STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 2703, Charging Party, v. COUNTY OF MERCED, Respondent.	Case No. SA-CE-502-M PERB Decision No. 1975-M September 5, 2008

Appearance: Law Offices of Bennett & Sharpe by Barry J. Bennett, Attorney, for American Federation of State, County, and Municipal Employees, Local 2703.

Before Neuwald, Chair; McKeag, Wesley and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the American Federation of State, County, and Municipal Employees, Local 2703 (AFSCME), of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the County of Merced (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by retaliating against James Toews (Toews), an employee of the County's Department of Parks and Recreation, because of his protected activities.

The Board has reviewed the entire record in this matter, including but not limited to the unfair practice charge, the Board agent's warning and dismissal letters, and AFSCME's appeal. Based on this review, we adopt the Board agent's warning and dismissal letters as the decision of the Board itself, subject to the following discussion.

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

DISCUSSION

Protected Activity

The Board agent concluded that the charge failed to allege facts showing Toews engaged in protected activity. This conclusion was based on two findings. First, the Board agent found the allegation that Toews was an AFSCME member failed to demonstrate protected activity as a matter of law. Second, the Board agent found the allegation that AFSCME represented Toews "during various disputes with the County that arose in the fall of 2006" failed to comply with PERB Regulation 32615(a)(5)[2] because it was "vague and ambiguous."

We agree with both of these findings but nonetheless conclude that the charge did allege facts showing that Toews engaged in protected activity. In addition to the two allegations considered by the Board agent, the charge also alleged: "On February 13, 2007, the November 27, 2006 Intent to Suspend was downgraded to a written warning after Toews and AFSCME questioned whether that level of discipline was justified." Representation by a union in a work-related dispute is a protected activity. (Regents of the University of California (Costa) PERB Decision No. 1087-H; Los Angeles Unified School District (1992) PERB Decision No. 957 (LAUSD).) This allegation therefore provides a "clear and concise" statement of facts showing that Toews engaged in conduct protected by the MMBA. Further, it establishes that the County had knowledge of Toews' protected activity. Accordingly, we conclude that the charge sufficiently alleged both Toews' protected activity and the County's knowledge of his protected activity.

[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32615(a)(5) states that a charge must contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice."

Adverse Action

The Board agent found that neither the July 16, 2007 letter advising Toews that he would be subject to termination if he did not return to work by July 23, nor the July 23 notice to vacate the County-owned residence, constituted adverse action. In making these findings, the Board agent relied on State of California (Department of Health Services) (1999) PERB Decision No. 1357-S (State of California (DHS)), for the proposition that "notice from an employer that it would be seeking adverse action is not itself an adverse action." We find this to be an inaccurate statement of the law arising from an overly broad interpretation of State of California (DHS).

It is well-established in PERB case law that unequivocal notice of the employer's intent to impose discipline is an adverse action. (Carmichael Recreation and Park District (2008) PERB Decision No. 1953-M [notice of intent to suspend]; LAUSD [notice of intended dismissal]; Monterey County Office of Education (1991) PERB Decision No. 913 [notice of intent to dismiss].) While it appears to reach a contrary result, State of California (DHS) is in fact distinguishable from those cases because it does not involve unequivocal notice of intent to discipline. There, the employee's supervisor told the employee that "she would be seeking adverse action against him." The supervisor provided no specifics about the threatened adverse action, orally or in writing. The Board found the supervisor's isolated statement insufficient to constitute adverse action for purposes of establishing a prima facie case of retaliation. In light of its facts, State of California (DHS) does not apply, as the dismissal suggests, to all notices of intent to impose discipline. Rather, the case applies only when the employer's notice does not indicate that it has made a firm decision to impose discipline, such as when the notice fails to provide any specifics of the action sought or the reasons therefore.

Here, the County "notified Toews in writing that he was absent without leave as of July 16, 2007 and directed him to return to work by July 23, 2007 or the department would begin the Intent to Terminate process." This letter did not provide unequivocal notice that the County had decided to terminate Toews' employment. Rather, it shows that as of July 16 the County's decision to terminate still depended upon whether or not Toews returned to work by July 23. Therefore, under State of California (DHS), the July 16, 2007 letter did not constitute adverse action.

