STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TANYA LEA DULANEY, Charging Party, v. CITY OF SAN DIEGO, Respondent.	Case No. LA-CE-48-M PERB Decision No. 1738-M January 20, 2005
TANYA LEA DULANEY, Charging Party, v. SAN DIEGO MUNICIPAL EMPLOYEES' ASSOCIATION, Respondent.	Case No. LA-CO-5-M

Appearances: National Right to Work Legal Defense Foundation, Inc., by John R. Martin, Attorney, for Tanya Lea DuLaney; Michael Rivo, Deputy City Attorney, for City of San Diego; Tosdal, Smith, Steiner & Wax by Ann M. Smith, Attorney, for San Diego Municipal Employees' Association.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the San Diego Municipal Employees' Association (Association) to an administrative law judge's (ALJ) proposed decision (attached). The unfair practice charge alleged that the City of San Diego (City) and the Association violated the Meyers-Milias-Brown Act (MMBA)[1] by denying a non-agency fee payor the ability to use

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

pretax money to enroll in employee group dental and eye care plans. The complaint alleged that this violated MMBA sections 3502, 3506 and 3515.7(b). The charge alleged under section 3515.7(b) was later withdrawn and a notice of partial withdrawal was issued June 18, 2002.

The case went to hearing before an ALJ. The ALJ found that Tanya Lea DuLaney (DuLaney) participated in protected activity when she chose not to be a member of the Association. He further found that because Association members were able to receive benefits of specific dental and eye care plans that were denied to DuLaney because she was not a member of the Association, an agency fee payor or conscientious objector, there had been an adverse action.

Following the issuance of the proposed decision by the ALJ, the City withdrew its exceptions and only the Association proceeded. The City and the Association then went forward with the meet and confer portion of the proposed remedy. That aspect is therefore moot.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the amended charge, the parties' briefs, the proposed decision, the exceptions filed by the Association and the response filed by DuLaney. We find the ALJ proposed decision to be free of prejudicial error and adopt it as the Board's own decision, subject to the discussion below.

DISCUSSION

DuLaney is a criminologist with the City. She has been employed in this capacity since 1995. She is in one of four professional bargaining units represented by the Association. She is not a member of the Association.

In the comprehensive memorandum of understanding (MOU) between the City and the Association for the term July 1, 1998 through June 1, 2002, a flexible benefit plan was included in Article 28.

In the flexible benefit plan, the City made a specific contribution of pretax money toward each employee's benefits. Using this money, each employee was required to select one health insurance policy and one life insurance policy. With the remaining money the employee had a choice among additional benefits. Two of the options were for Association members only. One was an eye care plan and one was a dental plan.

The MOU noted that the only dental plan available under the flexible benefits plan was the plan only available to Association members. The only eye care plan was the one open only to Association members.

That MOU had no agency shop provision, but on October 31, 2001, a separate MOU was signed between the City and the Association regarding agency shop. The City and the Association agreed on procedures for implementing agency shop elections in three of the four professional units, including DuLaney's.

A new comprehensive MOU was executed on May 14, 2002. Article 28 continued the flexible benefits plan, stating, in part "An employee must be either an [Association] member, or where appropriate, an agency fee payor to be eligible for [Association's] dental and eye care plans."

At hearing, it was stipulated by the parties that Article 28 of the new MOU would be interpreted as allowing an employee like DuLaney, neither an Association member nor required by law or contract to be an agency fee payor or conscientious objector, to enroll in the Association eye care and/or dental plan by voluntarily assuming the role of agency fee payor or conscientious objector.

DuLaney then testified at hearing that she would enroll in the Association dental plan if she were not required to become a member of the Association or agency fee payor, but she would not become an agency fee payor just to enroll. She also testified she was not a conscientious objector as defined by the agency shop memo.[2]

The PERB complaint against the Association alleges that the Association has violated MMBA section 3506 and PERB Regulation 32604(b)[3] by discriminating against DuLaney, by interfering with employee rights and by engaging in conduct "inconsistent with [its] duty to fairly represent employees."

Discrimination

The City and the Association argued that the denial of this benefit opportunity was not an adverse action subject to discrimination law. Although they relied on Palo Verde Unified School District (1988) PERB Decision No. 689 (Palo Verde) for the premise that must prove an adverse action as part of a prima facie case, the ALJ was not persuaded.

In Palo Verde an employee office relocation was at issue.

The ALJ found Palo Verde distinguishable. He stated that an office relocation may be favorable or unfavorable but that the loss of a benefit opportunity is unfavorable.

