STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LABORERS LOCAL NO. 270, Charging Party, v. CITY OF MONTEREY, Respondent.	Case No. SF-CE-128-M PERB Decision No. 1766-M May 20, 2005

Appearances: Weinberg, Roger & Rosenfeld, by Alan G. Crowley, Attorney, for Laborers Local No. 270; William B. Conners, City Attorney, for City of Monterey.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the City of Monterey (City) to an administrative law judge's (ALJ) proposed decision (attached). The unfair practice charge and complaint alleged that the City violated the Meyers-Milias-Brown Act (MMBA)[1] by denying the Laborers Local No. 270 (Local 270) and a bargaining unit employee's representational rights at a disciplinary hearing, conduct which constitutes a violation of MMBA section 3509(a) and PERB Regulation 32603(a).[2]

The Board has reviewed the entire record in this matter, including the unfair practice charge and supporting letters, the City's responses, the complaint, the answer, the parties' post-

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

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

hearing briefs, the ALJ's proposed decision, the City's exceptions and Local 270's response to the City's exceptions. In light of this review, the Board finds that the ALJ's proposed decision is free of prejudicial error and that the ALJ has adequately addressed the issues raised by the City on appeal. The Board therefore adopts the ALJ's proposed decision as a decision of the Board itself.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is found that the City of Monterey (City) violated Government Code sections 3502, 3503, 3506 and 3509, provisions of the Meyers-Milias-Brown Act (MMBA), and Public Employment Relations Board (PERB) Regulation 35603(a) and (b). (Cal. Code Regs., tit. 8, sec. 31001, et seq.) The City violated the MMBA by interfering with the right of an employee to designate an employee organization representative for the purpose of representation on a matter of employer-employee relations, and by interfering with the right of a recognized employee organization to represent a member in his employment relations with the City.

Pursuant to section 3509(a) of the Government Code, it is hereby ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with the right of employees to designate an employee organization representative for the purpose of representation on a matter of employer-employee relations.

2. Interfering with the right of a recognized employee organization, Laborers Local No. 270 (Local 270), to represent a member in his employment relations with the City.

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 at all work locations where notices to bargaining unit employees customarily are posted, copies of the Notice attached hereto as an Appendix. 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 other 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 Local 270.

Chairman Duncan and Member Shek joined in this Decision.

APPENDIX

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. SF-CE-128-M, Laborers Local No. 270 v. City of Monterey, in which all parties had the right to participate, it has been found that the City of Monterey (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3502, 3503, 3506 and 3509, and Public Employment Relations Board Regulation 35603(a) and (b). (Cal. Code Regs., tit. 8, sec. 31001, et seq.) The City violated the MMBA when it interfered with the right of an employee to designate Laborers Local No. 270 (Local 270) as his representative in a matter of employer-employee relations, a termination hearing before the City Council. In addition, the City violated the MMBA when it interfered with the union's right to represent a member in an employment related matter, a termination hearing before the City Council.

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

CEASE AND DESIST FROM:

1. Interfering with the right of employees to designate an employee organization representative for the purpose of representation on a matter of employer-employee relations.

2. Interfering with the right of a recognized employee organization, Local 270, to represent a member in his employment relations with the City.

Dated: _____ CITY OF MONTEREY

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

LABORERS LOCAL NO. 270, Charging Party, v. CITY OF MONTEREY, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-128-M PROPOSED DECISION (6/21/04)

Appearances: Weinberg, Roger and Rosenfeld, by Alan G. Crowley, Attorney, for Laborers Local No. 270, LIUNA, AFL-CIO; William B. Conners, Assistant City Attorney, for City of Monterey.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

This action was initiated on August 6, 2003, when Laborers Local No. 270 (Union or Local 270) filed an unfair practice charge against the City of Monterey (City) alleging that the City denied the Union and a bargaining unit employee representational rights at a disciplinary hearing. The general counsel of the Public Employment Relations Board (PERB or Board) on November 20, 2003, issued a complaint against the City. The complaint alleges that at a termination hearing for a bargaining unit employee the City, through its agent the City Council, ordered the employee's designated Union representative to leave the hearing room because the City intended to call him as a witness. By this conduct, the complaint alleges, the City interfered with employee rights guaranteed by the Meyers-Milias-Brown Act (MMBA) section 3506 and committed an unfair practice under section 3509(a) and PERB Regulation 32603(a).[1] The complaint also alleges that the City, by its conduct, denied the Union the right

[1] The MMBA is codified at Government Code, section 3500, et seq. Unless otherwise indicated, all subsequent references are to the Government Code. Section 3506 provides that:

to represent employees in violation of section 3503 and committed an unfair practice under PERB Regulation 32603(b).[2]

> 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.

Section 3509(b) provides that:

> A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq. Regulation 32603(a) provides that it shall be an unfair practice for a public agency to

> 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.

[2] Section 3503 provides that:

> Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the public agency.

PERB Regulation 32603(b) provides that it shall be an unfair practice for a public agency to:

> Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1,

The City filed an answer to the complaint on December 9, 2003, generally denying all allegations and asserting a number of affirmative defenses. Denials and defenses will be addressed below, as necessary.

A settlement conference was conducted by a Board agent on or about January 13, 2004, but the matter was not resolved. The undersigned conducted a hearing in Oakland on March 3, 2004. With the receipt of the final brief on April 15, 2004, the matter was submitted for decision.

