

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



MODESTO CITY EMPLOYEES' ASSOCIATION,

Charging Party,

v.

CITY OF MODESTO,

Respondent.

Case No. SA-CE-486-M

PERB Decision No. 1994-M

December 19, 2008

Appearances: Rose Law Firm by Joseph W. Rose, Attorney, for Modesto City Employees' Association; Liebert Cassidy Whitmore by Jesse J. Maddox, Attorney, for City of Modesto.

Before Wesley, Rystrom and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Modesto City Employees' Association (Association) to the proposed decision of an administrative law judge (ALJ). The complaint alleged that the City of Modesto (City) violated the Meyers-Milias-Brown Act (MMBA)¹ by increasing City employee Blair Bradley's (Bradley) disciplinary suspension from two days to five days in retaliation for his appeal of the suspension. The ALJ found the Association failed to establish a prima facie case of retaliation.

The Board has reviewed the entire record in this case, including but not limited to, the unfair practice charge, the complaint and answer, the hearing transcripts and exhibits, the ALJ's proposed decision, the Association's exceptions and the City's response thereto. Based on this review, the Board affirms the ALJ's dismissal of the complaint and underlying unfair practice charge for the reasons discussed below.

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

BACKGROUND

Bradley is a senior environmental compliance inspector in the water quality control division of the City's public works department. At the time of the PERB hearing, Bradley had worked for the City for more than 18 years. Bradley served as president of the Association from 2002 to 2006.² Since 2006, he has been a union steward for the Association.

First Vehicle Incident

On January 6, 2006, Bradley left his assigned City vehicle unattended without setting the parking brake. The vehicle rolled into a storm drain basin and was submerged. As a result, the \$7,900 vehicle was totaled.

On May 22, 2006, Deputy Public Works Director, Dan Wilkowsky (Wilkowsky) issued Bradley a Notice of Intent to Recommend Suspension and Right to Respond. The notice proposed to suspend Bradley for three days without pay. On June 2, Bradley received a Skelly³ hearing before Public Works Director, Dr. Nicholas Pinhey (Pinhey). Bradley was represented at the hearing by the Association's attorney, Robert Phibbs. On June 30, Pinhey issued a final notice of suspension that reduced the suspension to two days based on Bradley's work history and acceptance of responsibility for the incident.

²The record does not establish when in 2006 Bradley's term as Association president ended.

³In Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 215 [124 Cal.Rptr. 14] (Skelly), the Supreme Court held that to satisfy due process requirements, a public employer must provide an employee with "notice of the proposed [disciplinary] action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline."

Second Vehicle Incident

On November 7, 2006, Bradley rear-ended a garbage truck with his assigned City vehicle. Bradley did not see the truck because he was making a U-turn while checking his pager. The City vehicle suffered \$3,183 in damage. The garbage truck was also damaged and the truck driver sustained minor injuries.

On January 16, 2007, Wilkowsky issued Bradley a written notice of his intent to recommend that Bradley be suspended for five days without pay for the November 7, 2006 collision. That same day, the Association's new attorney, Joseph Rose (Rose), filed an appeal of the proposed suspension with City Personnel Director, Robin Renwick (Renwick).⁴ Renwick instructed Deputy Personnel Director, Barbara Santos (Santos) to contact Rose about the appeal. Santos informed Rose that the appeal was premature because no final notice of discipline had yet been issued.

On February 1, 2007, Pinhey conducted a Skelly hearing regarding the discipline for Bradley's November 7, 2006 collision. During the hearing, Rose proposed reducing the suspension to two days. Bradley testified that Pinhey told him he would reduce the suspension to two days with three days held in abeyance. When Bradley asked what that meant, Pinhey responded that the three days held in abeyance would be added to any future discipline imposed for a similar incident. Conversely, Pinhey testified that he never told Bradley or Rose that he would reduce the suspension. Pinhey also testified that he alone had the authority to determine the length of suspension to impose on Bradley and that any reduction by him would

⁴Article 43 of the memorandum of understanding (MOU) between the City and the Association provides that an employee has the right to appeal a disciplinary action to binding arbitration. The employee must file a written appeal with the personnel director within 30 days following the notice of discipline. Upon receiving the appeal, the City must request a list of seven arbitrators from the State Mediation and Conciliation Service (SMCS).

be communicated in the final notice of discipline, as it had been in the June 30, 2006 final notice regarding the first vehicle incident.

