STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ALHAMBRA FIREFIGHTERS ASSOCIATION, LOCAL 1578, Charging Party, v. CITY OF ALHAMBRA, Respondent.	Case No. LA-CE-272-M PERB Decision No. 2037-M June 9, 2009

Appearances: Arnold Furr, President, for Alhambra Firefighters Association, Local 1578; Burke, Williams & Sorensen by Donald C. Potter, Attorney, for City of Alhambra.

Before McKeag, Neuwald and Dowdin Calvillo, Members.

DECISION

NEUWALD, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the Alhambra Firefighters Association, Local 1578 (Association) to an administrative law judge's (ALJ) proposed decision (attached). The charge alleged that the City of Alhambra (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally changing its policy regarding the location of personnel records without giving the Association prior notice or opportunity to bargain. The Association alleged that this conduct constituted a violation of MMBA sections 3503, 3505 and 3506, thereby committing an unfair practice under section 3509(b).

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

Having reviewed the proposed decision in light of the exceptions and the entire record in this case, the Board adopts the proposed decision as its own, subject to the discussion of sanctions (attorney's fees) below.[2]

DISCUSSION

As set forth in great detail in *City of Alhambra* (2009) PERB Decision No. 2036-M (*City of Alhambra I*), in order for a party to obtain an award of attorneys fees the moving party must demonstrate that the charge was "without arguable merit" and pursued in "bad faith" (*City of Alhambra I*).

In the ALJ's proposed decision, she found the testimony of two of the Association's witnesses, Association President, Robert D'Ausilio (D'Ausilio) and Association Vice-President, Paul Curtis (Curtis), to be "inherently contradictory, illogical, and unreasonable, and I do not credit them." (Proposed dec., p. 14.) The ALJ further found:

> The weight of all of the above evidence leads to the inescapable conclusion that any reasonable person would know, or should have known, in April 2001, April 2003, March 2005, April 2005, May 2005, or at the latest June 2005, that the Department maintained its own set of personnel records, perhaps not as complete as the official files kept by the City's Personnel Department, but personnel records nevertheless. Further, having discredited their testimony, I find that D'Ausilio and Curtis did in fact know of the Department's personnel files: D'Ausilio knew it in March 2005 when he requested "the entire Fire Department personnel file on Mr. [Kevin] Webster." He knew it in April 2005 when Stedman testified that the Department kept four sets of employee files, including personnel files.[3] And he knew it in

[2] In light of the Board's holding in *Long Beach Community College District* (2009) PERB Decision No. 2002 that the statute of limitations is not an affirmative defense but rather an element of the charging party's prima facie case, the Board does not adopt the statement on page 12 of the proposed decision that the statute of limitations is an affirmative defense which the City has raised in this case.

[3] The attached proposed decision states that Battalion Chief Bruce Stedman (Stedman) testified at Curtis' *Skelly* hearing (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, the court held that due process guaranteed to public employees the right to a hearing prior to the

> April 2005 when he testified at his own deposition that "the department carries the personnel file." And Curtis knew it in June 2005 when he made a contract proposal that the City "discontinue the use of multiple personnel files."

(Proposed dec., pp. 14 and 15, emphasis added.)

Later in the proposed decision, the ALJ determined:

> Here, the Association has not defied a Board order, nor has it continued to file charges over the same matters previously dismissed. Rather, it filed an unfair practice charge complaining of conduct which it knew and should have known occurred long before the charge was filed. Its arguments to the contrary, both factual and legal, are without any arguable merit, as discussed above. I especially note D'Ausilio's testimony that his acknowledgement of Department personnel files in his April 2005 deposition was untrue and made only to "bait" City attorney Davis, as well as his convoluted attempt to explain that when he said the Department "carries" files, he meant merely that the Department transports files back and forth from City Hall. Thus, in an attempt to save the instant case, he admitted that he previously lied under oath. As discussed above, the testimony of both D'Ausilio and Curtis is discredited; they not only should have known that the Department maintained personnel files, but they actually did know. I take this as strong evidence that this untimely charge was brought in bad faith.

(Proposed dec., pp. 16 and 17, emphasis added.) In short, the ALJ found that D'Ausilio lied under oath in order that the Association's unfair practice charge may survive a timeliness challenge. We have reviewed the ALJ's findings and the entire record supports her conclusions. Such conduct easily satisfies the two prong test of "without arguable merit" and taken in "bad faith" so that attorneys fees should be awarded to the City.