He noted that the test in that case is "whether [a] reasonable person under the same circumstances would consider [such] action adverse". He reasoned that the benefit itself is, when looked at objectively, a positive. He noted that it was described by the Association as an inducement for employees to join the Association. He concluded that if it is favorable enough

[2]The MOU defined conscientious objector as an employee "who is a member of a bona fide religion, body or sect that has historically held conscientious objections to joining or financially supporting public employee organizations."

[3]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

to be considered an inducement, then to be denied the opportunity is unfavorable and therefore adverse. The ALJ also noted that if the situation were reversed and Association participants were denied a benefit because they belonged to the Association, he thought they would certainly believe that involved an adverse action.

Interference

The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons. (Public Employees Assn. v. Board of Supervisors (1985) 167 Cal.App.3d 797, 807 [213 Cal.Rptr. 491].)

The ALJ noted that DuLaney engaged in protected activity by abstaining from participation in the Association. She and any other employees who choose not to join the Association have every right not to. He found no legitimate business reason for the policy here. This was another violation of MMBA section 3506 and a violation of PERB Regulation 32603(a) against the City, and a violation of MMBA section 3506 and PERB Regulation 32604(b) against the Association.

The Association, in its exceptions, argues that this is a relatively minor employer action therefore not adverse (Association's Statement of Exceptions, p. 6:8-10). The Association disagrees with the ALJ and believes his reliance on Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416, 423 [182 Cal.Rptr. 461] (Campbell) is misplaced.

The ALJ cited Campbell, concluding that this situation is one of discrimination against DuLaney and others like her because of the fact that she is excluded from the Association plans is "inherently destructive of important employee rights, because it targets the employee right that is most fundamental to MMBA: the right to join and participate in employee organizations, or to refuse to join or participate in employee organizations."

Duty of Fair Representation

The ALJ also found a violation of the duty of fair representation by the Association for negotiating an MOU that discriminates against DuLaney and other employees like her who abstain from participation in the Association. This was a violation of the Association's duty of fair representation and an additional violation of MMBA section 3506 and PERB Regulation 32604(b).

DISCUSSION

We disagree with the conclusion of the exceptions filed by the Association. At p. 25, the conclusion states:

> The facts of this case may not fit the mold of prior cases which have come before PERB for adjudication. Certainly, there is not even a remote similarity between the facts here and those which warranted action in prior PERB and state court cases to redress true discrimination and interference with employees' protected rights.

On the contrary, just as the ALJ has set forth, this is exactly a case of discrimination. Whether it applies to one person or a cast of thousands, it is still a situation in which a person is being denied a benefit because of protected activity. It just happens that in this case that protected activity is not joining the Association rather than joining it. Just as there should be no adverse action for joining the Association, there should be no adverse action for not joining it. It comes down to whether Palo Verde is on point or Campbell is.

In Palo Verde, the issue was an office relocation. There, a union activist teacher was given an extra duty assignment of overseeing the district computer program. He had to drive from his campus to the district office a couple of days a week to perform those duties. The office he used for the extra duty assignment was adjacent to the office of the superintendent and he could see and hear a lot of what went on in the superintendent's office.

The district then relocated the extra duty work from the district office to the campus where he taught after the possibility of a teacher's strike was raised. The teacher filed an unfair practice charge alleging the move was because of his union activities. The Board found that in a technical sense the union activities resulted in the relocation, but that the district overcame any inference of unlawful motive.

The district knew of the teacher's union activities when he was originally appointed to the position. It was the possibility of a strike and the district preparing for that possibility that caused the need to relocate the teacher, not the teacher's activities, according to the Board. The Board held that the relocation was not unlawful where the employee suffered no adverse consequences from the move. The test was a reasonable person standard regarding adverse consequences. In footnote 5 the Board stated, "While the employee may reasonably have felt that he was in fact injured by the relocation, as the dissent argues, his reaction is still a subjective one if, as here, the facts do not support the alleged injury." (Palo Verde.)

In Campbell, the City of Campbell adopted a date for retroactive payment of salary and medical insurance premium increases that were less favorable for members of one organization over another.

The Campbell Municipal Employees Association (CMEA) went to impasse with the city over the issue of establishing wages and conditions of employment. The negotiations had entered "meet and confer" sessions to negotiate a memorandum of understanding. In the

middle of the sessions, the city decided they should wait until after the election to see if Proposition 13 passed. CMEA agreed and also agreed that existing salaries and insurance coverage would continue.

