STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DIANE LEWIS, Charging Party, v. CITY OF OAKLAND, Respondent.	Case No. SF-CE-808-M PERB Decision No. 2387-M August 4, 2014

Appearances: Law Offices of Denise Eaton May by Denise Eaton May, Attorney, for Diane Lewis; Renne, Sloan, Holtzman & Sakai by Erich Shiners, Attorney, for City of Oakland.

Before Huguenin, Winslow and Banks, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Diane Lewis (Lewis) and a cross-exception filed by the City of Oakland (City) to the proposed decision of an administrative law judge (ALJ). The ALJ dismissed the complaint and Lewis's underlying unfair practice charge against the City. The complaint alleged that, on or about August 6, 2010, the City laid off Lewis from her position as a Deputy City Attorney (DCA) in the Office of the City Attorney (OCA), because of Lewis's exercise of protected activities, in violation of sections 3502.1, 3506 and 3509, subdivision (b), of the Meyers-Milias-Brown Act (MMBA or Act)[1] and PERB Regulation 32603, subdivisions (a) and (g).[2]

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

[2] PERB Regulations are codified at California Code of Regulations, title 1, section 31001 et seq.

We have reviewed the entire record in this matter, including the charge and first amended charge, the complaint and amended complaint, the transcript of the hearing before the ALJ and the exhibits thereto, the parties' post-hearing briefs, the ALJ's proposed decision, and the parties' exceptions and cross-exception and their responses thereto. With respect to the issues raised by Lewis's discrimination allegation, the ALJ's findings of fact are supported by the record and the proposed decision is well-reasoned and in accordance with applicable law, except where noted below. We affirm the result of the proposed decision, subject to the discussion below.

PROCEDURAL HISTORY

Lewis filed her charge on February 4, 2011. The charge alleged that the City violated the MMBA by laying off Lewis in retaliation for her protected activity, including her tenure as president of Local 21's DCA chapter and her participation on the International Federation of Professional and Technical Employees, Local 21's (Local 21) bargaining team.

The City filed a position statement on March 10, 2011, which denied any wrongdoing, and Lewis filed a response to the City's position statement on August 31, 2011.

On October 14, 2011, Lewis filed a first amended charge, which included additional factual details and exhibits in support of her retaliation allegation. The City responded with a second position statement on November 18, 2011, which again denied any wrongdoing.

On November 22, 2011, PERB's Office of the General Counsel issued a complaint, alleging that the City laid off Lewis because of her protected activities, including her role as president of the DCA chapter of Local 21 and her participation on Local 21's bargaining team, which had opposed certain bargaining proposals prepared and championed by City Attorney John Russo (Russo), the highest manager in Lewis's chain of command.

The City answered the complaint on December 19, 2011, by admitting certain facts, denying all material allegations, and asserting various affirmative defenses, including that Lewis was laid off for budgetary reasons, and that the City's conduct was "privileged and exercised because of operational need and business necessity."

The parties were unable to resolve their dispute at an informal settlement conference held on January 12, 2012. A formal hearing was held on June 18-21, 2012 before a PERB ALJ. With the filing of post-hearing briefs on August 5, 2012, the matter was fully submitted.

The proposed decision, which dismissed the complaint and underlying unfair practice charge, issued on November 1, 2012.

On November 21, 2012, Lewis filed exceptions to the proposed decision and a request for oral argument before the Board itself. On December 11, 2012, the City filed its response to Lewis's exception and a cross-exception of its own. The City also opposes Lewis's request for oral argument.

FACTUAL SUMMARY

Organization and Funding of the Office of the City Attorney

From 2001 until June 2011, Russo was the City attorney, an elected position in charge of OCA. OCA provides legal services to various departments of the City. Organizationally, OCA is divided into two divisions, Litigation and Advice, each of which is under the supervision of a Chief Assistant City Attorney. The Litigation and Advice divisions are further subdivided into smaller units corresponding to various specialty practice areas.

OCA operations are funded from several sources, including the City's general, liability, recycling, sewer, workers' compensation, redevelopment, and retirement funds. Like other City departments, OCA is subject to a system called "position control budgeting," whereby every position must be attached to a specific funding source. However, because funding from

a particular source is often insufficient to finance all positions which perform the duties for which the funding was designated, the City may "borrow" from another funding source or from multiple sources to cover the entire cost associated with funding a position.

Rosemarie Sanchez (Sanchez), who at all times relevant to this case was the OCA's legal administrative services manager, testified that because of the need to piece together funding from various sources, the OCA budget typically "looked different than the way the services were being performed." At the time of the hearing, Dan Rossi (Rossi) was employed as DCA in the Redevelopment unit of the Advice division. Although Rossi's position was funded in part by redevelopment agency funds, OCA also used money from various retirement funds to cover the remaining costs associated with the position, even though Rossi was not assigned to do any retirement fund work.

Local 21's Bargaining Unit

Since approximately 1998, Local 21 has been the exclusive representative of five bargaining units of City employees, including a unit consisting of all full- and part-time DCAs I-IV, excluding supervisory attorneys, non-attorneys, and certain categories of limited duration and temporary contract service employees. Local 21 also represents a unit that includes paralegals employed by OCA and a unit that includes Sanchez's position, even though Sanchez was a member of Russo's management team and "sat on the management side" in the City's negotiations with Local 21. Local 21 is not a party to these proceedings.

The Alternative Work Schedule and Telecommuting Programs

Since 2002, the memorandum of understanding (MOU) covering DCAs has provided for alternative work scheduling (AWS) and telecommuting programs for attorneys working in the OCA. As part of these programs, attorneys could work from home, and the evidence was that some attorneys did so, particularly at times when they were required to write briefs or

perform other duties that did not involve meeting with clients. At the time the AWS and telecommuting programs were adopted, the OCA already had a similar AWS program for its paralegals and there was testimony that similar programs were already in effect for employees in other City departments.

There was conflicting evidence as to the precise origins and impetus for extending the AWS and telecommuting programs to attorneys. Russo testified that he implemented that program when he assumed office, because he considered the attorneys "professionals" who didn't need to have someone watching over them like kids. He emphasized that he did this as a benefit to them, without demanding concessions in return. Lewis and Rossi testified that these programs were obtained through the give-and-take of collective bargaining. It was, however, undisputed that Russo favored adoption of these programs and did not oppose their inclusion in the MOU as "pilot programs." The pertinent language in the MOU stated that, "The City Attorney or designee may cancel at any time alternative work scheduling for any or all affected department employees."

Lewis's Employment History and Union Service

From 1999 until her layoff on August 6, 2010, Lewis worked as a DCA in the OCA Advice division. Initially, she worked in the Community Development unit. Following a reorganization of the Advice division, she was assigned to the Redevelopment unit, where she continued to work until the time of her layoff. At the time of her layoff, Lewis's position was funded entirely through federal funding and other redevelopment grant money. Although she worked on affordable housing projects, for which such funds were designated, she also worked on commercial development projects performed and real estate transactional work.

During her employment with the City, Lewis was a member of the DCA Chapter of Local 21 and held various positions in the organization. She was twice elected as the chapter

president, covering the period from 2006 until her layoff in 2010. She was also a member of Local 21's bargaining team for the DCA unit, which negotiated with the City for the 2008-2012 MOU. After fall 2009, when negotiations for the MOU concluded, Lewis remained on the bargaining team, which continued to meet with Russo and other City representatives over certain disputes concerning OCA schedules and work rules, as described below.

Rossi's Employment History and Union Service

Rossi, who was Lewis's colleague in the Redevelopment unit, had worked as a DCA for more than 20 years at the time of Lewis's layoff. He was also one of two "original organizers" when Local 21 began representing the City's deputy attorneys in 1998. Since that time, Rossi had served as president, vice-president and political affairs coordinator of the DCA Chapter of Local 21. Rossi was "involved in most of the bargaining committees that we've had," including the bargaining team for the 2008 MOU and for the single-issue and grievance resolution negotiations that continued with the City after the MOU went into effect.

Budget Cuts and Layoffs in OCA

Beginning in 2005 and recurring each year thereafter, the City Council cut the OCA budget, which resulted in four rounds of layoffs in the three consecutive years preceding Lewis' layoff in August 2010. DCAs are not part of the City's civil service, and the parties' MOU does not provide for seniority or criteria for making layoff selection decisions.

Russo, the two Chief Assistant City Attorneys, and Sanchez, made up the OCA management team whose responsibilities included making selections for layoffs. When informed of the need to reduce staff, Russo consulted first with Sanchez as to possible combinations of attorney and/or support staff positions to achieve the targeted costs-savings. He then met with the heads of the Litigation and Advice divisions to discuss which unit(s) would be affected. At this point, no individual names or positions were identified.

After hearing the concerns of the division heads, Russo then selected which positions to eliminate and which individuals to layoff, based on his prior discussions with the division heads and on his assessment of which individuals could be replaced with the least impact to the OCA operations and budget. Although Russo testified that he attempted to equalize the impact on the various units making up the Litigation and Advice divisions, he acknowledged that, throughout his tenure, staffing cuts had occurred disproportionately in the Litigation division, because litigation work was typically easier and cheaper to replace with outside counsel than was the more specialized work of the Advice division.

From 2005 to 2009, OCA lost about 17 attorney positions through layoffs and attrition. Of the eliminated positions, 10 were from the Litigation division and the remaining 7 came from Advice. Before Lewis was laid off, two of Local 21's representatives had been laid off. Patrick Tang (Tang), who had served as a member of a joint labor-management committee, had been laid off from his position in the Advice division in July 2009. Pelayo Llamas (Llamas), who at the time was a member of Local 21's bargaining team, had also been laid off from the Advice division, as the result of budget cuts imposed in April 2010.

Negotiations for Successor MOU and to Resolve Billable Hours Dispute

Local 21's initial MOU expired on June 30, 2008. Negotiations for a successor agreement began in April 2008 and continued until late July 2009, when a new MOU was concluded for the period 2008-2011. For most of this period, the main sticking point was the City's demand for a 10 percent reduction in employee compensation in response to the economic recession. However, in April 2009, the City presented, for the first time, a written proposal that would require all OCA attorneys to work at least 1500 "billable hours" of work per year. It was undisputed that Russo was the driving force behind this proposal which, he claimed, would make attorneys more accountable and assist his efforts to convince the City

Council that OCA attorneys were working hard and were more cost-effective than hiring outside counsel to replace laid-off attorneys. Russo acknowledged that OCA attorneys were already required to track and log their hours, but claimed the current system was inadequate because some attorneys did not record their time properly.

Local 21 opposed Russo's minimum billable proposal. Rossi had what witnesses described as a "heated" exchange with Russo over the proposal at a meeting on July 8, 2009. At one meeting, Russo also advised Local 21's bargaining team that there would be unspecified "consequences" if he did not get the billable hours language. After several "contentious" discussions over the subject, on July 20, 2009, Local 21 offered to agree to most of the economic concessions demanded by the City Council, in return for the City's abandonment of the billable hours requirement. Soon thereafter, the two sides concluded negotiations for a successor MOU that contained no minimum billable hours language. The 2008 MOU also carried over from the previous MOU the above-quoted "pilot program" language regarding the AWS and telecommuting programs, despite that these programs had been in existence for approximately six years by the time the new MOU went into effect.