Regarding the notice to vacate, it appears from the facts alleged in the charge that the County provided Toews with a residence at Yosemite Lake Park as a part of his employment. When Toews was terminated, he lost his entitlement to reside at the park. Because he no longer had a place to live, the County's elimination of this entitlement was certainly adverse to Toews. (See Trustees of the California State University (2003) PERB Decision No. 1507-H [stating "disciplinary action may have a direct impact on wages, health and welfare benefits, and other terms and conditions of employment since such action may reduce or eliminate entitlement to those items"].) The notice to vacate informed Toews of the County's definite intent to take this adverse action because of his termination. Therefore, the notice itself constituted an adverse action. Nonetheless, the charge fails to establish that the County took this adverse action because of Toews' engagement in protected activity. Consequently, this allegation does not support a prima facie case of retaliation.

Additional Facts on Appeal

PERB Regulation 32635(b) states that a "charging party may not raise new allegations or present new supporting evidence on appeal without establishing good cause." The Board has found good cause when "the information provided could not have been obtained through

reasonable diligence prior to the Board agent's dismissal of the charge." (Sacramento City Teachers Association (Ferreira) (2002) PERB Decision No. 1503.)

The Board agent concluded that the charge failed to demonstrate a nexus between Toews' protected activity and the County's adverse actions. AFSCME claims on appeal that such a connection did exist and provides additional facts in support of that connection. Specifically, AFSCME alleges on appeal that Deputy Director of Parks and Recreation Peggy Vejar "played a substantial role in the decision to terminate" Toews, "signed the letter of intent to terminate as well as the notice to vacate the residence," and "was carbon copied on other written correspondence to Toews." Nothing in the appeal indicates that AFSCME could not have discovered these facts prior to the dismissal of the charge. Accordingly, the Board will not consider these allegations on appeal.

ORDER

The unfair practice charge in Case No. SA-CE-502-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Neuwald and Members McKeag and Wesley joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-7508
Fax: (213) 736-4901

January 31, 2008

Barry J. Bennett, Esquire
Bennett & Sharpe
2444 Main Street, Suite 110
Fresno, CA 93721-2751

Re: AFSCME Local 2703 v. County of Merced
Unfair Practice Charge No. SA-CE-502-M
DISMISSAL LETTER

Dear Mr. Bennett:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 17, 2007. AFSCME Local 2703 (AFSCME) alleges that the County of Merced (County) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by retaliating against AFSCME bargaining unit member James Toews for engaging in protected activity.

I informed Mr. Bennett in my attached letter dated January 14, 2008, that the above-referenced charge did not state a prima facie case. Mr. Bennett was advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, he should amend the charge. Mr. Bennett was further advised that, unless he amended the charge to state a prima facie case or withdrew it prior to January 25, 2008, the charge would be dismissed.

On January 23, 2008, Mr. Bennett's assistant, Heather Phillips, requested an extension of time to either withdraw the charge or file an amended charge on behalf of AFSCME. Ms. Phillips' request was granted and AFSCME was given until February 4, 2008, to amend the charge. However, on January 31, 2008, Ms. Philips informed me via telephone that Mr. Bennett was not interested in filing an amended charge. Accordingly, the charge is dismissed for the reasons contained in my January 14, 2008 letter.

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Right to Appeal

Pursuant to PERB Regulations,[2] AFSCME may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Regulations 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

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

If AFSCME files a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

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

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

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

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

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Sean McKee
Regional Attorney

Attachment

cc: Fernanda A. Saude, Assistant County Counsel

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-7508
Fax: (213) 736-4901

January 14, 2008

Barry J. Bennett, Esquire
Bennett & Sharpe
2444 Main Street, Suite 110
Fresno, CA 93721-2751

Re: AFSCME Local 2703 v. County of Merced
Unfair Practice Charge No. SA-CE-502-M
WARNING LETTER

Dear Mr. Bennett:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 17, 2007. AFSCME Local 2703 (AFSCME) alleges that the County of Merced (County) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by retaliating against AFSCME bargaining unit member James Toews for engaging in protected activity.

Facts

AFSCME is an employee organization that represents approximately 1400 of the County's employees. James Toews (Toews) was hired by the County in July 2003. Toews joined AFSCME in August 2006.

"Prior to the time when Toews joined AFSCME," the County's Deputy Director of Parks and Recreation, Peggy Vejar (Vejar), told Toews and other employees that "there was no need for them to join AFSCME because they were already represented." "Following negotiations for a pay increase in 2006 where AFSCME rejected [the County's] proposed pay scales," Vejar told Toews and other employees that "AFSCME had just screwed them out of a 16 percent pay increase."