By January 1979 they agreed on all but two issues. Those issues were the amount of the city's 1978-1980 contribution on health care premiums for city employees and the method of disposing of any savings realized by the city from the anticipated depooling of participation in the Public Employees' Retirement System. The increases were to be paid retroactive to October 1, 1978.

Also in January 1979, the city negotiating committee requested an impasse meeting. They met and still were unable to resolve the two issues. The parties then went to mediation. It was unsuccessful. In accordance with the city's impasse procedures the issues then went to the city council. At that point, the city council did not limit itself to the two issues still in dispute and reached back into the settled issues and made modifications.

CMEA filed charges alleging that the only issues subject to determination by the city council under the impasse procedures were those still unresolved when impasse was requested.

One of the problems created was that "the date the City Council fixed for retroactivity of increases for those represented by CMEA was at variance not only with the date that was agreed upon earlier but also with the date fixed for retroactivity of increases for employees represented by all other organizations which negotiated with the City." The only difference asserted being that CMEA, unlike other organizations, chose to utilize the impasse procedure. (Campbell at p. 422.)

The court pointed out that "the City had in effect discriminated against employees represented by CMEA by withholding from them a degree of retroactivity in wage and fringe

benefit increases which had been agreed upon in earlier negotiations and which was granted to all other employees." (Id. at p. 424.)

We agree with the ALJ that Palo Verde is not on point and that Campbell is. We therefore recommend that the ALJ proposed decision be adopted as the Board's own. There is an adverse action when an employee is denied a benefit based on whether or not he or she is a union member just as in Campbell when there was an adverse action by treating members of one union differently than members of others. Here, the benefit is denied to non-union members.

ORDER IN CASE NO. LA-CE-48-M

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the City of San Diego (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3506 and Public Employment Relations Board (PERB) Regulation section 32603(a), by discriminating against Tanya Lea DuLaney (DuLaney), and by interfering with employee rights, in the availability of dental and eye care plans under the flexible benefits plan established by the City's memorandum of understanding with the San Diego Municipal Employees' Association (Association).

Pursuant to MMBA section 3509(b), it is hereby ORDERED that the City, its governing council and its representatives shall:

A. CEASE AND DESIST FROM:

1. Discriminating against DuLaney because of her non-participation in the Association, in the availability of dental and eye care plans under the flexible benefits plan.

2. Interfering with employee rights of non-participation in the Association, in the availability of dental and eye care plans under the flexible benefits plan.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Within ten (10) workdays following the date this decision is no longer subject to appeal, post copies of the Notice attached hereto as Appendix A at all work locations where notices to bargaining unit employees are customarily posted. The Notice must be signed by an authorized agent of the City, indicating that the City will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any material.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The City shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on DuLaney.

ORDER IN CASE NO. LA-CO-5-M

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that San Diego Municipal Employees' Association (Association) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3506 and Public Employment Relations Board (PERB) Regulation section 32604(b).

Pursuant to the MMBA, it is hereby ORDERED that the Association, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Discriminating against Tanya Lea DuLaney (DuLaney) because of her non-participation in the Association, in the availability of dental and eye care plans under the flexible benefits plan.

2. Interfering with employee rights of non-participation in the Association, in the availability of dental and eye care plans under the flexible benefits plan.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Within ten (10) workdays following the date this decision is no longer subject to appeal, post copies of the Notice attached hereto as Appendix B at all work locations where notices to bargaining unit employees are customarily posted. The Notice must be signed by an authorized agent of the Association, indicating that the Association will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any material.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The Association shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on DuLaney.

Members Whitehead and Shek joined in this Decision.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-48-M, Tanya Lea DuLaney v. City of San Diego, in which all parties had the right to participate, it has been found that the City of San Diego (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3506 and Public Employment Relations Board (PERB) Regulation section 32603(a). The City has violated MMBA section 3506 and PERB Regulation 32603(a) by discriminating against Tanya Lea DuLaney (DuLaney) and by interfering with employee rights, in the availability of dental and eye care plans under the flexible benefits plan established by the City's memorandum of understanding with the San Diego Municipal Employees' Association (Association).

As a result of this conduct, we have been ordered to post this Notice and we will:

CEASE AND DESIST FROM:

1. Discriminating against DuLaney because of her non-participation in the Association, in the availability of dental and eye care plans under the flexible benefits plan.

2. Interfering with employee rights of non-participation in the Association, in the availability of dental and eye care plans under the flexible benefits plan.