Russo was "frustrated" and "upset' because the MOU did not include his minimum billable hours proposal. In October 2009, he issued a memorandum advising the attorneys and paralegals that OCA was eliminating the AWS and telecommuting programs for both attorneys and paralegals, due to the need to have attorneys and staff present every day of the week. Current and former DCAs testified that some attorneys who had grown accustomed to the flexible schedule had difficulty restructuring their work and family lives around the newly-implemented set schedules. At the hearing, Russo explained that it was getting increasingly difficult to ensure adequate coverage in the office because of all the layoffs that, by this time, had occurred in OCA. However, there was no evidence that this concern had been raised

during negotiations for the MOU. As part of the same changes in OCA work rules, attorneys were required to log in and log out their worktime on their computers.

In response, Local 21 filed a grievance, alleging that the elimination of the AWS program was in retaliation for the DCAs' opposition to the minimum billable hours requirement proposed and championed by Russo. Although contract negotiations had since concluded, the two sides resumed meeting during the fall of 2009, to resolve the dispute over the elimination of the AWS and telecommuting programs and Russo's desire to revive the minimum billable hours proposal previously rejected by Local 21.

By all accounts, these negotiations were every bit as contentious as the previous contract negotiations. At a meeting on December 11, 2009, Local 21's spokesperson, Bob Muscat (Muscat), criticized the OCA proposal as misguided and as evidence of Russo's inability to manage the office effectively. Russo challenged Muscat to offer a viable alternative. Muscat characterized Russo as "anti-labor" and began enumerating the ways in which he believed he could run the OCA more effectively. Russo became visibly angry and "red faced," and stormed out of the room. The parties dispute whether he slammed the door behind him. The meeting continued for some time after Russo's departure, though no progress was made on the issues. Both Lewis and Rossi were present at this meeting.

After the aborted December 11, 2009 meeting, the two sides stopped meeting in person, though they continued discussing the issues by telephone and by exchanging written proposals. Union officials testified at the hearing that the City twice presented its billable hours proposals directly to the entire attorney unit, rather than to Local 21's designated representatives. The City's witnesses did not directly dispute this testimony, but claimed that the City's proposals were presented with little or no additional communication or explanation.

At some point after in person negotiations broke down, Local 21's bargaining team designated Rossi as its point person to attempt to resolve the dispute. Rossi also sent an email directly to Russo to urge him to reconsider his November 2009 change in the attorneys' work schedules and the sign-in/sign-out requirement. By early 2010, Local 21 had agreed, in principle, to some form of minimum billable hours proposal, though the two sides were unable to agree on the precise language until several months later. In July 2010, Lewis provided written comments on the City's most recent proposed language in which she raised several concerns. Although the substance of these concerns was conveyed by Rossi to the City's representatives, it was unclear whether the document itself or Lewis's authorship was disclosed. In September 2010, the parties signed an agreement to restore the AWS and telecommuting programs in return for a minimum billable hours requirement for OCA attorneys.

2010 Budget Crisis and Lewis's Layoff

While these negotiations were occurring, the City Council ordered additional staff reductions for the 2010-2011 fiscal year. In addition to reducing staff positions, Russo met with Sanchez about eliminating one or more attorney positions.[3] No individuals were identified for layoff at this time. Russo then met with the heads of Advice and Litigation, both of whom opposed any further cuts to their divisions. Russo testified that he decided the layoff should affect the Advice divisions, because Litigation had suffered a disproportionate share of previous layoffs.

Russo testified that he then chose the Redevelopment unit, because it had not been affected by prior staff reductions. Of the four attorneys in the Redevelopment unit, Russo ruled out Diane Millner (Millner), the unit's supervising attorney because she was, in his opinion, a

[3] The precise chronology is unclear. It appears from the record that, initially, Russo planned to lay off two attorneys. However, because one of the attorneys selected for layoff retired before the layoff was effective, Lewis was the only attorney eliminated in this round of layoffs, though other support staff positions were also affected.

"fantastic" lawyer who "never disappointed" and was therefore "untouchable." Russo testified that he similarly ruled out Richard Illgen (Illgen), because there was no other attorney who could be relied upon to handle the complex and unique rent control and rent arbitration matters handled by Illgen.

Of the two remaining attorneys, Rossi and Lewis, Russo testified that he chose to layoff Lewis because, over the course of Rossi's more than 20 years in the Redevelopment unit he had developed numerous important contacts and was consistently praised for his work, despite having worked on the largest and most politically controversial City projects. Although Lewis also worked on some large commercial development projects, Russo's view was that no one else in the office could replace Rossi without additional training. Russo also pointed to a projected $14 million deficit in the City's redevelopment budget for the coming fiscal year, to conclude that the kind of work performed by Lewis would decline.

The record is unclear as to the precise dates of Russo's meetings with Sanchez and the divisional heads or of the precise date of his decision to layoff Lewis. Lewis learned of Russo's decision in mid-July 2010 from Millner and Barbara Parker, the chief assistant attorney in charge of the Advice division. Lewis received written notice on July 26, 2010, and her last day of work was August 6, 2010. Russo met with Lewis at least once after she learned of the decision and assured her that his decision was not based on performance reasons but out of a desire to distribute the ongoing staffing reductions in the most "equitable" manner among the units.

THE PROPOSED DECISION

Most of the issues raised by the complaint and the City's answer were not in dispute before the ALJ. The City conceded that Lewis had engaged in protected conduct (1) by twice being elected and serving as Chapter President of the DCA chapter of Local 21, (2) by attending and participating in negotiations for the 2008-2011 MOU, (3) in continuing

negotiations with the OCA over its minimum billable hours proposal, and (4) the elimination of the AWS and telecommuting programs. The City also conceded that Russo was the relevant decision-maker in this case, and that he was aware of most, if not all, of Lewis's involvement in the above conduct. The City also conceded that Russo's decision to layoff Lewis was an "adverse action."

The City argued, however, that Lewis could not demonstrate that she was laid off *because of* her protected conduct. Rather, the City asserted that, when faced with a severe budget shortfall in early 2010, it looked to the Redevelopment unit, the sole unit within the OCA that had been spared from previous rounds of layoffs, and then selected Lewis as the attorney whose layoff would have the least effect on the unit. Alternatively, the City asserted, as an affirmative defense, that Lewis's layoff was necessitated by a severe budget shortfall, and that, even assuming some amount of anti-union animus was present, under the circumstances the City would have selected Lewis for layoff, regardless of her participation in protected conduct.

Thus, the disputed issues before the ALJ were limited to: (1) whether Lewis could demonstrate the necessary "nexus" to prove her discrimination claim, i.e., whether the City had laid her off *because of* her protected activity, and (2) whether the City had proved its affirmative defense that it both had a legitimate reason to layoff Lewis, and that the reason asserted for Lewis's layoff, i.e., the City's budget shortfall, was *in fact* the reason she was selected for layoff.

On the first of these issues, the ALJ concluded that Lewis stated a prima facie case that the City had laid her off in retaliation for her union affiliation and activities. On the issue of "nexus," the ALJ found sufficient evidence that the timing of the decision to layoff Lewis coincided with her involvement in bargaining with the City over the contentious issues of the

City Attorney's minimum billable hours proposal, and its elimination of the AWS and telecommuting programs. In addition to the close temporal proximity of Lewis's protected activity and the City's adverse action, as further evidence of unlawful motive the ALJ cited Russo's "personal" hostility and "red-faced" reaction to Local 21's conduct in bargaining and his sudden decision to eliminate the AWS and telecommuting programs when Local 21 successfully concluded negotiations for an MOU that did not include the minimum billable hours proposal championed by Russo.

With respect to the City's affirmative defense, Lewis did not dispute that the 2009-2010 budget crisis provided the City with a legitimate, non-discriminatory reason for eliminating staff, including DCAs. However, she argued that Russo's selection of Lewis for layoff, as opposed to other attorneys or support staff, was unlawfully motivated by anti-union animus.

On this issue, the ALJ concluded that, in light of a severe budget shortfall facing the City in early 2010, the City had offered a legitimate business reason for reducing staff, including one or more attorney positions within the OCA. With respect to the decision to select Lewis, as opposed to other attorneys or personnel, for layoff, the ALJ credited the testimony of Russo and Sanchez regarding the City's practice in previous layoffs of spreading the impact of the cuts among the various units in the OCA with Russo's assessment of "who would be missed the least." Based on these findings, the ALJ concluded that the City sufficiently demonstrated that it would have selected Lewis for layoff, regardless of her involvement in protected conduct. Accordingly, the ALJ dismissed the complaint.

THE PARTIES' EXCEPTIONS AND CROSS-EXCEPTION

The parties have filed various exceptions and one cross-exception to the proposed decision. The City cross-excepts to the ALJ's conclusion that Lewis established a prima facie case of retaliation because the timing of her layoff coincided with ongoing bargaining between

Local 21 and OCA, and because Russo's conduct during negotiations exhibited anti-union animus. The City argues that the record does not support a finding of close temporal proximity between Lewis's protected conduct and her layoff, because either she "had not taken an active and visible role" in Local 21's negotiations with the City for almost 9 months at the time Russo selected her for layoff, and thus, her protected activity ended *too early* to be a motivating factor in her layoff, or alternatively, that the specific conduct cited by the ALJ as the trigger for Russo's animus, Local 21's rejection of a draft agreement over a minimum billable hours proposal, occurred *too late* to coincide with the layoff decision, which must have been taken weeks or even months earlier.

The City also argues that the ALJ improperly conflated Russo's *personal* frustration with Local 21's opposition to the minimum billable hours proposal with union animus, simply because Russo was visibly offended during negotiations by Local 21's accusations that he was anti-labor. It argues that equating a decision-maker's frustration at the pace of negotiations and anger over an unwarranted personal attack with anti-union animus is contrary to reason and PERB precedent.

For her part, Lewis asserts seven exceptions, whose general thrust is to contest various findings of fact relied on by the ALJ to support his conclusion that the City had proved its affirmative defense, i.e., that Lewis would have been laid off, regardless of her involvement with Local 21. Lewis does not dispute the existence or severity of the budget crisis facing the City in early 2010, or that the City Council ordered OCA to cut staff. Instead, she argues that, contrary to the ALJ's findings of fact, the City's proffered justification for selecting Lewis, as opposed to other attorneys or support staff, was pretextual.

Specifically, Lewis points to evidence suggesting:

(1) that there was no actual or reasonably projected decrease to redevelopment agency funds or any other grant moneys used to fund her position;

(2) that her duties were sufficiently similar to those performed by Rossi that, with minimal training, she could have performed those duties;

(3) that Russo did not advise the heads of the Litigation and Advice divisions, including Lewis's supervisor, of his decision to select Lewis for layoff before making that decision;

(4) that Litigation, rather than the Advice divisions was the logical place for Russo to look for staffing reductions, given his own testimony that litigation work was relatively easier and cheaper to replace with outside counsel;

(5) that, contrary to the ALJ's findings, by 2010, the Redevelopment unit was not the only unit that had not experienced staff reductions, because, in fact, it had lost at least two attorneys in previous layoffs;

(6) that the work of the Redevelopment unit was not likely to constitute a decreasing proportion of OCA operations as a result of the systemic financial crisis; and

(7) that, even assuming the Redevelopment unit was the logical or appropriate place to select for a layoff, Russo did not offer credible and consistent reasons for choosing Lewis for layoff, as opposed to each of the other three attorneys in working the Redevelopment unit.