AFSCME's charge then provides:

> After joining AFSCME, Toews was provided with representation during various disputes with [the County] that arose in the Fall of 2006. Subsequent to these events, [the County] began a campaign of retaliation against Toews that includes the following:

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

a. In September, 2006, Toews received a performance evaluation where he was rated as "needs improvement" in his quality of work and leadership potential. Prior to this date, Toews had never received so much as a "Needs Improvement" on any evaluation of work performed at Merced County;

b. On September 29, 2006 David Hatcher, Toews' immediate supervisor, told Toews that he would bring him the items from his in-box. Hatcher delivered the paperwork with a note to Toews directing him to pick up his paperwork every Friday, especially when in town;

c. On October 20, 2006, Hatcher complained to other employees that he was unable to reach Toews by phone, though he made no attempts to call Toews' personal cell phone;

d. In or around November, 2006, [the County] issued to the Park Caretakers new procedures for completing weekly work schedules and Vejar stated that because of AFSCME, Park Caretakers would be required to complete the weekly schedule for posting by Wednesday;

e. In or around November, 2006, [the County] directed Toews [to] no longer . . . use his personal computer for creating weekly work schedules, but to complete them by hand instead. Toews had previously used his personal computer for creating work schedules and was provided ink by [the County]. [The County] was no longer willing to supply ink to Toews for printing work schedules;

f. On November 17, 2006, [the County] issued a notice to Toews that the winter work schedule would be changed due to an increase in the number of park reservations. This new schedule now required Toews to work on weekends during the winter months, when he normally would have weekends off;

g. On November 27, 2006, Toews was issued a letter of Intent to Suspend for neglect of duty, dishonesty, and conduct unbecoming of a public employee;

h. On February 13, 2007, the November 27, 2006 Intent to Suspend was downgraded to a written warning after Toews and AFSCME questioned whether that level of discipline was justified;

i. On March 23, 2007, Toews was placed on a medical leave of absence, after filing a workers' compensation claim for stress and anxiety resulting from his treatment at his workplace;

j. On June 7, 2007, while on medical leave of absence, Toews underwent surgery for an injury unrelated to his workers' compensation claim. Toews was provided with a release to return to work on July 30, 2007 with no restrictions;

k. On July 2, 2007, [the County] informed Toews that he had been released by his workers' compensation doctor to return to work with no restrictions. Toews was also informed that his FMLA had expired on June 15, 2007, but a 30 day extension of his leave of absence was authorized from June 15, 2007 to July 15, 2007;

l. On July 2, 2007, Toews requested an additional 15 day extension to accommodate the doctor's order that he remain off work until July 30, 2007 to recover from the June 7, 2007 operation;

m. On July 5, 2007, [the County] denied Toews' request for an additional 15 day extension of medical leave of absence until July 30, 2007;

n. On July 16, 2007, [the County] notified Toews in writing that he was absent without leave as of July 16, 2007 and directed him to return to work by July 23, 2007 or the department would begin the Intent to Terminate process;

o. On July 23, 2007, [the County] notified Toews in writing of its intent to terminate him effective July 30, 2007. [The County] also provided 30 day notice that Toews was to vacate the residence provided by the County by August 24, 2007;

p. On or about August 1, 2007, [the County] changed the locks to Yosemite Lake Park, preventing Toews from

entering the park, and consequently his County supplied residence, after business hours.

Discussion

PERB's Statute of Limitations

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School County (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (Los Angeles Unified School County (2007) PERB Decision No. 1929; City of Santa Barbara (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (Coachella Valley Mosquito and Vector Control County v. Public Employment Relations Board (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College County (1996) PERB Decision No. 1177.)

As previously stated, the above-titled charge was filed on August 17, 2007. Applying PERB's six-month statute of limitations to the present charge results in a determination that the alleged unfair practices by the County occurring prior to February 17, 2007 are untimely. Specifically, AFSCME alleges that in 2006 the County's Deputy Director of Parks and Recreation, Peggy Vejar, made statements that interfered with AFSCME's rights. However, this allegation is untimely because the alleged unlawful statements were made prior to February 17, 2007.

AFSCME also alleges that the County began retaliating against Toews for engaging in protected activity in 2006. AFSCME asserts that the adverse actions the County imposed against Toews for engaging in protected activity gradually escalated until Toews was terminated in July 2007. The alleged unlawful adverse actions taken against Toews by the County prior to February 17, 2007 are untimely because they occurred outside of PERB's six-month statute of limitations.