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imposition of discipline). In fact, as the parties correctly agree on appeal, Stedman testified at a disciplinary appeal hearing before the City Civil Service Commission.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-272-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

It is further ORDERED that the Alhambra Firefighters Association, Local 1578 pay to the City of Alhambra reasonable attorneys' fees and costs incurred in defending the unfair practice charge and complaint. Such costs and fees will be awarded in an amount established by a statement, submitted by declaration and submitted to the Association by the City, subject to review by the Public Employment Relations Board.

Members McKeag and Dowdin Calvillo joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ALHAMBRA FIREFIGHTERS ASSOCIATION, LOCAL 1578, Charging Party, v. CITY OF ALHAMBRA, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-272-M PROPOSED DECISION 8/17/07

Appearances: Jackson, DeMarco, Tidus, Petersen & Peckenpaugh by Elizabeth A. Barker, Attorney, for Alhambra Firefighters Association, Local 1578; Burke, Williams & Sorensen, LLP by Donald C. Potter, Attorney, for the City of Alhambra.

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

The Alhambra Firefighters Association, Local 1578 (Association) filed an original charge on April 24, 2006, and an amended charge on July 12, 2006, alleging that the City of Alhambra (City) unilaterally changed its policy regarding the location of personnel records by allowing them to be kept not only in the City's Personnel Office, which allegedly was the established practice, but also in the Fire Department, without giving the Association prior notice or opportunity to bargain. On August 14, 2006, the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that by the above conduct, the City violated the Meyers-Milias-Brown Act (MMBA) sections 3505 and 3506, thereby committing an unfair practice under section 3509(b).[1]

[1] The MMBA is codified at Government Code section 3500 et seq. Section 3505 requires that a public agency "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of . . . recognized employee organizations. Section 3506 provides that "(P)ublic agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of [protected rights]." And section 3509(b) declares that "(A) complaint

In its answer to the complaint, the City denied committing any unfair practice, and raised as affirmative defenses the statute of limitations and the absence of impact on unit employees.

An informal settlement conference was held on October 13, 2006, but the matter was not resolved. Formal hearing was held before the undersigned on April 26 and 27, 2007. At the hearing, counsel for the City indicated that the City would seek sanctions against the Association for bringing a frivolous charge. After the filing of post-hearing briefs, the matter was submitted for decision on July 27, 2007.

FINDINGS OF FACT

The City is a public agency within the meaning of MMBA section 3501(c). It was established by charter several decades ago. The Association is a recognized employee organization within the meaning of section 3501(b), representing a unit of fire captains, engineers, firefighter/paramedics and firefighters employed by the Alhambra Fire Department (Department).

The following regulations are relevant:

(1) In 1980, the Alhambra City Council adopted Resolution R80-32, relating to employer-employee relations pursuant to the MMBA. Section Five, entitled City Rights, gives City the following rights, inter alia:

> D. To control and determine the use and location of City's plants, facilities, property, material, machinery and equipment.

(2) The City Charter, section 248.170(D), *Records of Disciplinary Action,* declares:

> (1) *Filing of records.* Records of disciplinary actions will be filed in the confidential portion of an employee's personnel file.

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alleging any violation of this chapter . . . shall be processed as an unfair practice charge by the board."

This section shall not be open without the permission of the Personnel Officer.

(2) *Records purging.* Records of disciplinary actions shall be purged five years after the date of [ ] the action was taken unless there are subsequent disciplinary actions in the same or related areas.

(3) The City's Administrative Policy Manual section V-C-3 (V-C-3), in effect since at least 1981, states:

PURPOSE: To clarify in what manner and to whom employee personnel records will be made available in order to secure the confidentiality of personnel records of City employees.

POLICY: 1. Personnel records of City employees are confidential materials. This Agency shall not disclose any record, containing personnel and/or medical files which constitute a clearly unwarranted invasion of personal privacy...except with the prior written consent of the individual to whom the record pertains.
[Emphasis in original.]

2. Personnel records of individual employees will be made available to department heads only, with the written approval of the City Manager or his designees. Department heads in need of personnel records are responsible for their security, and are expected to use discretion in allowing only those of his staff having a direct need for any information contained therein to have access to such records.