After the Skelly hearing, Rose and Pinhey continued to discuss a reduction of Bradley's suspension. On March 9, 2007, Pinhey engaged in an e-mail exchange with Gail Wax (Wax), the public works department's administrative services officer. Pinhey wrote that a two-day suspension in exchange for Bradley's agreement not to appeal the suspension "might be a reasonable counter" to Rose's proposal. Wax expressed concern about making offers and counteroffers as part of the Skelly process. Pinhey responded that he had the same concern because such a practice would make it more difficult for the department to say in the future that particular discipline was non-negotiable.

Pinhey's April 23, 2007 Letter and Bradley's Appeal

On April 23, 2007, Pinhey faxed to Rose a letter about Bradley's proposed discipline. The letter began by recounting the offer and counteroffer made by each of them. It then stated that "the Skelly process is not a starting point for negotiations" and that Pinhey had exercised his discretion regarding Bradley's discipline "in a fair and reasonable manner." The letter then formally rejected Rose's counteroffer of a two-day suspension. Following a brief summary of the November 7, 2006 collision, the letter stated: "The discipline to be imposed upon Mr. Bradley for each incident is a suspension of two (2) days without pay, equal to sixteen (16) working hours, with three (3) days without pay, equal to twenty-four (24) hours, to be held in abeyance." The letter ended with a paragraph informing Bradley of his appeal rights under article 43 of the MOU.

Immediately upon receiving the letter, Rose e-mailed a copy to Bradley. Bradley and Rose then discussed the letter by phone. During this conversation, Bradley told Rose to appeal the letter. Later that same day, Rose faxed to Renwick a letter that stated in full:

This letter will serve as Blair Bradley's notice of appeal from Nick Pinhey's notice to suspend him without pay, which I received by fax today. A copy of Mr. Pinhey's letter is enclosed. This appeal is made under Article 43 of the Memorandum of Understanding (MOU) between the Modesto City Employees' Association (MCEA).

Please have the appropriate representative of the City of Modesto contact me to coordinate the scheduling of binding arbitration. Enclosed is my letter to the California State Mediation and Conciliation Service requesting a list of seven (7) neutrals from which to select an arbitrator to hear this case.

Attached to the letter were Pinhey's April 23, 2007 letter to Rose and Rose's letter to SMCS requesting a list of arbitrators.

Upon receiving the appeal, Renwick advised Rose by e-mail that the MOU required the City to request the list of arbitrators from SMCS so that the case could be properly assigned within the city attorney's office. Renwick testified she did not mention the appeal being premature at this time because Santos had already discussed that issue with Rose following his January 16, 2007 appeal.

E-mail Correspondence About Bradley's Suspension and Appeal

Pinhey began a week's vacation on April 30, 2007. Nonetheless, the personnel and public works departments continued to discuss Bradley's discipline while Pinhey was gone. On April 30, Santos e-mailed various City employees stating that Pinhey had reduced Bradley's suspension "in an effort to avoid arbitration" and she did not support reducing it further. Among the recipients of the e-mail were Pinhey, Wax, and Janice Stewart (Stewart), a retired annuitant who handled various personnel matters for the public works department under Wax's direct supervision.⁵

⁵Stewart worked in the City's personnel department for fourteen years before retiring from her position as deputy personnel director in April 2006.

On May 2, 2007, Stewart responded to Santos' April 30 e-mail; among the recipients were Pinhey and Wax. Stewart indicated she agreed with Santos about not reducing Bradley's suspension further. She then stated: "The 'offer' on the table was already a reduction to attempt to avoid arbitration. If they still want to go to arbitration, it was my understanding that all were in agreement that the days in 'abeyance' would be imposed."

Six minutes later, Jill Peltier (Peltier), an employee relations specialist in the personnel department, responded to Stewart's e-mail. Peltier's e-mail, sent to the same recipients as Stewart's, stated in full:

Also, just to be clear and get everyone up to speed, Joe Rose sent a Notice of Appeal to Robin dated 4/23/07. Joe also sent a separate letter on 4/23/07 to the State Mediation and Conciliation Service requesting a list of arbitrators. A copy of the letter was sent to Robin.

Later that day, Santos sent an e-mail to Wax and Stewart containing settlement language used by another City department in which the department agreed to hold suspension days in abeyance in exchange for the employee not appealing the reduced suspension.

Final Notice of Suspension

On May 3, 2007, Stewart sent an e-mail to Pinhey informing him that she and Wax were drafting for Pinhey's signature a final notice of discipline imposing a five-day suspension on Bradley.

When Pinhey returned from vacation on May 7, 2007, there were approximately 250 e-mails in his inbox. Pinhey testified that he did not read any of the e-mail correspondence about Bradley's appeal that was sent while he was on vacation until after he had signed the final notice. On May 10, Rose filed an appeal from the final notice "in an abundance of caution."