Retaliation/Discrimination Occurring After February 17, 2007

To establish a prima facie case of discrimination in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under the 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 Association v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Association v. City of San Leandro (1976) 55 Cal.App.3d 553.)

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 and the protected conduct. (Moreland Elementary School County (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, 131 Cal.App.3d 416); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro Police Officers Association, supra, 55 Cal.App.3d 553); (3) the employer's inconsistent or contradictory justifications for its actions (Id.); (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 (Id.; Los Angeles County Employees Association v. County of Los Angeles (1985) 168 Cal.App.3d 683).

Protected Activity

The Board has held that simply maintaining union membership is insufficient to demonstrate that an employee engaged in protected activity. (Chula Vista Elementary School County (1997) PERB Decision No. 1232; citing Novato Unified School County (1982) PERB Decision No. 210.)

Here, AFSCME asserts that in 2006, Toews became an AFSCME member. Based on the above-cited case law, Toews' membership in AFSCME is insufficient to demonstrate that he engaged in protected activity. AFSCME also asserts that: "After joining AFSCME, Toews was provided with representation during various disputes with [the County] that arose in the Fall of 2006." Alleging that an employee was "provided with representation during various disputes in the Fall of 2006" does not satisfy PERB Regulation 32615(a)(5) because the statement is vague and ambiguous. Consequently, AFSCME has failed to show that Toews engaged in protected activity. Without demonstrating that Toews engaged in protected activity, AFSCME cannot show that the County was aware that Toews engaged in protected activity or that the County retaliated against Toews for engaging in protected activity. (Novato Unified School County, supra, PERB Decision No. 210.)

However, for the reasons that follow, even if Toews did engage in protected activity when he was "provided with representation during various disputes in the Fall of 2006" and the County was aware that Toews engaged in protected activity, AFSCME has not demonstrated that the County retaliated against Toews for being provided with representation from AFSCME.

1. Being Placed on Medical Leave

When determining whether an employee has suffered adverse action, the inquiry is whether a reasonable person under the same circumstances would consider the action to have an adverse impact on his or her employment. (SEIU Local 790 (Montgomery) (2004) PERB Decision No. 1644-M; citing Regents of the University of California (1998) PERB Decision No. 1263-H; Palo Verde Unified School County (1988) PERB Decision No. 689; Newark Unified School County (1991) PERB Decision No. 864.)

Here, Toews was placed on a medical leave of absence after filing a workers' compensation claim for stress and anxiety resulting from his treatment at his workplace. While the imposition of involuntary disability leave is an adverse action (California State University, Long Beach (1987) PERB Decision No. 641-H[2]), AFSCME does not allege that Toews was involuntarily placed on a medical leave of absence. The facts show that Toews requested to be placed on medical leave to relieve the stress and anxiety he was encountering at his workplace.[3] Therefore, since the purpose of the medical leave was to remedy Toews' stress and anxiety he suffered while at work, a reasonable person under the same circumstances as Toews would not consider being placed on medical leave adverse action.

2. Request for a 15 Day Extension of Medical Leave

On July 5, 2007, Toews' request for an additional 15 day extension of medical leave was denied by the County. The facts demonstrate that Toews' was granted medical leave because of his workers' compensation claim, not because of his operation. Toews' operation was prompted because of "an injury unrelated to his workers' compensation claim." The facts also show that Toews' request for an extension was prompted by his medical operation since Toews' workers' compensation doctor released him with no restrictions on July 2, 2007. A reasonable employee under the same circumstances would not consider the County's refusal to grant Toews' additional medical leave for his workers' compensation claim adverse action since Toews' request for additional medical leave was prompted by "an injury unrelated to his workers' compensation claim." However, even if the County's actions did adversely affect Toews' employment, AFSCME has failed to provide facts demonstrating the causal connection or nexus between the County's denial of Toews' request and AFSCME's representation of Toews during "various disputes in the Fall of 2006."

In Konocti Unified School District (1982) PERB Decision No. 217, PERB refused to automatically impute union animus to the entire school board despite finding that the

[2] In Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608, the California Supreme Court explained that it is appropriate to take guidance from cases that interpret California labor relations statutes with parallel provisions.

[3] This conclusion is supported by Toews' requests for a 30 and then 15-day extension to remain on medical leave.

superintendent harbored union animus. PERB relied heavily on the fact that the school board was independent and that it rejected the superintendent's recommendations. (Id.)