(a) In order to gain access to personnel records, a Request for Personnel Records stating the employee's name, position, reason (for request), date (of request), and the department head's signature must be submitted to the City Manager's office for approval.

(b) The request, approved or disapproved, will be sent to the department making the request by the City Manager's office.

(c) The approved request is then presented to the personnel office for personnel records of the employee concerned. If a staff person of the department making the request presents the approved request on behalf of the respective department head, he/she will be required to initial the request.

(d) Personnel records "out on approval" should be returned promptly, and must be returned by the close of the workday (4:45 p.m.).

. . .

6. Each official personnel file maintained in the Personnel Department shall be available for the inspection of the employee, subject to reasonable limitations as to time, place and procedure . . . .

(a) Upon an approved request . . .

(b) An employee must inspect the contents in the Personnel office, under the supervision of Personnel official staff.

(c) Removal by an employee of any material from the official personnel file is prohibited.

The "official" personnel files governed by V-C-3 contain employee job applications, evaluations, wage increases, action forms, leave requests, disciplines, etc. Other employee records, e.g., medical and training records, are kept in different sets of files in the Personnel Office. City Manager/Personnel Director Richard Bacio (Bacio) testified that his practice is to allow a department head, or an employee, to review personnel files upon a written request stating, inter alia, the reason for the review. After Bacio approves and signs the request, his staff produces the file or those portions requested. The files must be reviewed in the Personnel Office at City Hall and must be returned to the clerk by 4:45 p.m. the same day; they may not be removed.

In addition to the official files, the various City departments, including the Fire Department (Department), maintain "working files" which contain copies of some of the above documents as well as any other documents the department head may wish to keep. There is no operative written policy regarding departmental working files.[2] Vincent Kemp (Kemp) testified that since he became Fire Chief in 2002, he has maintained working personnel files,

[2] As discussed below, there is a recent proposed written policy.

which contain copies of performance evaluations, disciplinary records, and probationary reports. They are kept confidential, but copies of documents from the files may be reviewed upon written request by the affected employee, supervisors, managers, and others with the employee's consent. They may be removed from the chief's office for review, and it appears that some may be kept indefinitely (discussed below). There is no evidence as to what use these working files are put to, or how long individual documents or files are maintained.

In early 2006 the issue of personnel file location and handling arose when Paul Curtis (Curtis), Association vice president/fire captain, told Robert D'Ausilio (D'Ausilio), Association president/fire engineer,[3] that some supervisors were using employees' prior evaluations to write current evaluations without submitting V-C-3 requests for the employees' personnel files. Thus, on February 10, 2006, D'Ausilio requested information from Kemp regarding the maintenance of personnel records, stating his concern with how the City and the Department were handling these records: "It has been reported to our membership that supervisors' personnel evaluations are being spread throughout the department without regard for confidentiality under some supposition that everyone needs to know their content."[4] Kemp responded on February 28, stating in part:

> Richard Bacio, Personnel Director, has granted me, as Department Head, permission to maintain copies of Department employee records, which is in accordance with Administrative Policy V-C-3. Further, in accordance with the introduction to the Administrative Policy Manual regarding internal departmental matters, the Department has adhered to an informal policy of handling copies of certain personnel documents for Department employees, which constitutes a valid past practice. We do not believe that personnel files, including performance evaluations,

[3] D'Ausilio served as Association president until April 2007.

[4] There is no evidence that the Association filed any grievance regarding the maintenance, access, or disclosure of employee personnel records or of confidential information.

> have been mishandled by the Department. However, we are aware that personnel record maintenance by the Department is a concern of the [Association] and so the Department has been compiling a Department-specific policy on maintaining copies of Department employees' personnel files to address your concerns. Once the draft is completed, we will forward a copy to the [Association] so we can begin meeting and conferring over the policy.[5]

The Association contends that prior to Kemp's February 28 letter, it did not have any affirmative confirmation from either the City or the Department that the Department kept its own personnel files.

The City and the Department argue that the Association knew or should have known that the Department has long maintained working personnel files, as shown by the following:

- In April 2001 D'Ausilio, representing Curtis in a grievance, submitted a written request for Curtis' prior evaluations. The request was made on a Department form entitled "Alhambra Fire Department/Request to Access Personal Employment File." Unlike the City's V-C-3 form, the Department's request form does not provide for the signature of the City Manager. D'Ausilio received the documents from the then-Fire Chief; he testified that he believed the chief got them from the Personnel Office through a V-C-3 request, and he did not know the files should not be removed from there. He said he did not think to ask the chief how he got the documents. D'Ausilio still retains those documents; he was never asked to return them. He testified that he believed these were working copies which he could keep because he was representing Curtis, and which the Department could keep during the investigation of a disciplinary matter.