Dated: _____ CITY OF SAN DIEGO

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CO-5-M, Tanya Lea DuLaney v. San Diego Municipal Employees' Association, in which all parties had the right to participate, it has been found that the San Diego Municipal Employees' Association (Association) violated the Meyers-Milias-Brown Act, Government Code section 3506 and Public Employment Relations Board Regulation section 32604(b).

As a result of this conduct, we have been ordered to post this Notice and we will:

CEASE AND DESIST FROM:

1. Discriminating against Tanya Lea DuLaney because of her non-participation in the Association, in the availability of dental and eye care plans under the flexible benefits plan.

2. Interfering with employee rights of non-participation in the Association, in the availability of dental and eye care plans under the flexible benefits plan.

Dated: _____

SAN DIEGO MUNICIPAL EMPLOYEES' ASSOCIATION

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

TANYA LEA DULANEY, Charging Party, v. CITY OF SAN DIEGO, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-48-M
TANYA LEA DULANEY, Charging Party, v. SAN DIEGO MUNICIPAL EMPLOYEES' ASSOCIATION, Respondent.	UNFAIR PRACTICE CASE NO. LA-CO-5-M PROPOSED DECISION (6/10/03)

Appearances: National Right to Work Legal Defense Foundation by John R. Martin, Staff Attorney, for Tanya Lea DuLaney; Michael Rivo, Deputy City Attorney, for City of San Diego; Tosdal, Levine, Smith, Steiner & Wax by Ann M. Smith, Attorney, for San Diego Municipal Employees' Association.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In these two cases, a public employee alleges that her employer unlawfully discriminated against her and interfered with employee rights, and that her union also unlawfully discriminated against her, interfered with employee rights, and violated its duty of fair representation. The employer and the union deny that their conduct was unlawful.

Tanya Lea DuLaney (DuLaney) filed unfair practice charges against the City of San Diego (City) and the San Diego Municipal Employees' Association (Association or MEA) on

March 6, 2002. The general counsel of the Public Employment Relations Board (PERB) issued complaints against the City and the Association on June 18, 2002. The Association filed an answer on July 11, 2002; the City filed an answer on September 12, 2002.

On September 9, 2002, DuLaney filed a request to amend the complaints, which was granted in part and denied in part on October 24, 2002. A formal hearing was held on February 19, 2003. With receipt of the final post-hearing brief on May 30, 2003, the cases were submitted for decision.

FINDINGS OF FACT

DuLaney is a public employee within the meaning of Government Code section 3501(d) of the Meyers-Milias Brown Act (MMBA).[1] The City is a public agency within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a).[2] The Association is an employee organization within the meaning of MMBA section 3501(a), a recognized employee organization within the meaning of MMBA section 3501(b), and an exclusive representative within the meaning of PERB Regulation 32016(b).

DuLaney has been employed by the City as a criminalist since 1995. She is in the professional unit of City employees, one of four bargaining units represented by the Association. She is not a member of the Association.

There was a comprehensive Memorandum of Understanding (MOU) between the City and the Association for the term July 1, 1998, through June 30, 2002. Article 28 of this MOU provided a flexible benefits plan, under which the City made a specific contribution of pretax money toward each employee's benefits. For the fiscal year beginning July 1, 2002, this

[1] MMBA is codified at Government Code sec. 3500 and following.

[2] PERB Regulations are codified at Cal. Code of Regs., tit. 8, sec. 31001 and following.

contribution was set at $4,175. Using this money, each employee was required to select one health insurance policy and one life insurance policy. With the remaining money, the employee could select among the following additional benefits:

1. Dependent Care Reimbursement
2. Dental/Medical/Vision Reimbursement
3. Cash Payment (taxable)
4. 401(k)
5. M.E.A. Dental Plan (must be M.E.A. member)
6. M.E.A. Eye Care Plan (must be M.E.A. member)
7. Cancer and Catastrophic Illness Insurance

While the City's contribution increased in later years, as did the cost of various benefits, the employees' basic options remained more or less the same.

As the MOU indicated, the only dental plan available under the flexible benefits plan was the "M.E.A. Dental Plan," which was available only to Association members, and the only eye care plan was the "M.E.A. Eye Care Plan," also available only to Association members. Non-members could use the City's contribution for other purposes (including dental/medical/ vision reimbursement and a taxable cash payment), but they could not use that contribution for the only employee group dental and eye care plans.