Here, AFSCME offers the statements that Vejar made in 2006 as evidence that the County possessed an unlawful motive when it denied Toews' request for an extension. However, AFSCME does not allege that Vejar denied Toews' request for an extension. There are no facts contained in the charge that demonstrate that Vejar had any connection to the County's decision to deny Toews' extension request. In addition, AFSCME failed to show who denied Toews' request for an extension on July 5, 2007. Thus, it is unknown whether the person who denied Toews request was influenced by Vejar or whether he or she was capable of making an independent decision. Accordingly, AFSCME has not demonstrated that Toews' request was denied because he was "provided with representation during various disputes in the Fall of 2006."

3. Notice of Intent to Terminate

The Board has held that notice from an employer that it would be seeking adverse action is not itself an adverse action. (State of California (Department of Health Services) (1999) PERB Decision No. 1357-S, (Department of Health Services).) The Board reasoned that while the employee "may have been apprehensive about a possible future adverse action, his subjective reactions do not establish the required adverse action." (Id.)

Here, in a letter dated July 16, 2007, the County notified Toews that if he did not return to work by July 23, 2007, the County would begin the Intent to Terminate process. The County's July 16, 2007 letter does not impose adverse action, but instead, notifies Toews of the County's intent to take adverse action against him *if* he did not return to work by July 23, 2007. As a result, AFSCME has failed to show that a reasonable person under the same circumstances as Toews would consider the action to have an adverse impact on his or her employment.

4. Termination of Toews' Employment

Discharging an employee is an adverse action. (Regents of the University of California (Einheber) (1997) PERB Decision No. 949-H.) On July 30, 2007, the County terminated Toews' employment. The County alleged that it was terminating Toews' employment because he did not report to work by July 23, 2007. AFSCME alleges that the County terminated Toews' employment because he engaged in protected activity.

As previously stated, AFSCME has not demonstrated that Toews engaged in protected activity or that the County was aware that Toews engaged in protected activity. However, even if Toews did engage in protected activity by being "provided with representation during various disputes with [the County] that arose in the Fall of 2006," AFSCME has failed to demonstrate the necessary connection or nexus between Toews' termination and the alleged protected activity. As previously stated, the comments made by Vejar in 2006 cannot be automatically imputed to the entire County. (Konocti Unified School District, supra, PERB Decision

No. 217.) AFSCME does not allege that Vejar terminated Toews' employment or that Vejar was in any way involved with the County's decision to discharge Toews. In addition, there are no facts contained in the charge that show who terminated Toews' employment. Thus, it is unknown whether the person who terminated Toews' employment was influenced by Vejar or whether he or she was capable of making an independent decision. Therefore, AFSCME has failed to show that the County possessed the requisite unlawful intent when it discharged Toews, as required by Novato Unified School County, supra, PERB Decision No. 210.

5. Notifying Toews to Vacate the County Provided Residence

As previously stated, notice from an employer that it would be seeking adverse action is not itself adverse action. (Department of Health Services, supra, PERB Decision No. 1357-S.) On July 23, 2007, the County provided Toews with notice that he had 30 days to vacate the residence provided by the County. Relying on the Board's decision in Department of Health Services, supra, PERB Decision No. 1357-S, the County's notice of its intent to remove Toews from his County residence is not itself adverse action. Toews' subjective reactions do not establish the required adverse action. (Id.)

6. Locking Toews Out of His County Provided Residence

The term "wages" includes emoluments of value. (Trustees of the California State University (San Marcos) (2004) PERB Decision No. 1584-H.) The County provided residence is an emolument of value because it provides Toews with a place to reside when he is not at work.

On or about August 1, 2007, the County changed the locks to Yosemite Lake Park, consequently preventing Toews from entering his County provided residence. A reasonable employee under the same circumstance as Toews would consider being locked out of his or her workplace and home to have an adverse impact on his or her employment. Nonetheless, AFSCME has failed to demonstrate that Toews was locked out of the park and his County provided residence because he was "provided with representation during various disputes in the Fall of 2006."

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations AFSCME wishes to make, and be signed under penalty of perjury. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB.

If I do not receive an amended charge or withdrawal from AFSCME before January 25, 2008, I shall dismiss AFSCME's charge. Questions concerning this matter should be directed to the above telephone number.

Sincerely,

Sean McKee
Regional Attorney