- In April 2003 D'Ausilio requested information relevant to another Curtis grievance. By letter of May 13, Kemp stated that Curtis "has now consented to the release of

[5] Kemp's draft, cited and discussed below, was given to the Association during contract negotiations in 2006.

his file to the Union. A copy of [Curtis'] personnel file is enclosed." By a second letter dated May 14, Kemp stated that the Department had already provided a copy of Curtis' personnel file. D'Ausilio testified that he believed Kemp got the file from the Personnel Office through a V-C-3 request. D'Ausilio still retains those documents and was not asked to return them.

- In March 2005 D'Ausilio requested information regarding the discharge of firefighter Kevin Webster (Webster), including "(T)he entire City of Alhambra personnel file of Mr. Webster . . . [and] . . . the entire Fire Department personnel file on Mr. Webster." Bacio responded by letter stating in part:

> We are unclear as to what you are requesting . . . The official personnel files for Fire Department employees are maintained by the City's personnel office, which we have agreed to provide pursuant to your [request]. Nevertheless, the City agrees to produce a copy of "personnel file" records that the Fire Department has copies of regarding Mr. Webster.

D'Ausilio claims he did not know the Department kept a set of files, but he was merely making the broadest possible request, and that Bacio's response did not clarify the issue. He and Curtis testified to their belief that under V-C-3, the Department is able to obtain from the City copies of relevant personnel records during its investigation of employee discipline, but that when the discipline becomes final, the documents must be returned to the Personnel Office.

- In April 2005 at Curtis' Skelly hearing,[6] then-Battalion Chief Bruce Stedman (Stedman) testified as follows:

> Q: How many sets of files are kept on firefighters in the department, sir?
>
> A: Disciplinary files?
>
> Q: Files in general of any kind that contain personnel information.

[6] In Skelly v. State Personnel Board (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14], the court guaranteed to employees the right to a pre-discipline hearing.

A: I can think of four.

Q: Would you tell us what you can understand to be in there.

A: We have DMV files. We have training record files, personnel files and respiratory protection files.

At the instant hearing D'Ausilio testified that he did not rely on Stedman's explanation, as Stedman was not the Department's custodian of records and did not necessarily know what the Department had. In its post-hearing brief, the Association also contends that Stedman had characterized these files as "disciplinary files," thus the Association believed they were limited to disciplinary matters.

- In April 2005 D'Ausilio gave a deposition, presumably under oath, to Mr. Davis, counsel for the City, related to the Association's then-pending lawsuit against the City. In that deposition, D'Ausilio complained about Kemp not providing him with requested documents from Curtis' personnel file:

> What I do know is the department carries the personnel file and the city personnel department carries a personnel file, which I don't understand that.

In spite of his deposition statement, at the instant hearing D'Ausilio testified that he did not know at the time of his deposition that the Department kept personnel files:

> A: I wanted to see if the department is keeping records. And I made a statement, really just trying to bait him [Davis] to see if he'd reply.
>
> Q: So, is it your testimony you made a statement about the personnel records that you didn't know whether or not was true?
>
> A: I was trying to get out of Mr. Davis if the department was carrying department records or not.
>
> . . .
>
> A: Mr. Davis and I were going back and forth on a couple of issues. And I'm under the perception that Mr. Davis has been writing letters about the City. I've been getting attacked quite a

> bit. I believe Mr. Davis is the one that was writing these letters and I wanted to know if the department was carrying personnel files and I was, basically, baiting him in my statement. I said the department carries. You know what does that mean? My statement is carries means transferred back and forth in the particular document. . . .

- In May 2005 Curtis made a broad information request seeking, inter alia, all rules and regulations regarding record-keeping. Bacio responded by letter of May 27, stating that "(D)ocuments responsive to this request are the City's Municipal Code and the Fire Department Policy Manual, both of which the Association have. You will recall that the City produced them in connection with a document request in [the Association's lawsuit]." The Association argues that Bacio's response indicated that only the City keeps personnel files.

