that Hamilton's testimony demonstrates that the fire chief himself believed the 1997 side letter only applied to the first incumbent and that once that term had been fulfilled, the benefits of the program would be fully realized. On this issue, Lopez cites Hamilton's prior deposition testimony. However, that testimony does not support his position. Read in context, Hamilton's testimony was only that he had conceded to the Union the right for selections after the initial one to be based on a competitive examination with properly promulgated job specifications.

Fundamentally, the three-year commitment was enforceable, and there being no precedent for early release from such a commitment, Lopez is essentially complaining that Weisgerber refused to grant him a benefit to which he had no entitlement. While Moss's and Getreu's question to Lopez as to why he had not promoted immediately, suggests that they may have believed it was at least possible for Weisgerber to waive the requirement, this is the only evidence favoring Lopez. But I find that is insufficient to raise an inference of unlawful intent. Moss and Lee credibly testified that they believed that the City was within its rights to demand fulfillment of the three-year commitment.

²⁹ These included the Safe Place program, smoke detector and battery distribution program, security bar program, and Operation Strobe Light.

Other Possible Factors

I have also considered whether the timing of the City's decision to require fulfillment of the three-year commitment was suspicious. While nominally present, this factor carries very little weight because of Lopez's history of complaints dating back to 1982. The City's record of complaints, grievances, and other actions reveals an employee whose protected activity has been more or less continuous throughout his employment. Lopez himself admits to filing complaints regarding 17 different matters over a period of approximately 20 years, and has suggested that the City has found in his favor on some occasions.

And despite what I would consider a high number of complaints, even by Lopez's count, Lopez has steadily promoted through the ranks. Even prior to the current dispute, Weisgerber selected Lopez over three other candidates for the Pub Ed/PIO position, despite his earlier lawsuit over Egelston's selection. Indeed, I am struck by how relatively mild the adverse action claimed by Lopez in this case is (a delay in the promotion of five months and the loss of tie-break seniority with Battalion Chief Silvi) and by Weisgerber's willingness to appoint Lopez into one of the eight "command team" positions – in spite of Lopez's litigious history. In short, if the City were motivated to retaliate for protected activity, it seems highly unlikely that it would have been able to ignore Lopez's repeated challenges to management and award him membership in that select group.

Lopez suggests that he has been rejected a number of times when competing for other vacancies in the Department, placing specific emphasis on the fire marshal position. Lopez notes two occasions when a less senior candidate prevailed. There is the implication that he was better qualified or more senior than those against whom he competed. This evidence is simply too speculative and undeveloped to support an inference of unlawful intent. Just by

way of example, Lee and Moss, two presumably well-respected officers, have seniority roughly equal to Lopez but have not yet reached the rank of battalion chief.

The City's alleged failure to address Lopez's complaint about Getreu sleeping at the firehouse until after he left fire prevention duties is an isolated incident which viewed in context suggests little. The underlying complaint was relatively trivial. There is nothing indicating that Getreu was intentionally harassing Lopez by attempting to engage him in negative gossip, or that the City unreasonably failed to find actionable harassment on Getreu's part.

Finally, Lopez makes a particular point in his briefing of asserting that he was denied pay commensurate with Eggleston while he was the Pub Ed/PIO captain, and with Battalion Chief Silvi, when he promoted to battalion chief. He claims that when these complaints were brought to Weisgerber's attention, Weisgerber refused to act. I reject these claims as being without sufficient support in the record. Lopez offered no affirmative testimony as to either of the claims that Weisgerber failed to act. According to documents in the case, the issue concerning the Pub Ed/PIO position apparently was a matter discovered by the former human resources director and brought to light while reviewing Lopez's 56-hour benefits claim. She concluded that the other administrative captain positions were receiving more base pay. Lopez's point is that the correction as to his pay did not occur until more than a year later. However, the document cited by Lopez as purporting to establish the delay, a City resolution, was never identified as being an action to correct the pay disparity. Rather that resolution was identified as evidencing the adoption of the job specifications for the Pub Ed/PIO position, and nothing in the resolution indicates that it was intended to do anything more. As to the battalion

chief's pay, Lopez claims he was paid \$4,000 less per year than Silvi, but his record citations do not demonstrate this to be the case.

Prima Facie Showing

The City has taken exception to the scope of evidence allowed in this case with respect to unlawful intent, in particular, the collateral events which Lopez claims demonstrate disparate treatment. I have attempted to balance the right of the charging party to present its case with the right of the respondent to limit the case to relevant evidence. Notwithstanding the wide latitude granted to Lopez, I find in the final analysis that there is insufficient evidence to raise an inference of discriminatory or retaliatory intent.

Lopez has filed many complaints during his tenure and portrays the City as repeatedly finding against him.³⁰ I did not find this to be the case. I have reviewed nearly all of the disputes highlighted by Lopez and find no evidence of an ongoing conspiracy to restrict his protected activity. In nearly every instance, the City has had a credible explanation for the alleged disparate treatment. Significantly, the City, and in particular Chief Weisgerber, has allowed Lopez to advance over his 20-year career to the point where he is now a part of the Department's command team, where, generally, loyalty is expected and dissent is not. The only instance of disparate treatment that I find somewhat suspicious was the timing of the new acting battalion chief training program. Nevertheless, this standing alone is insufficient to raise an inference of unlawful intent; it was one instance not amounting to proof of a pattern of disparate treatment.

³⁰ At the same time, Lopez has acknowledged, or at least implied, that the City has found in his favor on some occasions. As was common in this case, the evidence is conflicting rather than persuasive as to Lopez's theory of the case. Is the City finding in his favor evidence that he raised legitimate complaints as opposed to frivolous ones, or that the City could be unbiased in addressing those complaints?

The most significant inquiry in this case concerns the purported justification for the adverse action challenged in this case, namely, the delay of the promotion to battalion chief. As to this matter, Lopez has failed to prove that the City has acted in a manner that is inconsistent with the relevant agreements with the Union or deviated from past practice with respect to the enforcement of time commitments. I find that the 1997 side letter remained a binding agreement and there was no evidence that the City had a practice of granting early releases from such commitments. Accordingly, I find that Lopez has failed to demonstrate a prima facie case for unlawful animus based on protected activity. Therefore, the unfair practice charge and complaint must be dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. SF-CE-6-M, Michael F. Lopez v. City of Milpitas, are hereby DISMISSED.

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

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

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

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

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

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

Donn Ginoza
Administrative Law Judge