ALJ's Proposed Decision

The ALJ concluded that the Association failed to establish a prima facie case of retaliation. The ALJ found that Bradley's April 23, 2007 appeal was protected activity and that the five-day suspension was an adverse action. However, the ALJ found the Association did not establish employer knowledge of Bradley's protected activity because the record showed Pinhey was unaware of Bradley's appeal at the time he signed the final notice of discipline imposing the five-day suspension. Based on this finding, the ALJ dismissed the complaint and the underlying charge.

Association's Exceptions

The Association challenges the proposed decision on two grounds. First, the Association argues the ALJ erroneously credited Pinhey's testimony that he was unaware of Bradley's appeal when he signed the final notice of discipline. According to the Association, this testimony was "implausible" because Pinhey received multiple e-mail communications discussing the appeal and it is hard to believe that he did not read any of those e-mails, or otherwise learn about the appeal from other City employees, before he issued the final notice. Second, the Association asserts that Wax and Stewart both knew of the appeal at the time they drafted the final notice for Pinhey's signature. Therefore, the Association argues, Wax and Stewart's retaliatory motive for increasing Bradley's suspension to five days should be imputed to Pinhey and the City under a "subordinate bias liability" theory.

City's Response to Exceptions

The City argues in response that Pinhey was on vacation during the time that the e-mails about Bradley's suspension were sent to his e-mail account and the record contains no evidence that any of the other parties to those communications informed Pinhey of the appeal by any other means before he issued the final notice of discipline. The City also contends that

there is no factual basis for the Association's "subordinate bias liability" theory because: (1) Wax and Stewart are not Pinhey's subordinates, and (2) neither Wax nor Stewart were aware that Bradley had appealed Pinhey's April 23, 2007 letter or that the letter had reduced the suspension to two days with three days held in abeyance. Finally, the City asserts that there is no circumstantial evidence of a nexus between Bradley's appeal and the five-day suspension, again because Wax and Stewart lacked knowledge of what exactly Bradley had appealed.

DISCUSSION

1. Request for Oral Argument

Pursuant to PERB Regulation 32315, the Association has filed a request for oral argument.⁶ The Association asserts that its request should be granted because it excepts to the ALJ's proposed decision, but provides no further reasons why oral argument is necessary in this matter. The City does not oppose the Association's request but merely asks that if the Board grants the request, the City also "be allowed to participate in oral argument before the Board."

Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (Antelope Valley Health Care District (2006) PERB Decision No. 1816-M; Arvin Union School District (1983) PERB Decision No. 300.) Based on our

⁶PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32315 provides in full:

A party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file with the statement of exceptions or the response to the statement of exceptions a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument.

review of the record, all of the above criteria are met in this case. Therefore, the Association's request for oral argument is denied.

2. Association's Rebuttal

The Association filed a rebuttal to the City's response to its exceptions. The City then filed a formal objection to the rebuttal, asserting that "such additional argument is not allowed under the PERB Regulations."

PERB regulations do not expressly provide for or preclude the filing of reply or rebuttal briefs on appeal. (Los Angeles Unified School District/Los Angeles Community College District (1984) PERB Decision No. 408.) Consequently, the Board has ruled that it has discretion to allow the filing of a reply brief when a response to exceptions "raises new issues, discusses new case law or formulates new defenses to allegations." (Ibid.)

The Association's rebuttal does not address arguments, case law or defenses raised for the first time in the City's response. Rather, the rebuttal provides additional argument and record citations to bolster arguments originally made in the Association's exceptions and addressed by the City in its response. Accordingly, the Board declines to exercise its discretion to consider the Association's rebuttal.

3. Retaliation

To establish a prima facie case of retaliation in violation of MMBA section 3506 and PERB Regulation 32603(a), the Association must show that: (1) Bradley exercised rights under the MMBA; (2) the City had knowledge of his exercise of those rights; and (3) the City imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced Bradley because of his exercise of those rights. (Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d

416 [182 Cal.Rptr. 461] (Campbell); San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 [127 Cal.Rptr. 856] (San Leandro).)

a. Protected Activity

The complaint alleged that Bradley engaged in conduct protected by the MMBA when he appealed Pinhey's April 23, 2007 letter pursuant to article 43 of the parties' MOU. MMBA section 3502 grants public employees "the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." PERB has long recognized that "[a]n employee's attempt to assert rights established by the terms of a negotiated agreement clearly constitutes participation in the activities of an employee organization." (North Sacramento School District (1982) PERB Decision No. 264 (North Sacramento).)⁷ Because Bradley's appeal was an attempt to assert a right established by the parties' MOU, the appeal was protected under the MMBA.

b. The City's Knowledge of Bradley's Protected Activity

The Association must also show that the City had knowledge of Bradley's April 23, 2007 appeal.⁸ The ALJ found the Association failed to make this showing because it did not prove "that Pinhey knew about Bradley's April 23 appeal when he issued the final notice of discipline on May 7." This finding was based on Pinhey's testimony that he did not read any of the e-mails about Bradley's appeal until after he signed the final notice of discipline.