- In its June 2005 proposal during 2005/2006 contract negotiations, the Association cited Municipal Code section 248.200 and V-C-3 as the limits of record-keeping authority, and proposed that the City "discontinue the use of multiple personnel files and to consolidate personnel files to reflect the Administrative Policy referenced above." Curtis testified that he drafted this proposal in order to "find out what existed," because during his Skelly hearing (noted above), Stedman had mentioned files he never knew existed. In August, the City countered with a "maintain the status quo" proposal on that issue. However, in January 2006,[7] the City proposed language related to the Department's record-keeping: "Personnel Records: Language from Chief," and attached the following draft written by Kemp:

> FIRE DEPARTMENT EMPLOYEE FILES
>
> (A) The Personnel Department shall maintain the official personnel file ("Personnel File") for each Department employee. Thus, all original documents shall be kept by the Personnel Department.

[7] All dates hereafter refer to the year 2006 unless otherwise specified.

(B) The Department shall forward all *original* Personnel File documents to the Personnel Department for inclusion in the appropriate Personnel File as soon as reasonably possible. . . . [Italics in original.]

(C) The Department shall keep an employee file for all employees. The Department shall maintain a copy of all pertinent documents necessary to manage the Department. The Department may also maintain a copy of any internal documents regarding any disciplinary investigation or necessary action for the management of the Fire Department. These files . . . do not constitute the official "Personnel File" which is maintained only by the Personnel Department.

(D) The Department's employee files shall be maintained by establishing an eight-part folder in each file with the following sections:

(a) Application materials and employee contact information;
(b) Personnel action forms;
(c) Commendations, continuing education requests and certificates;
(d) Personnel evaluations and progressive testing documents;
(e) Hazardous material exposure forms;
(f) Leave requests;
(g) Employee correspondence and responses thereto, and
(h) Records of final disciplinary action . . .

. . .

(G) Disciplinary documents...must be annually purged from the Fire Department's files...

. . .

(J) Any requests for access to Personnel File documentation must be made to and fulfilled by the Personnel Department, and the Fire Department should refer all such requests to the Personnel Department.

(K) Each personnel file maintained in the Fire Department shall be available for the inspection of the employee...Fire personnel may request their supervisor to review, with them, their personnel files at any time. The inspection of the Department personnel file is subject to the following conditions:

(a) An employee must inspect the contents in the Fire Department Administrative office, under the supervision of official Fire Department staff.

(b) Removal by an employee of any material from the Fire Department personnel file is prohibited.

This draft language was referred to in Kemp's February 28 letter to D'Ausilio and was attached to the City's last, best and final offer of March 6. The Association contends that the list of files in this draft is different from the list which Stedman, at Curtis' April 2005 Skelly hearing, testified was maintained by the Department.

By letter of March 7 Kemp told D'Ausilio, "I have developed a Department-specific policy on maintaining copies of Department employees' personnel files to address your concerns [of February 10]," and stated that he would implement that policy on March 24 unless the Association responded. On March 13 D'Ausilio responded: "Your new draft policy contains drastic changes to the current policies and Municipal Code of the City." However, D'Ausilio conceded that "some of the documents included in your draft may be maintained at the department level . . . without violating the intent and purpose of the governing Alhambra Charter and Code language." D'Ausilio also noted that the parties were at impasse, and that the new record-keeping policy should not be implemented until impasse procedures are resolved. As of this writing, the draft policy has not yet been implemented, and the parties have not reached a new contract.

The Association contends that the harm to employees caused by the alleged unilateral change, i.e., the maintenance of personnel files by the Department, is that the confidentiality of employees records cannot be guaranteed. The Association also complains that the Department is not necessarily required to purge disciplinary files after five years, as required of the City by the City charter, section 2.48.170(D)(2). The Association also complains that the City's actions diminish the Association's ability to represent its members.