Lewis has also requested oral argument before the Board itself, a request that the City opposes. We first review the standard for evaluating discrimination allegations, and employer defenses thereto, before addressing Lewis's request for oral argument, the City's cross-exception, and Lewis's exceptions.

DISCUSSION

When evaluating discrimination cases, PERB and California courts follow the so-called *Wright Line* or burden-shifting analysis developed by federal and state private-sector authorities. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Wright Line, A Div. of Wright Line, Inc.* (1980) 251 NLRB 1083, affd. (1st Cir. 1981) 662 F.2d 899, cert. denied (1982) 455 U.S. 989; *Martori Bros. Dist. v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721 (*Martori Bros.*).) To demonstrate a prima facie case that an employer discriminated or retaliated against an employee in violation of MMBA section 3506 and/or section 3502.1[4] and PERB Regulation 32603(a) a charging party must show that: (1) the employee exercised rights under the MMBA; (2) the employer had actual or imputed knowledge of the protected conduct; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato, supra,* PERB Decision No. 210; *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*City of Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553.) As with other unfair practice allegations, the charging party in a discrimination/retaliation case bears the

[4] The complaint alleges, *inter alia*, violations of MMBA sections 3506 and 3502.1. Section 3506 provides that, "Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502," which, in turn, guarantees 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," and likewise the right to refrain from doing so. By contrast, section 3502.1 states that, "No public employee shall be subject to punitive action or denied promotion, or threatened with any such treatment, for the exercise of lawful action as an elected, appointed, or recognized representative of any employee bargaining unit." Because neither party has suggested that the appropriate standard for evaluating discrimination allegations under sections 3502 and 3506 differs in any way from that required by 3502.1, and because we have previously interpreted section 3502.1 as amplifying, rather than supplanting, the standard developed by decisional law interpreting sections 3502 and 3506 (*Santa Clara Valley Water District (Coleman)* (2013) PERB Decision No. 2349-M (*Coleman*), pp. 22-26), we do so again, when considering the claims and defenses of the present case.

initial burdens of production and persuasion. (*Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, pp. 4-5, adopting Board agent's dismissal.)

If the charging party establishes all the elements of a prima facie case, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same course of action even if the charging party did not engage in any protected activity. (*Trustees of the California State University* (2000) PERB Decision No. 1409-H, citing *Novato, supra*, PERB Decision No, 210, *Martori Bros., supra,* 29 Cal.3d 721.) The employer's burden includes both the burden of production, i.e., of going forward with evidence, and persuasion. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337 (*Palo Verde*), p. 12, citing with approval federal authorities.)

When it appears that the employer's adverse action was motivated by both lawful and unlawful reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Bros., supra*, 29 Cal.3d 721, 729-730.) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304 (*McPherson*).) Although some cases suggest that the inquiry "is not whether the employer had a lawful reason for the action but whether it took the action for an unlawful reason" (*Baker Valley Unified School District* (2008) PERB Decision No. 1993), more recently, the Board has clarified that the employer must establish *both* that a legitimate, non-discriminatory reason existed for taking the adverse action, *and* that the reason proffered was, in fact, the reason for taking the adverse action. (*Palo Verde, supra,* PERB Decision No. 2337, pp. 12-13).

As the ALJ observed, most of the issues in this case are not in dispute. The City concedes that Lewis has satisfied all of the elements of a prima facie case, except for showing that her layoff was motivated, at least in part, by anti-union animus. Likewise, Lewis

apparently concedes that the City had a legitimate, non-discriminatory reason for reducing staff. However, she avers that the City's stated reasons for selecting Lewis for layoff, rather than other attorneys or staff, are pretextual.

Lewis's Request for Oral Argument

The Board has historically denied requests for oral argument when the record is adequate, the parties have had an opportunity to fully brief the matter, and the issues are sufficiently clear to make oral argument unnecessary. (*Los Angeles Community College District* (2009) PERB Decision No. 2059; *Monterey County Office of Education* (1991) PERB Decision No. 913.) Over the course of a four-day hearing, the parties presented testimony from 11 witnesses and introduced numerous documents as exhibits. They also filed post-hearing briefs in which they argued various points and authorities. Because the above criteria have been met in this case, we deny Lewis's request for oral argument.

The City's Cross-Exception

We next consider the City's cross-exception to the ALJ's determination that Lewis put on sufficient evidence of unlawful motive to prove a prima facie case that her layoff was for an unlawful, discriminatory purpose.

Unlawful motive is "the specific nexus required in the establishment of a prima facie case" of retaliation. (*Palo Verde, supra*, PERB Decision No. 2337, p. 10.) It may be established by direct evidence, as when the employer's words or conduct reveal that its adverse action was based on union activity or other protected conduct (*Contra Costa Community College District* (2006) PERB Decision No. 1852), or when the natural and probable consequence of an employer's conduct is to discourage (or encourage) membership or participation in an employee organization, such that the Board may fairly presume that the employer intended this result. (*Coleman, supra*, PERB Decision No. 2349-M, p. 23, fn. 8; *City of Campbell, supra,*

131 Cal.App.3d 416; *American Ship Building Co. v. NLRB* (1965) 380 U.S. 300, 311-312; *NLRB v. Great Dane Trailers, Inc.* (1967) 388 U.S. 26, 32.)

Because direct evidence of an unlawful state of mind is relatively rare (*Regents of the University of California (Davis)* (2004) PERB Decision No. 1590-H), it may also be established by circumstantial evidence and inferred from the record as a whole. (*Novato, supra*, PERB Decision No. 210, p. 6.) Through its decisional law, PERB has developed several so-called "nexus" factors for identifying circumstances which may support an inference of unlawful intent. These include the timing of an adverse action in relation to the exercise of protected activity (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*)); an employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S (*Transportation*)); a departure from established procedures or standards (*Santa Clara Unified School District* (1979) PERB Decision No. 104); shifting, vague, inconsistent or contradictory justifications offered for the employer's actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); employer animosity towards union or other concerted employee activity (*Cupertino Union Elementary School District* (1986) PERB Decision No. 572 (*Cupertino*)); or any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento*; *Novato*.) Although important, the first of the so-called nexus factors, temporal proximity between an employee's protected conduct and an adverse action, is usually not determinative in itself. Rather, it goes to the strength of the inference of unlawful motive to be drawn. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129; *Moreland Elementary School District* (1982) PERB Decision No. 227.)

The City first disputes the ALJ's finding of temporal proximity between Lewis's protected conduct and the City's adverse action as unsupported by the record. It argues that

Lewis's involvement in protected activity either ended too early, or occurred too late, to have any causal relationship to the decision to lay her off. It points out that, after the acrimonious December 11, 2009 meeting, face-to-face negotiations between the two sides ceased, and thereafter further discussion regarding the billable hours and AWS issues occurred by telephone and letter communicated through designated individuals serving as point persons. Because there were no further meetings for Lewis to attend and because Rossi was Local 21's designated point person, as far as Russo was concerned, Lewis played no visible role in subsequent communications between Local 21 and the City on these issues. Thus, Russo's decision in approximately May 2010 to layoff Lewis did not occur until more than 5 months after the meeting at which Russo became visibly upset by Local 21's conduct in negotiations.

Alternatively, the City argues, Lewis's protected conduct occurred too late. Lewis did raise concerns about and make written comments on the City's July 12, 2010 proposal shortly after the document was presented to Local 21. Although Russo denied any knowledge of Lewis's concerns about the July 12, 2010 draft, Lewis testified that she sent her notes to Local 21, which were then presumably conveyed to OCA's representative, which at that time was Attorney Jonathan Holtzman (Holtzman). Thus, even assuming that Russo learned of Lewis's role in Local 21's decision to reject the July 12, 2010 proposal and demand further changes to the language of the draft agreement, it would have been several weeks after the City's decision to lay off Lewis, which took place sometime before the end of the fiscal year in June 2010. Thus, if one accepts the ALJ's view that a triggering event for Russo's animosity towards Local 21 was its rejection of the minimum billable hours proposal, the City argues that Lewis would not have been on OCA management's radar as far as the billable hours issue was concerned in late Spring or early Summer 2010 when Russo selected her for layoff.

Much of the City's argument requires no extended discussion here, as the proposed decision already addressed these same points, which were raised in the City's closing brief. We agree with the ALJ that the City takes too narrow a view of Lewis's protected activity, because she participated in bargaining on behalf of Local 21 for an extended period, encompassing dates both before and after those identified by the City. (See *City of Torrance* (2008) PERB Decision No. 1971-M (*City of Torrance*), p. 17.)

To the extent the City's argument goes not so much to "timing" as to the separate element of "employer knowledge," this issue was also adequately addressed in the proposed decision. The City admits that Russo was aware of Lewis's status as a member of the bargaining team and the ALJ reasonably found that Russo had no reason to believe that her role had changed after the two sides stopped meeting in person. Thus, the ALJ properly concluded that Lewis satisfied the "timing" factor, by showing that her involvement in protected conduct coincided with the City's decision to lay her off.

In finding that Lewis satisfied the timing factor, the proposed decision does not, as the City suggests, hold "that *any* adverse action against a union officer or bargaining team member during negotiations creates an inference of retaliation, even if the specific facts show *no causal connection* between the two." (Emphasis added.) Although it is "axiomatic that discrimination against a union activist not only affects that individual, but also has a chilling effect upon the rights of all employees" (*Coleman, supra*, PERB Decision No. 2349-M, p. 26), nothing in the proposed decision departs from long-standing PERB precedent that the charging party bears the burden of proving each element of its case, including the respondent's unlawful motive as "the necessary connection or 'nexus' between the adverse action and the protected conduct." (*Los Angeles Unified School District* (2010) PERB Decision No. 2124, pp. 10-11.) In the present case, the ALJ did not rely on the timing factor alone to support his conclusion that

Lewis's layoff was motivated, at least in part, by anti-union animus. As the City's cross-exception acknowledges, the proposed decision also pointed to other circumstantial evidence in the record, to which we now turn.

In addition to the timing factor, the ALJ credited the testimony of several witnesses that Russo took Local 21's opposition to the billable hours proposal "personally," and that Russo eliminated the AWS and telecommuting programs when the billable hours proposal was not included in the 2008 MOU. Because the City also disputes these findings, we next consider the City's arguments that neither the evidence of Russo taking "personal" offense to Local 21's bargaining tactics, nor the evidence that he eliminated the AWS and telecommuting programs in response to Local 21's rejection of the minimum billable hours proposal, support the ALJ's conclusion that Russo exhibited anti-union animus toward Local 21 generally, or toward Lewis specifically.

The ALJ found, and the City concedes, that Russo was "frustrated" and "angered" by Local 21's opposition to the billable hours proposal, and that his frustration manifested itself, most visibly, at the December 11, 2009 meeting. The ALJ relied, in part, on Russo's own account of this meeting to conclude that, "Russo was not merely voicing his opposition to Local 21's bargaining position," and that Russo's "overtly personal reactions demonstrate animus."