This comprehensive 1998-2002 MOU had no agency shop provision. On October 31, 2001, however, the City and the Association executed a special and separate MOU regarding agency shop. Pursuant to MMBA section 3502.5 (as amended effective January 1, 2001), the City and the Association agreed in the MOU on procedures for implementing agency shop elections in three of the Association's four bargaining units, including DuLaney's professional unit. The MOU provided that in any unit that voted in favor of agency shop each employee "shall have the choice of either becoming a member of [the Association], or of being a non-member and paying a service fee or conscientious objector fee." The MOU defined a

conscientious objector as an employee "who is a member of a bona fide religion, body, or sect that has historically held conscientious objections to joining or financially supporting public employee organizations." Such a conscientious objector would be required "to pay sums equal to the dues, initiation fees, or agency shop fees, to a non-religious, non-labor charitable fund," to be chosen from a designated list.

Agency shop elections were held in the three bargaining units on December 1, 2001. Of the three units, only the technical unit voted in favor of agency shop. DuLaney's professional unit did not, nor did the administrative and field support unit.

On May 14, 2002, the City and the Association executed a new comprehensive MOU for the term July 1, 2002, through June 30, 2005. Article 14 of this new MOU incorporated by reference the special MOU regarding agency fee. Article 14 further stated:

> Modified Agency Shop: Effective July 1, 2002, each person hired to fill a position in the Professional or in the Administrative Support and Field Service Units shall, as a condition of employment, be required to become a member of MEA or to pay a service fee. This modified agency shop provision shall also be made applicable to each person hired to fill a position in the Technical Unit in the event that, during the life of this MOU, the agency shop arrangement currently in effect for that unit is terminated by a lawful vote of the employees in that unit. This modified agency shop shall be administered on the same terms as currently in effect for the agency shop arrangement in the Technical Unit. [Emphasis added.]

Article 28 of the new MOU continued the flexible benefits plan, stating in part:

> An employee must be either an MEA member, or where appropriate, an agency fee payor to be eligible for MEA's Dental and Eye Care Plans.

The Association's dental and eye care plans continued to be the only such plans available under the flexible benefits plan.

At the hearing, it was stipulated that Article 28 of the new MOU would be interpreted as allowing an employee like DuLaney, who is neither an Association member nor required by law or contract to be an agency fee payor or conscientious objector, to enroll in the Association's dental plan and/or eye care plan by voluntarily assuming the status of an agency fee payor or conscientious objector.

DuLaney testified at hearing that she would enroll in the Association's dental plan if she were not required to become an Association member or agency fee payor, but she would not become an agency fee payor in order to enroll. She also testified that she was not a conscientious objector as defined by the agency shop MOU.

For the 2002-2003 fiscal year, the City's pretax flexible benefit plan contribution for each employee was $4,725. DuLaney allocated $75 of this amount to life insurance, $2,801 to health insurance, $300 to dental/medical/vision reimbursement, $1,000 to a 401(k) plan, and $549 to a cash payment, for a grand total of $4,725.

ISSUES

1. Did the City and the Association unlawfully discriminate against DuLaney?
2. Did the City and the Association interfere with employee rights?
3. Did the Association violate its duty of fair representation?

CONCLUSIONS OF LAW

MMBA section 3502 states:

> Except as otherwise provided by the Legislature, public employees shall have 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. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency.

MMBA section 3506 states:

> 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.

PERB Regulation 32603 states in part:

> It shall be an unfair practice for a public agency to do any of the following:
>
> (a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

The PERB complaint against the City alleges that the City has violated MMBA section 3506 and PERB Regulation 32603(a) by discriminating against DuLaney for the exercise of her right under MMBA section 3502 to abstain from Association membership, and by interfering with employee rights under MMBA.

PERB Regulation 32604 states in part:

> It shall be an unfair practice for an employee organization to do any of the following:
>
> (b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

The PERB complaint against the Association alleges that the Association has violated MMBA section 3506 and PERB Regulation 32604(b) by discriminating against DuLaney, by interfering with employee rights, and by engaging in conduct "inconsistent with [its] duty to fairly represent employees."

Discrimination

At first glance, these cases seem quite simple: the City and the Association have negotiated and maintained a benefit policy that explicitly discriminates between Association participants and non-participants, offering a benefit opportunity to one group while denying it to the other. In the final analysis, the cases really are that simple.

The benefit opportunity in question is the opportunity to use pretax money to enroll in employee group dental and eye care plans. Under the MOU between the Association and the City, Association participants have this opportunity, because they are Association participants, while non-participants like DuLaney do not have this opportunity.