ISSUES

1. Was the charge timely filed?

2. If so, did the City unlawfully change its policy regarding the location of personnel files?

3. Should sanctions be ordered against the Association?

CONCLUSIONS OF LAW

Statute of limitations

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 District v. Public Employment Relations Board (2005) 35 Cal.4th 1072 [29 Cal.Rptr.3d 234].) 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 District (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which has been raised by the respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party now bears the burden of demonstrating that the charge is timely filed. (Cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

Here, the issue is when the Association knew or should have known that the Department maintained employee personnel files. I find more than ample evidence that the Association had, or should have had, such knowledge long before the statutory limitations period:

- In April 2001 D'Ausilio received Curtis' prior evaluations from Kemp, and in April 2003 he received Curtis' entire personnel file. At one point in the hearing, D'Ausilio testified that he believed Kemp obtained the documents from the Personnel Office through a V-C-3 request. However, the V-C-3 policy requires that files be viewed only in the Personnel

Office and may not be removed. D'Ausilio also testified that he believed the Department could keep employee files during the pendency of disciplinary matters. However, Curtis' grievances have long been finalized and D'Ausilio has never been asked to return the documents. Therefore, a reasonable person would have known that the files came directly from the Department.

- In March 2005 D'Ausilio requested information including "the entire City of Alhambra personnel file of Mr. Webster," as well as "the entire Fire Department personnel file on Mr. Webster;" one month later, at Curtis' Skelly hearing in April 2005, which D'Ausilio attended, Stedman testified that the Department keeps four sets of files, including personnel files; in the same month, D'Ausilio testified at a deposition that he "know[s]...the department carries the personnel file and the city personnel department carries a personnel file;" and two months later, in its June 2005 contract proposal, the Association proposed that the city "discontinue the use of multiple personnel files." Yet D'Ausilio testified that he never knew the Department had personnel files; he claims that in March 2005 he was only making the broadest possible information request; at the April 2005 Skelly hearing he discounted Stedman's testimony because Stedman was not the "custodian of records;" and in his April 2005 deposition he was only "baiting" Davis, the City's attorney. D'Ausilio also testified that when he told Davis he knew the Department "carries the personnel file," he meant only that the Department "transferred [the files] back and forth" from the City, i.e., he did not mean that the Department maintained its own files. As discussed below, I do not credit D'Ausilio and find that he had actual knowledge of the Department's files.

For his part, Curtis claims that his June 2005 contract proposal was only to "find out what existed." However, Curtis must have at least suspected that the Department had its own set of files, and I do not credit his position to the contrary. Nor do I credit the Association's

argument in its post-hearing brief that at the April 2005 Skelly hearing Stedman was testifying only as to disciplinary files, as this argument misstates the record; Stedman's testimony, quoted above, shows that he was testifying as to "files in general of any kind that contain personnel information." D'Ausilio and Curtis contend that all along, they had been trying to find out what files the Department had, and their own statements acknowledging the Department's personnel files were made only in an attempt to find out whether the Department had them. Yet when Stedman, Kemp, and Bacio all confirmed that the Department did indeed maintain personnel files, D'Ausilio and Curtis testified that they did not believe these confirmations. I find their testimony inherently contradictory, illogical, and unreasonable, and I do not credit them. (Regents of the University of California (CSEA) (1984) PERB Decision No. 449-H; Daikichi Sushi (2001) 335 NLRB No. 53 [169 LRRM 1197] (the ALJ may properly make credibility determinations based on the weight of the respective evidence, inherent probabilities, and reasonable inferences drawn from the record as a whole).)[8]

In its post-hearing brief, the Association correctly notes that files containing employee records have been referred to by a number of names, e.g. "records," "official personnel files," "personnel records," "personnel files," "employee files," etc. I find it clear that the files kept in the City's Personnel Department are the "official personnel files." I do not find it so clear what those files kept by the Department should be called. But by whatever name, they have the same scent, i.e., they contain employee records, which is what this dispute rests on.

The weight of all of the above evidence leads to the inescapable conclusion that any reasonable person would know, or should have known, in April 2001, April 2003, March 2005, April 2005, May 2005, or at the latest June 2005, that the Department maintained its own set of

[8] PERB may appropriately take guidance from federal cases where, as here, the statutes are similar. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

personnel records, perhaps not as complete as the official files kept by the City's Personnel Department, but personnel records nevertheless. Further, having discredited their testimony, I find that D'Ausilio and Curtis did in fact know of the Department's personnel files: D'Ausilio knew it in March 2005 when he requested "the entire Fire Department personnel file on Mr. Webster." He knew it in April 2005 when Stedman testified that the Department kept four sets of employee files, including personnel files. And he knew it in April 2005 when he testified at his own deposition that "the department carries the personnel file." And Curtis knew it in June 2005 when he made a contract proposal that the City "discontinue the use of multiple personnel files."