The City argues that the ALJ improperly conflated Russo's frustration and "personal" offense at Muscat's remarks with anti-union animus because, according to the City, "PERB precedent does not equate anger over such a personal attack with animus toward the union." We agree with the City that whether an employer's manager, representative or agent reacts strongly or takes "personal" offense to the words or conduct of a union representative or an employee engaged in protected activity is not itself determinative of whether the employer

committed an unfair practice. Nor are such spontaneous reactions necessarily compelling evidence of unlawful motive.

Because "disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses" (*Plaza Auto Center, Inc. & Nick Aguirre* (May 28, 2014) 360 NLRB No. 117 (*Plaza*)), the parties are afforded wide latitude to engage in "uninhibited, robust, and wide-open debate" in the course of those disputes. (*State of California (Department of Transportation)* (1983) PERB Decision No. 304-S (*Caltrans*), adopting proposed dec. at pp. 22-28; *Old Dominion Branch No. 496 v. Austin* (1974) 418 U.S. 264, 273; *Linn v. United Plant Guard Workers Local 114* (1966) 383 U.S. 53, 69.) Protecting the parties' freedom of speech is particularly important in negotiations and grievance proceedings, which the Legislature has designated as the preferred alternatives to strikes and other forms of economic warfare for resolving disputes over wages, hours and working conditions. (MMBA, § 3500, subd. (a); *San Francisco Unified School District* (1979) PERB Order No. IR-10, p. 3; see also *Caterpillar, Inc.* (1996) 322 NLRB 674, 676-677; and *NLRB v. Thor Power Tool Co.* (7th Cir. 1965) 351 F.2d 584, 587.) To effectuate this purpose of the MMBA and other PERB-administered statutes, the Board has recognized that the rights of public employees to engage in concerted activities permits "some leeway for impulsive behavior," "intemperate, abusive and inaccurate statements," or "moment[s] of animal exuberance." (*Caltrans, supra*, PERB Decision No. 304-S, proposed dec. at p. 25; *Rancho Santiago Community College District* (1986) PERB Decision No. 602 (*Rancho Santiago*), pp. 12-14; *Rio Hondo Community College District* (1982) PERB Decision No. 260, pp. 10-12; *Mt. San Antonio Community College District* (1982) PERB Decision No. 224, pp. 5-7; see also *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.* (1941) 312 U.S. 287, 293.) Because "not every impropriety committed during [otherwise protected] activity places [an] employee

beyond the protective shield of the [A]ct" (*Plaza, supra*, 360 NLRB No. 117), employee speech that is related to employer-employee relations will generally not lose its statutory protection *unless* it is so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" as to cause "substantial disruption of or material interference with" the employer's operations. (*Rio School District* (2008) PERB Decision No. 1986, pp. 13-14; *Pomona Unified School District* (2000) PERB Decision No. 1375, p. 16.)

By the same token, the MMBA's declared purpose of "promot[ing] full communication between public employers and their employees" cannot be effectuated, if the employer is not also free to speak its mind, without incurring liability for every impulsive act or intemperate remark by one of its managers or representatives. While criticism of management, including the integrity, fitness for duty, or leadership "style or skills of managerial personnel, is undoubtedly protected activity when it serves as a logical continuation of or invitation to participate in group activity, and so long as it is free of "actual malice" (*Caltrans, supra*, PERB Decision No. 304-S, proposed dec. at pp. 22-28; *Rancho Santiago, supra,* PERB Decision No. 602, pp. 12-14; *Regents of the University of California (Einheber)* (1997) PERB Decision No. 949-H, adopting ruling on motion to dismiss, p. 6; *cf. City of Alhambra* (2011) PERB Decision No. 2161-M, pp. 12-13), the law does not require a manager who is the object of such criticism to sit through it with unflinching stoicism, lest any discernible hint of anger, frustration, or disappointment become evidence of an unfair practice. (*Culver City Unified School District* (1990) PERB Decision No. 822 (*Culver City).*) Just as an employee may, in the course of protected activity, become "loud and boisterous" without losing the protection of the Act (*NLRB v. Air Contact Transport Inc.* (4th Cir. 2005) 403 F.3d 206, 211), so, too, may a

supervisor or other employer representative express anger or frustration without such expressions becoming evidence of an unfair practice.[5]

Although the MMBA includes no "employer free speech" provision akin to the Higher Education Employer-Employee Relations Act (HEERA)[6] section 3571.3 or NLRA section 8(c) from which the HEERA language is borrowed,[7] public employers subject to the MMBA may

[5] We do not suggest that the "free speech" rights of employers and employees stand on an equal footing. By enacting the National Labor Relations Act (NLRA), Congress sought to minimize "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association." (NRLA, §151; the NLRA is codified at 29 U.S.C. section 151 et seq.) Like the NLRA, California's collective bargaining statutes place limits on an employer's freedom of speech in recognition of the reality that an employer's words are not merely words; they are always, at least implicitly, backed up by the employer's power to control the terms and conditions of employment, a power not made available to employees or their representatives. Consequently, the surrounding circumstances in which an employer's statements are examined for any coercive effect must take into account employees' economic dependence on the employer for their livelihoods. (*Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M (*Coachella Valley*), pp. 20-21; *John Swett Unified School District* (1981) PERB Decision No. 188, pp. 5-8, adopting proposed dec. at pp. 27-28.) Because the employer has control over the employment relationship and knows it best, it is expected to make its views known without engaging in implied threats, brinkmanship or deliberate exaggerations likely to mislead employees. (*County of Riverside* (2010) PERB Decision No. 2119-M (*County of Riverside*), pp. 16-23; *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 619-20; *Federated Logistics & Operations* (2003) 340 NLRB 255, enforced (D.C. Cir. 2005) 400 F.3d 920, 925; and, *ITT Automotive v. NLRB* (6th Cir. 1999) 188 F.3d 375.)

[6] HEERA is codified at section 3560 et seq.

[7] HEERA section 3571.3 provides as follows:

> The expression of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute, or be evidence of, an unfair labor practice under any provision of this chapter, unless such expression contains a threat of reprisal, force, or promise of benefit; provided, however, that the employer shall not express a preference for one employee organization over another employee organization.

generally express or disseminate their views, arguments or opinions, which "shall not constitute, *or be evidence of, an unfair labor practice* ... unless such expression contains a threat of reprisal, force, or promise of benefit" or "express[es] a preference for one employee organization over another employee organization." (HEERA, § 3571.3; NRLA § 158, subd. (c), emphasis added; see also *Rio Hondo Community College District* (1980) PERB Decision No. 128 (*Rio Hondo*), pp. 18-20.)[8] The fact that a public agency's manager, or representative reacts negatively, or expresses his or her views on collective bargaining issues in an apparently unfiltered, emotional manner, does not by itself, constitute a threat of reprisal or force. (*Culver City, supra,* PERB Decision No. 822; *Bellevue Union Elementary School District* (2003) PERB Decision No. 1561 (*Bellevue*), adopting proposed dec. at pp. 37-38.)

As noted in the proposed decision, an employer is not required to remain neutral on employment matters, particularly in the context of bargaining or concerted activities. (*Bellevue, supra*, PERB Decision No. 1561.) Thus, in *Bellevue* and other cases, the Board found employer statements that were critical of the union's bargaining position and/or bargaining tactics permissible expressions of speech. (*Oak Park Unified School District* (1998) PERB Decision No. 1286; *Rio Hondo, supra,* PERB Decision No. 128.) By contrast, employer statements that disparage protected activity or the collective bargaining process itself, by suggesting that

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Section 8(c) of the NLRA (§ 158(c)) provides as follows:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit

[8] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the NLRA and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.) Agency and court interpretations of one California labor relations statute may also be instructive for interpreting other California statutes with similar provisions or purposes. (*Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617, 623-624.)

unionization will result in a loss of pay or benefits, or that use of the representative's grievance procedure is futile, reasonably tend to discourage participation in protected activity and thereby interfere with the rights of employees and/or employee organizations. (*County of Riverside, supra*, PERB Decision No. 2119-M, pp. 18-20; *The Regents of the University of California* (1997) PERB Decision No. 1188-H, pp. 21-26; *Office of Kern County Superintendent of Schools* (1985) PERB Decision No. 533, adopting proposed dec. at pp. 63-64;)

Similarly, PERB has recognized an employer's interest "in assuring that management and its employees are free from personal attack." (*Caltrans, supra*, PERB Decision No. 304-S, proposed dec. at p. 28; *Pittsburg Unified School District* (1978) PERB Decision No. 47.) While employees have a protected right to disparage management in general and the employer's representatives in particular (*Caltrans*, at p. 28), that right does not prohibit the employer from responding or the individuals in question from reacting negatively to such criticism, notwithstanding its protected status. (*Culver City, supra*, PERB Decision No. 822.) In *Culver City*, the charging party, an employee who had openly campaigned with the exclusive representative to obtain better health and retirement benefits for current and retired employees, made statements at a public meeting about a district official which, based on misinformation, questioned the official's veracity. After the meeting, the official approached the employee and, visibly upset, told the employee, "Don't ever call me a liar again in public." The official then warned the employee that, "You had better be in my office next week." Because the official's statements were made in response to a perceived personal attack on his veracity and integrity, the Board concluded that the official's comments would not reasonably tend to coerce or intimidate an employee in the exercise of protected activities. (*Id.* at p. 3.)[9]

[9] Employer statements alleged as interference violations are also relevant for inferring unlawful motive in support of a retaliation case. (*City of Torrance, supra*, PERB Decision No. 1971-M, p. 21, fn. 13.)

Thus, the employee's activity did not lose its protected status, but neither did the employer commit an unfair practice when its official responded to the perceived "personal" attack on his character.

The facts of the present case are analogous. Muscat's criticism of Russo's "management style," which occurred in the context of negotiations, was undoubtedly protected activity and the fact that it included an actual or perceived "personal" attack on Russo did not strip it of that protection. (*Thor Power Tool Co.* (1964) 148 NLRB 1379, 1380, *enforced* (7th Cir. 1965) 351 F.2d 584 [union steward's participation in grievance meeting does not lose statutory protection, despite "personal attack" which likened supervisor to a "horse's ass"].) At the same time, Russo was understandably frustrated and angered by that criticism and felt the need to respond in some manner. However, even accepting testimony that he "slammed" the door behind him as he left the room, his conduct on this occasion contained no express or implied threat of reprisal or promise of benefit. Under the circumstances, the fact that Russo was visibly angered or took "personal" offense to the comments of Local 21's spokesperson have little, if any probative value as to whether he harbored anti-union animus.

Of course, the Board may, and should, look beyond the ostensibly "personal" nature of an employer's comments or conduct to the surrounding circumstances in which they occurred to determine whether, when viewed in context, they convey "a threat of reprisal, force or promise of benefit" or "express[es] a preference for one employee organization over another employee organization." (*City of Torrance, supra*, PERB Decision No. 1971-M, pp. 20-21; *Los Angeles Unified School District* (1988) PERB Decision No. 659 (*Los Angeles*), pp. 9-10.) In the present case, however, we find nothing inherently coercive or threatening in Russo's spontaneous anger and reaction to Muscat's comments at the December 11, 2009 meeting.