In the face of these facts, the City and the Association argue that the denial of this benefit opportunity is not an "adverse action" subject to discrimination law.[3] They rely on Palo Verde Unified School District (1988) PERB Decision No. 689 (Palo Verde), in which PERB held that a charging party must prove an adverse action as part of a prima facie case of discrimination, and that the adversity of the action must be measured by an objective test. (See also Newark Unified School District (1991) PERB Decision No. 864 (test is whether reasonable person under same circumstances would consider action adverse).)

The argument of the City and the Association on this point is unconvincing. There is no dispute in this case that the benefit opportunity in question is, objectively, a good thing. In its post-hearing briefs, the Association repeatedly and honestly describes the benefit opportunity as an inducement for employees to join the Association. If the benefit opportunity is a good thing, favorable enough to be an inducement, then being denied that opportunity is unfavorable and adverse.

[3] Actually, the Association makes the argument; the City simply concurs.

The facts of Palo Verde are readily distinguishable. In that case, the alleged adverse action was the relocation of an employee's office. Such a relocation may be favorable or unfavorable, depending on the circumstances. Even under the same circumstances, reasonable people may disagree, for purely subjective reasons, on whether the action was favorable or unfavorable.

Reasonable people will agree, however, that opportunity and choice are good things, which allow them to maximize their economic advantage and personal happiness. Reasonable people will disagree, for subjective reasons, on the value of a particular opportunity, but reasonable people consider opportunity and choice to be favorable, and the denial of opportunity and choice to be unfavorable.

So it is with the benefit opportunity in this case. Although the opportunity to use pretax money to enroll in employee group dental and eye care plans will have different subjective value to different employees, reasonable employees will find the opportunity a favorable condition of employment, and the denial of that opportunity an adverse condition of employment.

If the facts of these cases were reversed, and Association participants were denied a benefit opportunity because they were Association participants, would the Association say that there was no adverse action? I think not.

I conclude that the benefit policy in the MOU does indeed discriminate against DuLaney for the exercise of her right to abstain from participation in the Association, through the adverse action of denying her the opportunity to use pretax money to enroll in employee group dental and eye care plans. Under MMBA, however, that is not the end of analysis. In Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416 [182

Cal.Rptr. 461] (Campbell), the court held that if discrimination under MMBA is "inherently destructive" of important employee rights, no proof of unlawful motivation is needed, even if there is evidence the discrimination was motivated by business considerations. The court further held that if the effect on employee rights is "comparatively slight," proof of unlawful motivation is needed, if there is evidence of legitimate and substantial business justifications.

Applying Campbell to the present cases, I would conclude that the discrimination against DuLaney is "inherently destructive" of important employee rights, because it targets the employee right that is most fundamental to MMBA: the right to join and participate in employee organizations, or to refuse to join or participate in employee organizations. (See MMBA section 3502, quoted above.) If the facts of these cases were reversed, and Association participants faced discrimination for choosing to be Association participants, I assume the Association would agree that the discrimination was "inherently destructive" of important employee rights and thus a violation of MMBA.

Even if I concluded that the effect on employee rights was "comparatively slight," I would still find a violation of MMBA, because there is no evidence of "legitimate and substantial business justifications." For its part, the City has offered no evidence and no argument that it had a business justification for discriminating against DuLaney. The Association has just one: the inducement of employees to join the Association.

Of course the Association has the right to encourage employees to join, and there are many legal ways for it to do so. Surely, however, the inducement of membership cannot be a legal justification for a discriminatory MOU. Any provision that discriminates against non-members will naturally tend to induce membership. If that tendency were enough to justify

otherwise prohibited discrimination, then the justification would completely swallow the prohibition.

In defending these cases, the City and the Association understandably try to distance themselves from the discriminatory MOU provisions in question. On reading the Association's post-hearing briefs, one would think that the City and the Association only negotiated about the amount of the City's flexible benefit plan contribution. Meanwhile, in a completely separate and unrelated scenario, the Association simply offered dental and eye care plans as a service to its members. This impression created by the Association's briefs omits three crucial features of the MOU:

1. The MOU limits how the City's pretax flexible benefit plan contribution can be used.

2. Under the MOU, there is only one dental plan and one eye care plan for which the City's contribution can be used.

3. This one dental plan and this one eye care plan are only available to Association members and fee payors.

These features of the MOU did not negotiate themselves into existence. The City and the Association negotiated them.