Accordingly, I conclude that the limitations period began to run well beyond six months before the unfair practice charge was filed, and that the charge is untimely.

Unilateral change

Having concluded that the charge is untimely, I shall not analyze whether the Department's maintenance of employee personnel records represents an unlawful change in policy.

Sanctions

As noted above, the City seeks sanctions against the Association. "Although the Board is rarely presented with circumstances that justify an award of attorney fees and costs, [it has] long held that such an award is appropriate where a case is without arguable merit, frivolous, vexatious, dilatory, pursued in bad faith or otherwise an abuse of process." (Hacienda La Puente Unified School District (1998) PERB Decision No. 1280, (Hacienda), citing Los Angeles Unified School District (1993) PERB Decision No. 1013; Chula Vista City School District (1990) PERB Decision No. 834.)

In Hacienda, sanctions were awarded after the school district willfully disregarded a prior Board order to provide certain requested information to the union. Sanctions were also awarded in United Professors of California (Watts) (1984) PERB Decision No. 398-H (Watts), where the charging party continued to file charges and appeals in derogation of a Board order that he "cease and desist from filing complaints that abuse the administrative processes of this Board," which issued when he appealed the dismissal of a prior charge. However, in several charges filed by a teacher against her union over a period of several years, the Board refused to assess costs but rather, in her most recent case, Los Rios College Federation of Teachers, Local 2279 (Deglow) (2003) PERB Decision No. 1515, the Board cited Watts for the proposition that "the Board may order sanctions only after it has ordered the party to cease and desist from filing frivolous charges over the same factual and legal issues previously addressed by the Board." The Board then warned the teacher to stop filing frivolous charges over the same subject matter, and apparently she has not filed such charges since.

But costs were recently assessed against the charging party in Marin County Law Library (Geismar) (2004) PERB Decision No. 1655a-M, when her attorney appealed the dismissal of her charge. The Board found the attorney's appeal, which referred to individual Board members by "demeaning and offensive names" to be "frivolous at best and certainly contemptuous in the least . . . a temper tantrum on paper . . . [without any] attempt to find legitimacy for the papers he filed."

Here, the Association has not defied a Board order, nor has it continued to file charges over the same matters previously dismissed. Rather, it filed an unfair practice charge complaining of conduct which it knew and should have known occurred long before the charge was filed. Its arguments to the contrary, both factual and legal, are without any arguable merit, as discussed above. I especially note D'Ausilio's testimony that his acknowledgement of

Department personnel files in his April 2005 deposition was untrue and made only to "bait" City attorney Davis, as well as his convoluted attempt to explain that when he said the Department "carries" files, he meant merely that the Department transports files back and forth from City Hall. Thus, in an attempt to save the instant case, he admitted that he previously lied under oath. As discussed above, the testimony of both D'Ausilio and Curtis is discredited; they not only should have known that the Department maintained personnel files, but they actually did know. I take this as strong evidence that this untimely charge was brought in bad faith.

The City was required to defend against this untimely charge during the investigation period, the settlement conference, two days of formal hearing, and in preparation of its post-hearing brief. The Association has had ample warning of the City's intention to seek sanctions. At the hearing, D'Ausilio acknowledged seeing letters to the Association from the City explaining why the charge was untimely and otherwise had no merit and stating that the City would seek sanctions. D'Ausilio discussed these letters with the Association governing body, which decided to proceed with the charge in spite of the City's warnings.

For all the foregoing, I have not seen a case which more completely fits the standards set forth in Hacienda, i.e., it is without arguable merit, frivolous, vexatious, dilatory, pursued in bad faith, and an abuse of process. Accordingly, I find that sanctions should be awarded against the Association.

PROPOSED ORDER

It having been found that the charge was not timely filed, the matter of Alhambra Firefighters Association, Local 1578 v. City of Alhambra, Case No. LA-CE-262-M, is hereby DISMISSED.

It is further ORDERED that the Association pay to the City reasonable attorneys' fees and costs incurred in defending the unfair practice charge and complaint. Such costs and fees will be awarded in an amount established by a statement, submitted by declaration and submitted to the Association by the City, subject to review by PERB.

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
(916) 322-8231
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 during a regular PERB business day. (Cal. Code Regs., tit. 8, secs. 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 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).)

Ann L. Weinman
Administrative Law Judge