Although our cases recognize that walking out of negotiations or a grievance meeting that is still in progress may be coercive, and hence, evidence of unlawful motive, such cases typically involve an employer's entire bargaining team leaving negotiations or its designated representative walking out of a grievance meeting, so that no further discussion is possible. (*San Bernardino City School District* (1998) PERB Decision No. 1270, adopting proposed dec. at p. 85; *California State University, Hayward* (1987) PERB Decision No. 607-H, pp. 16, 20; see also *San Ysidro School District* (1980) PERB Decision No. 134, considering but not deciding issue.) In the present case, Russo was indisputably the moving force behind the issues under discussion at the December 11, 2009 meeting, and departure was therefore noteworthy. However, Holtzman, and not Russo, was the City's designated spokesperson in these negotiations and there is nothing in the record to indicate that Holtzman lacked authority to continue the discussion in Russo's absence. Even the various union witnesses who testified about the meeting admitted that the discussion continued for some time, even after Russo's abrupt exit. We therefore agree with the City that, the fact that Russo took "personal offense" to Local 21's bargaining conduct, including the remarks of Local 21's spokesperson, does not lend support to the ALJ's conclusion that the City, by its agent Russo, acted with an unlawful motive when it selected Lewis for layoff.

The City is thus correct that, in the cases relied on by the ALJ to support his finding that Russo harbored animus against Local 21 and, by extension, against Lewis, the Board found evidence of animus, not solely from the "angry," "disappointed" or other "personal" reaction of the employer's representative, but from the individual's negative emotional reaction to protected conduct *in combination with other facts* that suggested an express or implied threat of reprisal or promise of benefit. Typically, the employer's agent not only exhibited anger, frustration, or disappointment in response to protected conduct, but then went out of his or her way *to*

communicate that anger, frustration or disappointment *to employees or their representative* in a manner was at least impliedly coercive.

For example, in *Trustees of the California State University (San Marcos)* (2009) PERB Decision No. 2070-H (*CSU San Marcos*), the Board found evidence of animus from testimony that a supervisor took complaints filed against him "personally," *and* that he that made it a point *to convey that displeasure directly to the grievant*, in addition to making other anti-union statements whose likely effect was to discourage an employee from pursuing a grievance and from any further contact with the union's representative. The manager's statement that he took the grievance "personally" not only occurred outside the context of a grievance meeting, but when the grievant was unaccompanied by his representative, *i.e.*, in a setting in which the employer had no immediate need or legitimate reason to discuss the grievance at all.

Likewise, in *City of Torrance, supra,* PERB Decision No. 1971-M, the mayor-elect of a city expressed *to the union president* his "personal disappointment" that she had questioned him at a city council meeting about alleged misconduct. He also told her that he would have a difficult time working with her organization, so long as she remained president. (*Id.* at pp. 19-20.) The Board reasoned that, while, "[o]n their face, these statements may appear to be addressed to [the union president] personally," when viewed in the context of other statements by the major-elect, including similar statements to other union officials, it was apparent that "he also harbored animus toward [the union] because of its active campaign against him in the mayoral election." (*Id.* at pp. 20-21.) The fact that the mayor-elect was "angry" or "disappointed" by employees' protected conduct is of less significance than the fact that, in each instance, *he chose to communicate* his anger or disappointment to those officials along with his express or implied threat of reprisal that, once in office, he would not work with the union because of its opposition to his candidacy and to issues that he supported.

In *Jurupa Community Services District* (2007) PERB Decision No. 1920-M (*Jurupa*), the Board adopted the ALJ's finding of nexus, which was based in part on a manager's statements aimed at dissuading an employee from filing and pursuing a grievance. The manager testified that he was "upset" by the employee's "attitude" and by his determination to pursue a grievance, which the manager regarded as a failure "to follow [the] proper procedures," i.e., going through the chain of command *before* filing a grievance. (*Id.* adopting proposed dec., at pp. 9, 15-16.) It is well-settled that employer statements aimed at discouraging employees from filing or pursuing a grievance have a reasonable tendency to interfere with, coerce or restrain employees in the exercise of protected rights. (*Empire Union School District* (2004) PERB Decision No. 1650, p. 4; *Los Angeles, supra,* PERB Decision No. 659, pp. 9-10; *Clinton Foods, Inc.* (1978) 237 NLRB 667; *Schneider's Dairy, Inc.* (1980) 248 NLRB 1093.) In particular, statements to the effect that an employee should "go through the chain of command" before resorting to the collectively-bargained grievance procedure, or that imply an employee may achieve a better result by approaching management "directly" *i.e.*, without union representation, constitute unlawful threats of reprisal and/or promises of benefit. (*Southern California Gas Co.* (1980) 251 NLRB 922; *Burgess Mining & Construction Corp.* (1980) 250 NLRB 211.) Thus, *Jurupa* does not squarely address the question of whether a manager's negative emotional reaction to protected conduct may, by itself, constitute evidence of unlawful motive, since in *Jurupa*, as in *CSU San Marcos* and *City of Torrance, the manner* in which the "personal" reaction of the employer's agent was communicated to an employee *also* involved express or implied threats of reprisal and/or promises of benefit. (*Jurupa, supra*, PERB Decision No. 1920-M, adopting proposed dec., at pp. 9, 15-16.)[10]

[10] The other case relied on by the ALJ, *Sonoma County Junior College District* (1991) PERB Decision No. 895 (*Sonoma*) presents a somewhat different issue. In *Sonoma*, the Board found evidence of an administrator's "aversion toward collective bargaining" from his own

The above cases thus stand for the proposition that expressions of anti-union sentiment by an employer or one of its agents may support an inference of unlawful motive in a discrimination or retaliation case. (*City of Torrance, supra,* PERB Decision No. 1971-M, p. 19, citing *Jurupa,* at pp. 19-20; see also *Coachella Valley, supra,* PERB Decision No. 2031-M, pp. 20-21 [manager's statement conveying his "disappointment" *to employees* that they were considering union representation *and* suggesting that layoffs would result if the organizing campaign succeeded].) The fact that anti-union sentiment is expressed in "personal" terms, such as a manager's anger, frustration or disappointment in employees or their representative for engaging in protected activity does not establish that an employer's "personal" or unfiltered emotional reaction, by itself, supports an inference of unlawful motive, particularly in the present circumstances where it is difficult, if not impossible, to disentangle anti-union sentiment from an understandable "personal" reaction to being criticized as an inept manager.

While we thus do not regard Russo's angry and "red-faced" outburst as itself evidence of unlawful motive, we nonetheless agree with the ALJ's conclusion that, when considered as a whole, the record supports a finding of nexus in this case, because there was compelling evidence of Russo's anti-union animus on other occasions. In particular, we agree with the

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testimony before the ALJ that he "was not pleased" by a union's organizing drive because he feared that collective bargaining would change the administration's "excellent" working relationship and rapport with the faculty. Although there was no evidence that the administrator communicated this aversion to employees, his testimony before the ALJ was deemed sufficient evidence that his fear was directed at the collective bargaining process itself.

In the present case, the ALJ relied on evidence of Russo's conduct in negotiations, including the testimony of various witnesses that he became visibly "upset" and "red-faced" at Local 21's opposition to the minimum billable hours proposal that he championed. Although Russo admitted that he was "offended" by Local 21's characterization of him as "an evil monster," unlike the administrator's "fear" in *Sonoma,* Russo's offense was not directed against the collective bargaining process itself, but at what he regarded as unfounded and unnecessary personal attacks on his management-style, character and history of public service.

ALJ that Russo's decision to eliminate the AWS and telecommuting programs, on the heels of Local 21's rejection of Russo's minimum billable hours proposal, was evidence of animus towards Local 21. The City argues that, although Russo could have discussed with Local 21 his concerns about the AWS and telecommuting programs before eliminating them, he was under no legal obligation to do so, and that it was therefore improper for the ALJ to rely on the fact that Russo suddenly and unexpectedly eliminated these programs to support a finding of unlawful motive. In support of its argument, the City cites to section 13.2 of the parties' MOU, which states, in relevant part, that, "The City Attorney or designee may cancel at any time alternative work scheduling for any or all affected department employees."

Although Russo's elimination of the AWS and telecommuting programs is not itself a timely adverse action before the Board, the same general principles and mode of analysis may be used to determine whether that action should be considered as evidence in support of a finding of unlawful motive. Even accepting, for the sake of argument, the City's characterization of this language as clearly and unambiguously permitting it to act unilaterally here, the City's argument nonetheless misses the mark. The point of the "nexus" analysis in a discrimination case is to determine whether a particular adverse action was unlawfully discriminatory, that is to determine "the true, underlying reason for the [action]." (*Sunnyside Nurseries, Inc. v. ALRB* (1979) 93 Cal.App.3d 922, 934-935, *hg. den.*) As we recently observed in *Palo Verde, supra*, an employer defending against a prima facie case of retaliation cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. (*Palo Verde, supra*, PERB Decision No. 2337, pp. 31-32.)

The fact that the parties *may* have included language permitting the City to rescind the AWS does not dispose of the issue, which is whether, in this case, the City acted with an

unlawful purpose. (*Berkeley Unified School District* (2003) PERB Decision No. 1538; *San Leandro Unified School District* (1983) PERB Decision No. 288, p. 13) MMBA sections 3502 and 3502.1 prohibit public agencies from taking certain actions, including actions which are otherwise entirely lawful, when undertaken for an unlawful retaliatory purpose. (*City of Campbell, supra,* 131 Cal.App.3d 416.) Even where it has unquestioned discretion to act, a public agency is not free to exercise that discretionary authority in a manner that violates the rights of employees or employee organizations. (*City of Monterey* (2005) PERB Decision No. 1766-M (*City of Monterey*), p. 12; *McFarland Unified School District v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166).

Thus, even assuming the City could have rescinded the AWS for a variety of legitimate reasons, or for no reason at all, at any time it chose, we agree with the ALJ that the particular timing and other circumstances of Russo's decision supports a finding of animus. As the ALJ observed, the parties had been in negotiations for more than a year, "an obvious forum" for Russo to raise concerns about the lack of attorney availability during regular business hours. Yet, it was only after the MOU was concluded, without the billable hours proposal demanded by Russo, that he chose to exercise the discretion, purportedly afforded to him by the MOU, to eliminate the AWS and telecommuting programs.

Although not discussed by the ALJ, there was also considerable evidence of the City's conduct during negotiations with Local 21 over the proposed billable hours requirement and the restoration of the AWS that was relevant to the issue of nexus. PERB follows private-sector precedent in considering evidence of events lying outside the six-month statute of limitations to "show the true character" of events within the statute of limitations, including whether a respondent acted for an unlawful purpose in cases where motive is an issue. (*Lemoore Union High School District* (1982) PERB Decision No. 271, adopting *International Assn. of*

Machinists v. NLRB (1960) 362 U.S. 411 (*Machinists*); *Trustees of the California State University* (2008) PERB Decision No. 1970-H, p. 20.) Such evidence of unlawful motive may include allegations included in a prior unfair practice charge (*Lake Tahoe Unified School District* (1993) PERB Decision No. 994), or facts which, though not alleged in a previous charge, would arguably constitute an unfair practice, if they had been alleged in an unfair practice charge. (*Rainbow Municipal Water District* (2004) PERB Decision No. 1676-M (*Rainbow*), p. 1, adopting proposed dec. at pp. 4, 10; *International Union of Operating Engineers, Local 571* (1979) 241 NLRB 1066, affirmed (8th Cir. 1980) 624 F.2d 846, 847.) Although such evidence cannot be used to establish an independent violation, because the underlying conduct is outside the limitations period, it can, nevertheless serve as background evidence to "shed light on the true character" of the respondent's motive for any conduct that is part of a timely-filed allegation. (*California State University, Hayward (Dees)* (1991) PERB Decision No. 869-H *(CSU Hayward)*, p. 23, fn. 13; *North Sacramento, supra,* PERB Decision No. 264, pp. 11-12; *San Diego Unified School District* (1991) PERB Decision No. 885 (*San Diego*), p. 38.)