I conclude that both the City and the Association did unlawfully discriminate against DuLaney for the exercise of her right to abstain from participation in the Association, by denying her the opportunity to use pretax money to enroll in employee group dental and eye care plans. The City thus violated MMBA section 3506 and PERB Regulation 32603(a). The Association thus violated MMBA section 3506 and PERB Regulation 32604(b).

Interference

Under MMBA, the test for interference with employee rights is parallel to the test for discrimination. Under Public Employees Assn. v. Board of Supervisors (1985) 167 Cal.App.3d 797 [213 Cal.Rptr. 491], interference is established by proof of (1) protected activities by employees, (2) conduct that tends to interfere with, restrain or coerce employees engaging in those activities, and (3) a lack of legitimate business justifications for that conduct.

In the present cases, employees like DuLaney engage in protected activity by abstaining from participation in the Association. (MMBA section 3502.) The benefit policy in question tends to interfere with those employees by denying them a benefit opportunity. The more the employees need or want that benefit opportunity, the more they are coerced into abandoning their protected activity of non-participation in the Association. As previously discussed, there is no legitimate business justification for that policy in these cases.

I conclude that the City and the Association have interfered with employee rights under MMBA. The City has thus again violated MMBA section 3506 and PERB Regulation 32603(a), while the Association has again violated MMBA section 3506 and PERB Regulation 32604(b).

Duty of Fair Representation

MMBA does not expressly impose a statutory duty of fair representation on employee organizations. In Hussey v. Operating Engineers Local Union No. 3 (1995) 35 Cal.App.4th 1213 [42 Cal.Rptr. 2d 389], however, the court stated that under MMBA "unions owe a duty of fair representation to their [unit] members, and this requires them to refrain from representing their [unit] members arbitrarily, discriminatorily, or in bad faith."

In the present cases, I have concluded that the City and the Association negotiated an MOU that discriminates against employees like DuLaney who abstain from participation in the Association. The Association's actions in negotiating that MOU were thus discriminatory and in violation of its duty of fair representation. The Association has thus again violated MMBA section 3506 and PERB Regulation 32604(b).

Collateral Estoppel

In its post-hearing reply brief, as well as in a footnote to its opening brief, the Association argues that PERB should give collateral estoppel effect to a recent federal court order granting motions to dismiss in Brannian, et al., v. City of San Diego, et al. (S.D. Cal.) Case No. 02CV1726 BTM (CGA) (order entered May 1, 2003). In Gikas v. Zolin (1993) 6 Cal.4th 841 [25 Cal.Rptr.2d 500], the California Supreme Court reiterated the threshold requirements for application of the collateral estoppel doctrine:

> Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

In the present case, it appears that most or all of these requirements are unfulfilled.

First of all, it does not appear that the order granting motions to dismiss is final. Also, it does not appear that DuLaney is in privity with any party to the federal proceeding. Moreover, the issue before the federal court is solely one of federal constitutional law, not MMBA law. Thus, the federal court could base its order in part on the proposition that "neither union members nor non-union members constitute a 'protected class.'" That is not

MMBA law as it applies to these cases. I conclude that the federal court order should not be given collateral estoppel effect.

Remedy

MMBA section 3509(b) in part gives PERB jurisdiction to determine "whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter [MMBA]." In the present cases, the City and the Association have been found to have violated MMBA by discriminating against DuLaney and by interfering with employee rights. The Association has also been found to have violated its duty of fair representation. It is therefore appropriate to direct the City and the Association to cease and desist from such conduct.

It is also necessary and appropriate to direct the City and the Association to take affirmative actions to effectuate the purposes of MMBA. Without such actions, the current MOU between the City and the Association will continue to discriminate against DuLaney, to interfere with employee rights, and to deny non-participants in the Association their right to fair representation.

The City and the Association argue that any remedy in these cases should apply only to DuLaney. If these cases were only about discrimination against DuLaney, or if the remedy was only to be retrospective, I would tend to agree. DuLaney, however, has not sought any make-whole remedy for past discrimination against her. Furthermore, the PERB complaints, which I have found to be justified, allege not only discrimination against DuLaney but also interference with "employee rights" and a violation of the Association's duty "to fairly represent employees." These allegations on their face are not limited to DuLaney, nor should the remedy be.

The City and the Association also argue that they should not be required to remedy any violation until their next scheduled negotiations in 2005. I see no reason, however, why the City and the Association should thus be allowed to continue their interference with employee rights.[4] I nonetheless appreciate that benefit plans cannot be amended overnight, and I would therefore allow the City and the Association some time to amend the flexible benefit plan.