⁷When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

⁸PERB commonly phrases the legal standard as whether the employer had knowledge of the employee's protected activity. However, the actual inquiry is whether the individual(s) who made the ultimate decision to take adverse action against the employee had such knowledge. (See Sacramento City Unified School District (1985) PERB Decision No. 492 [finding employer did not have knowledge of employee's protected activity when selection committee that did not select employee for position had no such knowledge but other district employees did].)

In its exceptions, the Association argues that Pinhey was not a credible witness because his testimony contained internal inconsistencies and also conflicted with testimony he gave at a January 2008 arbitration hearing over Bradley's two vehicle incidents. The Association further argues that Pinhey's testimony was "implausible" because it requires one to believe that none of the City employees who knew of Bradley's appeal mentioned it to Pinhey before he signed the final notice of discipline.⁹

"[W]hile the Board will afford deference to the [ALJ's] findings of fact which incorporate credibility determinations, the Board is required to consider the entire record, including the totality of testimony offered, and is free to draw its own and perhaps contrary inferences from the evidence presented." (Santa Clara Unified School District (1979) PERB Decision No. 104 (Santa Clara USD).)

The record contains ample support for the ALJ's determination that Pinhey's testimony was credible. The evidence establishes that Pinhey began a week's vacation on April 30, 2007. Two days later, on May 2, Pinhey was copied on two e-mails discussing Bradley's appeal. Pinhey testified that upon his return to work on May 7, there were approximately 250 e-mails in his inbox and that he signed Bradley's final notice of suspension before reading either of the May 2 e-mails about Bradley's appeal. The Association presented no testimony or evidence that contradicted Pinhey's testimony. Based on this evidence, we agree with the ALJ's finding that Pinhey was unaware of Bradley's April 23, 2007 appeal at the time he signed and issued the final notice suspending Bradley for five days.

⁹The Association also argues that Pinhey's testimony was not credible because it conflicted with the content of his April 23, 2007 letter. Pinhey testified that the portions of the letter imposing the two day suspension with three days held in abeyance and informing Bradley of his appeal rights were included in error because he did not intend for the letter to be a final notice of discipline. It also appears from the record that no other City employee reviewed this letter before Pinhey faxed it to Rose. While this evidence indicates a troubling lack of care on the part of Pinhey and the City, it does not indicate that Pinhey testified untruthfully.

Nonetheless, we disagree with the ALJ's finding that the City had no knowledge of Bradley's protected activity. As pointed out in the Association's exceptions, both Wax and Stewart knew of Bradley's April 23, 2007 appeal at the time they drafted the final notice of discipline for Pinhey's signature. PERB may impute an employee's knowledge of protected activity to the employer if the employee was directly involved in the adverse action. (Regents of the University of California (1983) PERB Decision No. 319-H.) Accordingly, based on Wax and Stewart's knowledge of Bradley's appeal, we find that the City had knowledge of Bradley's protected activity at the time it took adverse action against him.¹⁰

c. Adverse Action

Evidence of adverse action is also required to support a claim of retaliation. (Palo Verde Unified School District (1988) PERB Decision No. 689.) PERB has held, and the parties agree, that a final notice of suspension is an adverse action. (Los Angeles County Superior Court (2008) PERB Decision No. 1979-C; see Regents of the University of California (1983) PERB Decision No. 310-H [suspension was adverse action].) Thus, the May 7, 2007 final notice of discipline imposing a five-day suspension on Bradley constituted an adverse action.

d. Nexus

Finally, the Association must demonstrate a "nexus" between Bradley's protected activity and the City's adverse action. In other words, the Association must show that the City acted with discriminatory intent. Because direct evidence of discriminatory intent is rarely possible, the Board has held that "unlawful motive can be established by circumstantial evidence and inferred from the record as a whole." (Novato Unified School District (1982) PERB Decision No. 210 (Novato USD).)