The various witnesses' accounts and the exhibits introduced at trial may be grouped into three categories, corresponding roughly to evidence that the City interfered with employee and organizational rights by making coercive statements across the table to intimidate Local 21's negotiators and by subjecting bargaining unit members to increased scrutiny and other more onerous working conditions as a reprisal for Local 21's bargaining position; that the City's negotiators by-passed Local 21 or used direct communications with unit employees to undermine Local 21's authority; and, that the City's conduct suggests bad faith in negotiations with Local 21 over the billable hours proposal and restoration of the AWS.

Because a substantial part of Lewis's case consisted of evidence of the City's conduct in negotiations, which she contends demonstrates animus, we now consider this evidence. The

City disputed some of this evidence and certainly the inferences to be drawn from it. The City's closing brief before the ALJ categorically dismissed it as "nothing more than an attempt to strengthen a weak case by bootstrapping bad faith bargaining into Lewis's retaliation claim." However, while the City interposed a number of objections to the form of the questions by which witnesses were asked about these matters, it never objected that evidence of conduct by Russo or other agents of the City that could be characterized as implied threats during negotiations, direct dealing, or bad faith bargaining was irrelevant or otherwise categorically improper for consideration by the ALJ to show that Lewis was laid off for an unlawful, retaliatory purpose. Accordingly, we regard this evidence as appropriate and probative "background evidence" used to show unlawful motive (*Trustees of the California State University, supra,* PERB Decision No. 1970-H, adopting proposed decision at p. 20), and we consider, in turn, each of the three categories identified above.

Threats to Impose More Onerous Working Conditions in Response to Protected Activity

Although threats or other coercive statements are analyzed as "interference" violations for which no showing of unlawful motive is required, it is well-settled that collateral evidence of an employer's coercive statements or conduct, even when occurring outside the six-month limitations period, may be properly considered as evidence of antiunion motivation for allegations that are within the applicable limitations period. (*E.L. Jones, Dodge, Inc.* (1971) 190 NLRB 707, 708, fn. 6.)

Rossi also testified that, in a meeting in Russo's office, that occurred shortly before Russo eliminated the AWS, a "lively exchange" took place between Local 21's negotiators and Russo over the billable hours issue. According to Rossi, Russo became "fairly angry" and, at one point, said that if he did not get what he wanted from the negotiations, he "knew how to play

the game," and that he would have to look at other means or other measures, which Rossi interpreted as an implied threat to impose less favorable working conditions.

Local 21 Staff Representative Victoria Carson (Carson) was present at the same meeting. She testified that Russo seemed "upset" and "angry" about Local 21's rejection of the billable hours proposal, that he "made it clear he was going to fight about it," that "he was going to get it," that "he was going to go to the press." According to Carson, Russo told those present that he "knew all about the tactics that the Union was going to use, and he was going to fight us." Former DCA and former Local 21 bargaining team member Kandis Westmore (Westmore) similarly recalled that Russo told the attorneys present that he would carry out this fight in the media, and that "the public is not going to be sympathetic to lawyers."

Rossi also testified, without contradiction, as to increased scrutiny of attorneys' hours of work. The City's stated justification for the elimination of the AWS and implementation of new work rules was that some attorneys were not putting in the requisite hours. According to Rossi, the requirement that attorneys adhere to a set schedule and record their hours of work "was such a punitive kind of idea that the only explanation was that [Russo] was going to use that to strong arm the Union into agreeing to his billable hours proposal in return for getting rid of that policy, because it was so onerous." Rossi testified, without contradiction, that Barbara Parker informed him that he would be suspended if he did not submit and adhere to a set work schedule.

Whether analyzed as interference or discrimination, PERB and California Courts interpreting the MMBA have held that imposing more onerous working conditions on an entire group of employees, or making threats to do so, because of the concerted activity of some among them is an unfair practice. (*Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M, p. 23; *Cupertino, supra*, PERB Decision No. 572, p. 6; *City of Campbell,*

supra, 131 Cal.App.3d 416, 422-425; *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S.)

Although Russo, the son of a labor union official, denied any retaliatory purpose, we credit the essentially consistent testimony of Rossi, Carson and Westmore over that of Russo regarding his reasons for eliminating the AWS.[11] Because they are closely related in time and subject matter to the decision to eliminate the AWS, whose timing we also found suspicious, we consider the above testimony of Rossi and other witnesses for Lewis regarding Russo's implied threats to resort to unspecified "other measures and other means" if Local 21 would not abandon its opposition to the billable hours proposal to constitute credible evidence of anti-union animus and thus of unlawful motive in dealing with Lewis.

The City's Direct Communications With Unit Members Regarding its Proposals

As suggested above, an employer may communicate directly with represented employees about employment matters, though it may not use such communications to alter or waive rights on negotiable subjects, or to undermine the authority of the representative. (*Omnitrans* (2010) PERB Decision No. 2143-M; *City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M.) Lewis put on testimony and documentary evidence tending to show the following: On or about December 16, 2009, Russo sent a letter, ostensibly addressed to Muscat, but in fact broadcast to all bargaining unit members via email, which characterized Local 21's negotiators as "very unprofessional and disrespectful" and which then presented the City's most recent proposal on the billable hours issue. It is undisputed that the proposal had not been previously presented to Local 21's negotiators.

[11] Although more remote in time from the events surrounding Lewis's layoff, Rossi also testified that "early on" in Russo's tenure as City Attorney, he had expressed his displeasure with the fact that attorneys were unionized at all, because, in Russo's view, they could not strike without abandoning their clients and thereby jeopardizing their own licenses to practice.

On December 18, 2009, Muscat responded by denying Russo's accusations of "unprofessional and disrespectful" conduct and by requesting that Russo not engage in "unlawful direct dealing" with Local 21's membership. Specifically, Muscat's letter requests that Russo "refrain from communicating confidential bargaining proposals or divisive and inaccurate cover letters to the membership or third parties." Despite this request, on January 22, 2010, Holtzman sent a similar letter, addressed to Muscat but forwarded to the entire unit, which communicated the City's "last best final offer" on the billable hours subject. Although Russo and Holtzman denied any intent to undermine or disparage Local 21, they did not deny that both communications in question were forwarded to unit employees, or that they were not first provided to Local 21's designated representatives.

Although an employer may generally use direct communications with unit members to make accurate reports as to what has already occurred in negotiations (*Muroc Unified School District* (1978) PERB Decision No. 80), presentation of its proposals simultaneously to employees and their bargaining representative, particularly when such communications are prefaced with comments about the "unprofessional and disrespectful" character of the representatives, suggests that their purpose was as much to undermine the authority of the representative as to engage in the give-and-take of collective bargaining. (*General Electric Co.* (1964) 150 NLRB 192, 195, enforced (2d Cir. 1969) 418 F.2d 736, cert. denied (1970) 397 U.S. 965.) Although direct dealing is not an unfair practice that requires a showing of unlawful motive, we find the evidence, particularly the documentary evidence, of the City's direct communications with unit members support a finding of anti-union animus.

Evidence of Bad Faith Bargaining

Although the indicia of bad-faith bargaining are many, the ultimate test is whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate

negotiations or undermine the authority of the bargaining representative. (*City of San Jose* (2013) PERB Decision No. 2341, pp. 19-22.) In addition to the above evidence concerning direct communications with unit members, Lewis has put on evidence tending to show that the City conditioned further meetings on Local 21's abandonment of its bargaining position, that it engaged in dilatory tactics and that it failed to provide its bargaining representatives with sufficient decision-making authority to carry out meaningful negotiations.

Rossi testified that, following Russo's abrupt departure from the December 11, 2009 meeting, "[t]here wasn't much of a discussion," and that the meeting "ended fairly soon." Kathleen Salem-Boyd, president of DCA Chapter of Local 21, testified that, after Russo "stormed out of the room," Holtzman remained at the table and the two sides "talked a little longer" before the meeting ended.

In the ensuing weeks, Local 21 requested that the parties resume meeting on the billable hours proposal resume with Russo present because it was apparent to all that Russo was the moving force behind the proposal. As Muscat described it, the billable hours proposal "was a priority for Mr. Russo, but not for anybody else." However, Muscat testified that the City refused to conduct further meetings on the subject, unless Local 21 agreed to Russo's proposal. Muscat testified "We understood from Mr. Holtzman that we had to, as condition for [further] meeting[s], agree to Mr. Russo's billable hours proposal, at least conceptually, as a condition to meet and have the direct discussions with him." According to Muscat, "setting a pre-condition like that left little to discuss, frankly," because "[n]obody does that, to my knowledge."

Lewis also testified that, at one point in the negotiations, Sanchez attended a meeting in Russo's absence to respond to Local 21's questions about the billable hours proposal but that, Sanchez was unable to answer all of the questions, and from her responses, "it sounded like ... the only person who could answer them was the City Attorney," i.e., Russo.

The City's correspondence on the subject states that, "Mr. Russo is willing to meet with the attorneys to discuss this matter further but does not believe such a meeting would be productive if ... [Local 21] is unalterably opposed to any minimum billable hours requirement." Rossi testified that, by late 2009 or early 2010, Local 21 was not opposed in principle to *some* minimum billable hours requirement, and that its objective was to ensure that any number ultimately arrived at took account of the considerable leave time of veteran attorneys.

We conclude that, the above evidence does not amount to credible evidence of the City's unlawful motive. Russo's sudden departure from the December 11, 2009 meeting did not put an immediate end to all discussion, nor so frustrate negotiations as to suggest that the City sought to evade any agreement on these issues. (*City of San Jose, supra,* PERB Decision No. 2341.) The parties "talked a little longer" before the meeting ended and eventually agreed to resume negotiations through alternative methods of communication, including telephone and electronic mail. Thus, the evidence does not suggest that Russo's absence from in person meetings caused negotiations to breakdown.

Additionally, parties are generally free to designate their own representatives and to decide the composition of their respective negotiating teams. (*McPherson, supra,* 189 Cal.App.3d 293, 312; *Westminster School District* (1982) PERB Decision No. 277, p. 7; *State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1305-S, pp. 7-8; see also *City of Monterey, supra,* PERB Decision No. 1766-M.) Although it was understandable, under the circumstances, that Local 21 would wish to have Russo present for any negotiations aimed at resolving that issue, the City was under no legal obligation to comply with that request, since neither side may dictate the composition of its counterpart's representatives. While Russo's input was important, even essential, to any lasting resolution of the billable hours

issue and the restoration of the AWS, his presence at negotiations was not required because he was not the City's designated spokesperson.