An issue not fully explored in the briefs is exactly how the City and the Association may amend the flexible benefit plan to end discrimination and interference. I see at least three options:

1. The Association's dental and eye care plans could be removed from the flexible benefits plan. The plans could still continue as member benefits outside the flexible plan. (I appreciate, however, that this option would displease Association members.)

2. The Association's dental and eye care plans could be opened up to non-participants in the Association.

3. Additional dental and eye care plans, which are open to non-participants in the Association, could be added to the flexible benefits plan.

It is also appropriate that the City and the Association be directed to post notices incorporating the terms of the orders in these cases. Posting of such notices, signed by authorized agents of the City and the Association, will provide employees with notice that the City and the Association have acted in an unlawful manner, are being required to cease and desist from this activity and to take affirmative remedial actions, and will comply with the

[4] Also, I note that a preamble to the current MOU states in part, "The City and MEA agree to meet and confer during the term of this Memorandum only to the extent required by applicable law." I conclude that applicable law does require them to meet and confer, to remedy the MMBA violation embedded in the MOU.

orders. It effectuates the purposes of MMBA that employees be informed both of the resolution of this controversy and of the City's and the Association's readiness to comply with the ordered remedies. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER IN LA-CE-48-M

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the City of San Diego (City) violated the Myers-Milias-Brown Act (MMBA or Act), Government Code section 3506, and regulations of the Public Employment Relations Board, California Code of Regulations, title 8, section 32603(a), by discriminating against Tanya Lea DuLaney (DuLaney), and by interfering with employee rights, in the availability of dental and eye care plans under the flexible benefits plan established by the City's memorandum of understanding with the San Diego Municipal Employees' Association (Association).

Pursuant to MMBA section 3509(b), it is hereby ORDERED that the City, its governing council and its representatives shall:

A. CEASE AND DESIST FROM:

1. Discriminating against DuLaney because of her non-participation in the Association, in the availability of dental and eye care plans under the flexible benefits plan.

2. Interfering with employee rights of non-participation in the Association, in the availability of dental and eye care plans under the flexible benefits plan.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Meet and confer with the Association so as to establish, by the time of the next open enrollment period after this proposed decision becomes final, a flexible benefits

plan that does not interfere with employee rights of non-participation in the Association, in the availability of dental and eye care plans.

2. Post copies of the Notice attached hereto as Appendix A, within 10 workdays of this proposed decision becoming final, at all work locations where notices to bargaining unit employees are customarily posted. The Notice must be signed by an authorized agent of the City, indicating that the City will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any material.

3. Make written notification of the actions taken to comply with the Order, within 10 workdays of this proposed decision becoming final, to the San Francisco Regional Director of the Public Employment Relations Board, in accord with the regional director's instructions.

PROPOSED ORDER IN LA-CO-5-M

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the San Diego Municipal Employees' Association (Association) violated the Myers-Milias-Brown Act (MMBA or Act), Government Code section 3506, and regulations of the Public Employment Relations Board, California Code of Regulations, title 8, section 32604(b), by discriminating against Tanya Lea DuLaney (DuLaney), and by interfering with employee rights, in the availability of dental and eye care plans under the flexible benefits plan established by the Association's memorandum of understanding with the City of San Diego (City).

Pursuant to MMBA section 3509(b), it is hereby ORDERED that the Association, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Discriminating against DuLaney because of her non-participation in the Association, in the availability of dental and eye care plans under the flexible benefits plan.

2. Interfering with employee rights of non-participation in the Association, in the availability of dental and eye care plans under the flexible benefits plan.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Meet and confer with the City so as to establish, by the time of the next open enrollment period after this proposed decision becomes final, a flexible benefits plan that does not interfere with employee rights of non-participation in the Association, in the availability of dental and eye care plans.

2. Post copies of the Notice attached hereto as Appendix B, within 10 workdays of this proposed decision becoming final, at all work locations where notices to bargaining unit employees are customarily posted. The Notice must be signed by an authorized agent of the Association, indicating that the Association will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any material.

3. Make written notification of the actions taken to comply with the Order, within 10 workdays of this proposed decision becoming final, to the San Francisco Regional Director of the Public Employment Relations Board, in accord with the regional director's instructions.

APPEAL RIGHTS

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

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

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

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

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

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served

on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

THOMAS J. ALLEN
Administrative Law Judge