¹⁰The record also shows that several employees in the City's personnel department and city attorney's office knew of Bradley's appeal before the May 7, 2007 final notice of discipline issued. However, because none of these employees was involved in issuing the final notice, their knowledge of Bradley's protected activity cannot be imputed to the City.

The occurrence of the adverse action close in time to the employee's protected activity is an important indicia of unlawful motive. (North Sacramento.) However, timing alone is insufficient to establish retaliation. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (Campbell; State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro; Santa Clara USD); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro; State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S (Parks and Recreation)); (4) the employer's cursory investigation of the employee's misconduct (Trustees of the California State University (1990) PERB Decision No. 805-H); (5) the employer's offering of exaggerated, vague, or ambiguous reasons for its actions (McFarland Unified School District (1990) PERB Decision No. 786); (6) employer animosity towards union activists (San Leandro; Los Angeles County Employees Assn. v. County of Los Angeles (1985) 168 Cal.App.3d 683 [214 Cal.Rptr. 350]; Cupertino Union Elementary School District (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive (Novato USD; North Sacramento).

Because Pinhey had no knowledge of Bradley's protected activity, he could not have acted with an unlawful motive in issuing the final notice of five-day suspension. As a result, the Association argues in its exceptions that Wax and Stewart's unlawful motive should be imputed to Pinhey under a "subordinate bias liability" theory. The unlawful motive of subordinates may be imputed to the decisionmaker when the subordinates exerted influence on the decisionmaking process that led to the adverse action. (State of California (Department of

Corrections) (2001) PERB Decision No. 1435-S; Parks and Recreation.) In this case, however, the Association has failed to show that Wax and Stewart had an unlawful motive in drafting for Pinhey's signature the May 7, 2007 final notice of discipline.

The timing of the final notice of discipline, issued two weeks after Bradley filed his appeal, supports an inference of unlawful motivation. Nonetheless, the evidence does not establish any of the other six specific nexus factors. Thus, it appears that the Association is relying on the "catch all" factor of "any other facts which might demonstrate the employer's unlawful motive."

The Association argues both Wax and Stewart were aware that the City was seeking Bradley's agreement not to appeal the suspension in return for reducing his suspension to two days with three days held in abeyance. According to the Association, once Wax and Stewart learned of Bradley's appeal, they decided to increase Bradley's suspension to five days from the two days plus three in abeyance stated in Pinhey's April 23, 2007 letter.

Wax and Stewart testified they were both aware that Pinhey was considering reducing Bradley's suspension in exchange for an agreement not to appeal the suspension. However, neither was aware that Pinhey's April 23, 2007 letter purported to reduce the suspension to two days with three days held in abeyance. Wax testified she never saw any version of Pinhey's April 23 letter until after the final notice of discipline issued on May 7. Stewart testified she saw a draft of the letter prior to April 23 that did not include the statement that the discipline would be two days suspension with three days held in abeyance or the final paragraph about the right to appeal the discipline. She also testified she did not see the version of Pinhey's letter that was actually sent to Rose until after May 7. Moreover, the record establishes that as of May 7 the only notice either Wax or Stewart had of Bradley's appeal was Peltier's May 2 e-mail stating that Rose had sent a notice of appeal. There is no evidence that prior to May 7

Wax or Stewart saw the appeal letter itself (which did not mention the length of the suspension) or the copy of Pinhey's April 23 letter attached to it.

Viewed as a whole, this evidence shows that neither Wax nor Stewart were aware at the time they drafted the May 7, 2007 final notice of discipline that Pinhey had purported to impose a two-day suspension with three days held in abeyance rather than a five-day suspension. Without such knowledge, neither could have acted with the intent of increasing the suspension because of Bradley's appeal. Further, while Wax testified that the May 7 final notice issued as a result of Bradley's appeal, this in itself is insufficient to establish unlawful motive. Wax testified that Bradley's appeal indicated to her that a settlement exchanging a reduced suspension for a promise not to appeal was no longer possible. As a result, she instructed Stewart to prepare the final notice imposing the five-day suspension that had originally been recommended in Wilkowsky's January 16, 2007 notice.

The Association has not proven that either Wax or Stewart had an unlawful motive in drafting the May 7, 2007 final notice of discipline. Consequently, there is no unlawful motive to impute to Pinhey, who made the ultimate decision on Bradley's suspension. Because it has not demonstrated a nexus between Bradley's appeal and the City's imposition of a five-day suspension, the Association has failed to establish a prima facie case of retaliation.

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-486-M are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Wesley and Rystrom joined in this Decision.