Finally, there was also undisputed evidence that, as a member of Russo's "management team," Sanchez participated in managerial decisions, including layoff decisions, and that she was a member of *the City's* bargaining team in negotiations with Local 21, while *simultaneously belonging to a bargaining unit represented by Local 21.* Offering or conferring promotional opportunities or other employment benefits to an employee to work against an employee organization is an unfair practice in violation of the MMBA. (*Rainbow, supra,* PERB Decision No. 1676-M, p. 1, adopting proposed dec. at pp. 4, 10; see also *NLRB v. Exchange Parts Co.* (1964) 375 U.S. 405, 409-10.) Although the evidence of Sanchez's "dual status" was not developed in any detail, it was, nonetheless, undisputed. Taken together with the above evidence, it is sufficient to support a finding that Russo was willing to disregard and even disparage the principles of collective-bargaining when he regarded them as inconvenient.

Thus, on the record considered as a whole, we accept the ALJ's findings that Russo harbored animus and his conclusion that Lewis's sufficiently proved some degree of "nexus" between her protected activity and her layoff. We turn next to consider Lewis's exceptions.

LEWIS'S EXCEPTIONS TO THE ALJ'S FINDINGS OF FACT

Whether the Elimination of Lewis's Position, Which was Fully Funded by Redevelopment Money, Could Legitimately Be Used to Close a Budget Shortfall in the City's General Fund

Lewis's first exception concerns the manner in which attorney positions in the OCA were funded and selected for elimination. She cites evidence that her position in the Redevelopment unit was fully funded by redevelopment money, a fact which, she contends, undermines the ALJ's finding that there existed a legitimate budgetary reason to select Lewis for layoff. Lewis does not dispute the existence of a severe budget shortfall in the City's general fund in early 2010. Rather, she argues that, because her position was fully funded by a

funding source that matched the kinds of duties she typically performed, her position would not have been eliminated, but for a non-budgetary and therefore pretextual reason. The problem with this exception is that it does not address the ALJ's findings regarding the peculiarities of the OCA budgeting process, and the fact, based on the undisputed testimony of Russo and Sanchez, that OCA never considered how or whether a particular attorney's position was funded when making a selection for layoff decision.

The ALJ found that OCA operations were funded from several sources, including the City's general, liability, recycling, sewer, workers' compensation, redevelopment, and retirement funds. While every OCA position was attached to a specific funding source, the source was often insufficient to cover all positions performing the kind of work for which such funds were designated. Consequently, OCA would frequently "borrow" money from another fund or from multiple funds to cover all costs associated with a particular position. According to Sanchez, the OCA budget typically "looked different than the way the services were being performed."

For example, at the time of the hearing, Rossi was a DCA in the Redevelopment unit of the Advice division. Although Rossi's position was funded in part by redevelopment agency funds, OCA also used money from various retirement funds to cover the remaining costs associated with his position, even though Rossi was not assigned to do any retirement fund work. Similarly, at the time of her layoff, Lewis's position was funded entirely through federal funding and other redevelopment grant money. Although she worked on affordable housing projects, a kind of work for which such funds were designated, she testified that she also worked on commercial development projects and real estate transactional work, which are not "redevelopment" projects.

Accordingly, the fact that the funding sources for Lewis's position did not decrease, or the fact that these funding sources "matched" the kind of work she performed, do not support her argument that she should not have been laid off. Just as attorneys did not necessarily perform duties that matched their funding source(s), neither were their positions "tied" to their designated funding sources, such that an attorney in, say, the Redevelopment unit, would only be laid off in the event of a decline in redevelopment funding for his or her position. Put another way, none of the funding sources were immune from being raided to backfill a shortage in the City's general fund, which, by all accounts, was experiencing a severe budget shortfall in early 2010. Sanchez testified, without contradiction, that, after Lewis was laid off, her position was "moved" to the general fund to reflect the budget reductions ordered by the City Council, despite that Lewis's position was previously funded by redevelopment monies. Thus, the viability of the funding sources for Lewis's position, or whether they "matched" the kinds of duties she performed ultimately had no bearing on whether she was selected for layoff. We therefore reject this exception.

Whether Lewis's Duties Were Sufficiently Similar to Rossi's that She, Rather than Rossi, Would Have Been Retained in a Non-Discriminatory Layoff Decision

Lewis next argues that her duties were sufficiently similar to those performed by Rossi that, with minimal training, she could have performed the duties of his position. In support of this exception, she cites her own testimony, and the testimony of Rossi, that, in addition to her affordable housing work, Lewis also worked on commercial and economic development projects that were similar in type and scale to the kinds of projects included in Rossi's duties.

As with Lewis's first exception, the evidence she cites here does not ultimately affect the ALJ's finding that she would have been selected for layoff, regardless of her protected activity. Even accepting as true that some of her duties were similar to those performed by Rossi, consistent with Rossi's testimony, the ALJ found that *some* amount of additional

training would be necessary for Lewis, or anyone else in the OCA, to take over Rossi's work on the City's "largest and most politically controversial" projects and its redevelopment plan.

Although the City was not required by statute, contract or established practice, to follow seniority, or even consider it as one among other factors, when making its layoff decisions, the record indicates that Rossi was, by far, the more senior, and presumably more experienced, of the two attorneys, which played into Russo's assessment that Rossi was less dispensable than Lewis.

Lewis's task of showing that Russo's selection of Lewis, as opposed to Rossi, was pretextual is further complicated by the fact that both were members of Local 21's bargaining team. Indeed, the City correctly points out that, after December 2009, Rossi, rather than Lewis, was the most visible spokesperson for Local 21 regarding the minimum billable hours proposal and the related grievance contesting the City's elimination of the AWS and telecommuting programs. If Russo were motivated solely or even primarily by a desire to retaliate against Local 21 for opposing the minimum billable hours proposal, he was just as likely, or perhaps even more likely, to have laid off Rossi rather than Lewis.

However, the absence of retaliatory action against other union adherents does not disapprove a prima facie showing of retaliation against the complainant. A discriminatory motive, otherwise established, is not disapproved by proof that the employer did not attempt to weed out every union adherent. (*Transportation, supra,* PERB Decision No. 459-S; see also *Marin Community College District* (1980) PERB Decision No. 145 [evidence of unlawful motivation found where highly visible union activist disciplined for engaging in same conduct as less visible unionist who was not disciplined].) Likewise, an employer need not discharge the most vocal union supporter for PERB to conclude that its selection process was tainted by an unlawful retaliatory purpose. Sufficient damage may be done by selecting a less prominent, but

more vulnerable, candidate. (*Brown & Connolly, Inc.* (1978) 237 NLRB 271, 285, enforced (1st Cir. 1979) 593 F.2d 1373; *Brookfield Dairy, a Division of Hawthorne Mellody, Inc.* (1983) 266 NLRB 698, 699.)

The Board has therefore considered the possibility that Russo's intent was to retaliate against Local 21 for its opposition to the billable hours proposal, and that he was less concerned with *which* officer of the organization was targeted, than with conveying a message to Local 21 and to the entire unit of employees it represented, that if he did not get his way, "there would be consequences." Indeed, there is some evidence in the record to support this theory. The extraordinary, mid-cycle budget cuts imposed in April 2010 prompted the first round of layoffs after the December 11, 2009 meeting at which Russo expressed his frustration at Local 21 by walking out of the negotiations. In that round of layoffs, Russo selected Llamas, another member of Local 21's bargaining team who had been present at the acrimonious December 11, 2009 meeting, and in the following round of layoff decisions, in June-July 2010, Russo selected Lewis. There was also evidence that Russo communicated directly with the entire unit, not only to make his case for the billable hours requirement, but also to undermine the authority of Local 21's leadership, whom Russo criticized as "unprofessional."

The ALJ found that, of the 17 attorney positions eliminated through layoffs and attrition before Lewis's layoff in August 2010, only 2 of Local 21 officers — Tang and Llamas — were affected. However, the fact that Russo did not have history of laying off union officers or activists *before December 2009* is of little probative value for evaluating whether he chose Lewis for layoff in 2010 for the unlawful discriminatory purpose of retaliating against Local 21 for opposing the minimum billable hours proposal. Where an employer's decision to lay off a group of employees is unlawfully motivated by the union activism of some members of the group, the layoff is unlawful as to the entire group. (*Cupertino, supra,* PERB Decision No. 572.)

Despite this evidence, the record is insufficient to support a group retaliation theory, since no evidence was presented to suggest that the layoff of Llamas was retaliatory and, to the extent any evidence was presented on this subject, it pointed to the opposite conclusion. Indeed, it was undisputed that, because Llamas worked in the litigation division, where attorneys were relatively easier or less costly to replace, Russo's selection of Llamas for layoff was not taken for an unlawful, discriminatory purpose but was consistent with Russo's asserted practice of balancing the divisional "equities" with considerations of who would be least missed. Thus, even assuming the evidence establishes that the layoff of Llamas was motivated in part by his protected activity, an issue that is not directly before the Board, the City's conduct would still be lawful, if the City could demonstrate that it both had, and relied on, another, lawful reason, such that it would have ultimately taken the same action, regardless of the employee's involvement in protected activity. (*Bellevue, supra,* PERB Decision No. 1561; *Coast Community College District* (2003) PERB Decision No. 1560; *San Diego, supra,* PERB Decision No. 885; *California State University (Hayward), supra,* PERB Decision No. 869-H; *Culver City, supra,* PERB Decision No. 822; *The Regents of the University of California (U.C. San Diego)* (1983) PERB Decision No. 299-H; *San Leandro Unified School District* (1983) PERB Decision No. 288.)

Thus, on the record before us, we agree with the ALJ that the City would have retained Rossi, rather than Lewis, regardless of Lewis's protected activity. In support of this finding, we note that Rossi's involvement in protected activity was at least as prominent as Lewis's during the period in question, and if Russo's layoff selection decision had been motivated primarily by a desire to retaliate against Local 21, he was at least as likely to have selected Rossi rather than Lewis. Additionally, there is insufficient evidence to conclude that the City

would not have taken the same action of laying off Llamas, and then Lewis, in 2010, notwithstanding their participation on Local 21's bargaining team.

Whether, to What Extent, and When Russo Advised the Divisional Heads of His Decision to Layoff Lewis

Lewis also contends that the proposed decision inaccurately states that Russo consulted with the heads of the Litigation and Advice divisions, including Lewis's supervisor, about his decision to select Lewis for layoff before it became final. She argues that his testimony "merely described generalized arguments [that] he 'imagined' would come from the executive team about where layoffs should occur," but that "at no time" did Russo "state[] that he consulted with the division heads when making the ultimate decision to layoff off Lewis." According to Lewis, "the evidence reveals that Russo did not select the Advice unit for layoff due to any conversations with the division heads regarding their divisional needs and instead made the decision based on personal motives."

This exception appears to be based on a misreading of Russo's testimony. In describing his conversation with the management team, Russo stated that, based on his previous testimony "you" or "one" could "imagine" the respective arguments put forward by the divisional heads as to the where the staffing cuts ordered by the City Council should take place. Russo did not, as Lewis contends, testify that he only "imagined" such arguments.

More importantly, even if we were to accept Lewis's reading of the record on this point, it would not affect the result of the proposed decision. Lewis does not dispute the ALJ's finding that DCAs are not part of the civil service, nor that the parties' MOU includes no language mandating that layoffs occur by inverse seniority order or by any other criteria. In the absence of any evidence to the contrary, Lewis must also concede that, as City Attorney, Russo was vested with complete discretion to select Lewis, or any other attorney or staff member for layoff, so long as such selection was not made for an unlawful discriminatory

purpose. Whether Russo merely described to the divisional heads, in general terms, the possible combinations of positions to be affected by layoffs, or whether he specifically advised them that he intended to layoff Lewis, is of little consequence, since the City concedes that Russo was the person ultimately responsible for the decision to layoff Lewis and that, in fact, Russo and Russo alone made that decision. We therefore reject this exception as well.

Whether Russo's Decision to Layoff from the Advice Division Rather than Litigation was Pretextual

Lewis next contends that Litigation, rather than the Advice division, where Lewis (and Rossi) worked, was the more appropriate, non-discriminatory place for Russo to look for staffing reductions in 2010, given his own testimony that litigation work was relatively easier and cheaper to replace with outside counsel. To the extent this exception implies that Lewis's position in Advice was the only position selected for elimination in the summer of 2010, it misstates the record. In fact, the undisputed testimony of the City's witnesses was that, *in addition to Lewis*, Steve Rowell, an attorney employed in the Litigation division, was also selected for layoff, but that he chose to retire before the layoff took effect.[12] Additionally, although Lewis accurately cites to Russo's testimony that litigation work was easier and generally much less costly to replace through outside counsel than the more specialized tasks performed by attorneys in the Advice division, she ignores the undisputed fact that, by 2010, Litigation had already borne the brunt of several rounds of staffing reductions, including 10 of the 17 positions eliminated thus far. Based on this evidence, we agree with the ALJ that Russo was likely concerned that Litigation could not sustain further cuts, without compromising the effectiveness of the unit or resulting in OCA being "charged to the skies" to hire outside counsel to continue the department's litigation work.

[12] There was also evidence that a support staff position was eliminated in the same round of layoffs in which Lewis was affected, though the record does not indicate whether this position was specific to Litigation or Advice.

Whether the Redevelopment Unit had Been Subject to Previous Layoffs

Lewis also argues that, contrary to Russo's testimony and to the ALJ's findings, in 2010, the Redevelopment unit was not the only unit to have been spared from previous staffing reductions, because, in fact, it had lost at least two attorneys – Linda Moroz (Moroz) and Terry Brown (Brown) -- in previous layoffs. The City's witnesses, above all, Sanchez, attempted to explain this discrepancy by noting that at least one or both of these individuals was laid off in 2005, before the current Redevelopment unit was created out of the former Land Use/Development unit, as the result of a departmental reorganization. Lewis argues that, regardless of how the unit or its immediate predecessor organization was designated, one or both attorneys performed "redevelopment" work and that, it was therefore inaccurate for Russo to testify, and for the ALJ to find, that Lewis's position was eliminated, in part, because her unit had not been affected by prior staffing reductions.

The proposed decision considered this evidence but found it insufficient to support the finding urged by Lewis. The ALJ explained that Lewis did not recall either Moroz or Brown ever performing redevelopment work, and thus apparently credited the City's contrary testimony that both attorneys were part of the Finance rather than Redevelopment unit. Thus the ALJ found that the City's evidence was sufficient to show that the City had not previously laid off any attorneys from Redevelopment.

In her exception, Lewis points again to her own testimony that both Moroz and Brown worked in the formerly combined Redevelopment/Real Estate/Land Use unit and that Sanchez's testimony and an undated OCA organizational chart confirmed that Moroz worked "in the Redevelopment unit," along with Millner, Illgen, Lewis and Rossi. She also notes that Sanchez's testimony, that the person Russo hired to replace Brown performed municipal finance, rather than redevelopment work, does not directly contradict Lewis's contention that

Brown not only worked in the former Redevelopment/Real Estate/Land Use unit, but that she also actually performed some redevelopment work, and that her layoff therefore belies Russo's assertion that no attorneys were previously laid off from the Redevelopment unit. In response, the City argues that Lewis "presented no evidence as to whether Moroz or Brown actually performed redevelopment work," and that "her testimony was solely that she worked in the same unit with them."

The ALJ correctly observed that Lewis's testimony and the organizational chart only address what unit Moroz and Brown were assigned to, but not whether they performed "redevelopment" work. As such, the record was insufficient to determine the extent to which Russo considered the departmental reorganization of the former Redevelopment/Real Estate/Land Use unit when he selected Lewis or to rebut his testimony that he did so because he "felt that the layoff should occur in the Redevelopment unit *because* it had not been affected by prior reductions." (Emphasis added.) In the absence of some evidence that either Moroz or Brown actually performed work that would be properly considered "redevelopment" work, we will not overturn the ALJ's factual finding that Russo believed that no previous layoffs had affected redevelopment work, and that he acted, in part, based on this belief.

We recognize that it is the City's burden to prove its affirmative defense that it both had a non-discriminatory reason and, in fact, relied on that non-discriminatory reason, when it took adverse action against the employee. If Russo's proffered belief, mistaken or otherwise, that the Redevelopment unit had not previously experienced layoffs had been the sole justification offered by the City for its decision to layoff Lewis, then the result might be otherwise. However, Russo's assertion that the *post-reorganization* Redevelopment unit had experienced no attorney layoffs was only part of his proffered justification for selecting Lewis. Because we

agree with the ALJ that Russo credibly testified as to his other consideration, which attorney would be missed the least, we will not overturn the decision.

Whether Lewis Was the Redevelopment Unit Attorney Whose Absence Would be Missed the Least Because of a Projected Decline in the Kind of Work She Performed

Lewis also disputes the ALJ's finding that she, rather than one of her colleagues in the Redevelopment unit, was selected for layoff "because a greater proportion of the work she did was projected to decrease." Lewis contends that during economic slumps, developers typically come to the City as the financer of last resort, after being unable to obtain financing for construction from private lenders. Given the "counter-cyclical" nature of the work she performed, she argues that the work of the Redevelopment unit generally, and specifically the kind of work she performed was not likely to constitute a decreasing proportion of OCA operations during the economic downturn. As further support for this argument, she points to the City Redevelopment Agency budget for the fiscal years 2011-2012 and 2012-2013, and to the testimony of Jeffrey Levin, the housing policy and programs manager of the City's Redevelopment Agency, showing that the Agency's funding for OCA positions actually increased after Lewis's layoff. She contends that this evidence undermines the ALJ's finding that Russo laid off Lewis, rather than other Redevelopment attorneys, because he reasonably believed that, "a greater proportion of the work she did was projected to decrease."

As suggested already, the nexus inquiry is ultimately into the employer's motive for taking an adverse action, not necessarily the accuracy of its beliefs or predictions as to future events. The fact that Russo's assumption that redevelopment funding would decrease may have turned out to be wrong does not undermine the ALJ's finding that it was reasonable *at the time of the decision* to select Lewis for layoff. Lewis does not dispute the authenticity of the Redevelopment Agency's contemporaneous report, which predicted a $14 million deficit for the coming 2010-2011 fiscal year "due to a steep decline in tax increment revenue," the same

source of funding that supported Lewis's position. In light of the information that was available *at the time of his decision*, Russo's assumption that redevelopment funding would decrease does not appear unreasonable, and thus, there is insufficient evidence for the Board to overturn the ALJ's finding that Russo selected Lewis, rather than other attorneys, because, *as the only attorney who performed affordable housing work*, Lewis's duties could reasonably be expected to decrease as a result of the economic downturn.

Whether Russo's Selection of Lewis, Rather than other Attorneys in Redevelopment, was Pretextual

Even assuming the Redevelopment unit was the logical or appropriate place to reduce staff, Lewis argues that Russo did not offer credible and consistent reasons for choosing to layoff Lewis, as opposed to each of the other three attorneys working in the Redevelopment unit. The ALJ found that, once Russo had decided on Lewis's unit, his choices were limited to four attorneys: Millner, Illgen, Rossi and Lewis. To the extent this exception concerns Russo's stated reasons for choosing Lewis, rather than Rossi, the ALJ's findings of fact on that issue have already been discussed and found to be supported by the record. The substance of this exception then, is that Lewis challenges the ALJ's findings regarding Russo's reasons for selecting Lewis for layoff, as opposed to one or both of the other two attorneys working in the Redevelopment unit at the time.

Russo acknowledged that Millner was not categorically excluded from consideration simply because she was the supervising attorney of the unit. In fact, Russo testified that he had laid off supervisors before, including the supervising attorney in the Litigation unit whom Russo considered a personal friend. However, according to Russo, Millner was "a fantastic lawyer" who "never disappointed," and was therefore "untouchable." Lewis offered no evidence to rebut Russo's assessment that Millner, because of her work, was "untouchable" in a layoff

situation and we therefore decline to overturn the ALJ's findings of fact with respect to Russo's reasons for retaining Millner over Lewis.

This left Illgen who, according to Russo, "was the only person in the office who[m Russo] could rely upon to deal with the whole panoply of rent control and rent arbitration issues, which is a contentious issue and is extremely sui generis and one that I did not want to go out and try to hire outside counsel to handle because they'd have to learn the idiosyncrasies of the Oakland ordinance." Lewis disputes Russo's testimony on this point, by noting that another attorney, Alex or Alix Rosenthal (Rosenthal), had been trained to handle the rent control and rent arbitration duties performed by Illgen. However, Russo's testimony specifically acknowledged that he "had tried to cross-train Alix Rosenthal," but that Illgen was "the only" attorney equipped to address the uniqueness of Oakland's rent control ordinance. Lewis's own testimony seems to confirm that plans to transfer some of Illgen's duties to Rosenthal were no longer operative at the time Lewis was selected for layoff.

> Until about a year or so before I was laid off, there was another person in the redevelopment unit who was transferred out. That was Alex Rosenthal. And she was working with Mr. Illgen. They were planning to transfer that to her.

Sanchez also testified that, "Alix Rosenthal may have done some work with the rent board at some point in time" but she was never asked specifically about dates nor otherwise offered testimony to suggest that Rosenthal was still working in the OCA and was competent to take over rent board and rent issues from Illgen, in the event he, rather than Lewis, was laid off. Thus, the evidence that Russo had some viable alternative to retaining Illgen was inconclusive at best.

Additionally, to the extent Lewis challenges the ALJ's findings regarding Russo's reasons for retaining Millner and Illgen over Lewis, her task is made more difficult by the fact that the ALJ specifically found this part of Russo's testimony to be "credible and largely

unrebuted by Lewis." While the Board applies a de novo standard of review and is free to draw its own conclusions from the record, because an ALJ is in a much better position than the Board to accurately make credibility determinations based on live testimony, "the Board has determined that it will normally afford deference to administrative law judges' findings of fact involving credibility determinations unless they are unsupported by the record as a whole." (*Anaheim City School District* (1984) PERB Decision No. 364a, pp. 3-4; *Palo Verde, supra*, PERB Decision No. 2337, pp. 25-29.) Because the ALJ's findings regarding Russo's reasons for retaining Millner and Illgen over Lewis are supported by the record as a whole, we decline to overturn these findings. This exception is therefore also rejected.

Accordingly, we affirm the proposed decision, as supplemented by the above discussion.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-808-M are hereby DISMISSED.

Members Huguenin and Winslow joined in this Decision.