FINDINGS OF FACT

The City is a public agency within the meaning of section 3501(c). The Union is an employee organization within the meaning of section 3501 (a), a recognized employee organization within the meaning of section 3501(b) and an exclusive representative within the meaning of PERB Regulation 32016(b) of an appropriate unit of the City's employees. At all relevant times, Marcus Trujillo was a public employee within the meaning of section 350l(d) and a member of the unit represented by the Union.

In or about December 2002, City representatives suspected Trujillo, a custodian, of being intoxicated while on the job. Police were called to the work site for an investigation. Trujillo was released to his supervisor, Judi Hare, and her supervisor, George Helms. They informed Trujillo that he would be tested for drugs, and he allegedly requested Union field representative Tim McCormick represent him in the process. The request allegedly was denied and a drug test was administered to Trujillo.

At no time was McCormick involved in the incident leading up to the decision to test Trujillo. He was not a witness to Trujillo's behavior or movements on the day in question.

3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

And he did not speak to Trujillo at that time regarding a request for representation. Trujillo called McCormick after the interrogation and drug test to inform him of the results of the test and that his request for representation had been denied. McCormick testified in this proceeding that Trujillo told him during the telephone call that Hare and Helms refused his (Trujillo's) request to contact him (McCormick) during the interrogation. McCormick said, "[a]ccording to what [Trujillo] told me, he asked to call me before they said anything about testing him for alcohol. They were interrogating him, and he wanted me to be present." As more fully discussed below, Trujillo eventually was terminated and there was a dispute in his subsequent appeal about whether he asked Helms and Hare for Union representation at the time he was subjected to the drug test. Hare and Helms did not testify in this proceeding.

A few days after Trujillo was tested, he was called to another meeting with Hare and Helms. Trujillo contacted McCormick for representation and McCormick did so from that point forward. According to McCormick, Trujillo was upset at the meeting because he was told that he would be terminated pending an investigation. The test had revealed that Trujillo's blood alcohol content was borderline, and McCormick attempted to negotiate a settlement. During the meeting, Trujillo was asked if he had been drinking on the job, and he responded that he had been drinking the previous night. No settlement was reached at the meeting.

Trujillo next received a notice of intent to dismiss him and a Skelly[3] hearing was scheduled. Once again, McCormick represented Trujillo at the Skelly hearing. Approximately one week later, Trujillo received a notice of termination.

After the notice of termination was issued, McCormick in February 2003 appealed to City Manager Fred Meurer, the next formal step in the City's appeal procedure covering disciplinary matters. In the appeal, McCormick wrote,

[3] Skelly v. State Personnel Board (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14] (Skellv).

> We hereby file an appeal to the Notice of Action for Termination of Employment of Marcus Trujillo on the grounds of denial of Weingarten[4] rights and violations of state and federal laws, in obtaining evidence without proper cause. The Rules and Regulations of the City of Monterey cannot preclude an employee's right to be represented during an investigation, contrary to Mr. Reichmuth's theory. Neither does the City have a right to arbitrarily demand an employee to submit to invasive tests without strong, compelling and objective evidence. Such judgment became moot when the sworn law enforcement officers became involved and the decision fell within their purview. We do request a copy of the tape recording made during the investigation. Furthermore, we request the names of the investigating officers from Monterey Police department and any report that they may have [been] made by them regarding this incident.

Trujillo's appeal to the City Manager was unsuccessful, and McCormick appealed to the next level.

The final step of the appeal process involved a hearing before the City Council. The issues litigated in the hearing were the same as those argued before the City Manager. Specifically, McCormick testified in this unfair practice hearing that evidence surrounding the Weingarten issue was presented to the City Council. He said, "Mr. Trujillo was being interrogated by the personnel department and his superiors prior to the alcohol test being ordered at which point he requested me to be there according to him, and was denied that right."

At the hearing before the City Council, the City was represented by attorney William Connors, the City Council was represented by separate counsel, and McCormick was designated as Trujillo's representative. Attorney Alan Crowley represented Local 270 in the proceeding. On or about May 6, 2003, about one week prior to the hearing before the City

[4]NLRB v. J. Weingarten. Inc. (1975) 420 U.S. 251 [88 LRRM 2689] (Weingarten) holds that an employee has a right to a union representative during meetings with management where the employee reasonably fears adverse action may result.

Council, McCormick was informed by Connors that he would be called as a witness. The same notice indicated that Hare and Helms would be called as witnesses.

Also prior to the hearing, Connors sent McCormick a proposed stipulation of facts. McCormick agreed with most and disagreed with others. He forwarded the proposal to Crowley with his input. Crowley signed the stipulation of facts on behalf of the Union and returned it to Connors at the start of the hearing.

At the outset of the hearing on May 13, 2003, Connors moved to sequester McCormick as a potential witness. Connors cited a published opinion of the California Attorney General as authority for the proposition that permitting McCormick to remain in the hearing would violate the Ralph M. Brown Act (Brown Act).[5] McCormick was surprised by the request to exclude him. He testified that he has been a Union representative for some 29 years and has never been excluded from a hearing. Crowley opposed the motion to sequester.

The City Council granted the motion and excluded McCormick from the hearing. He waited outside the hearing room for three hours while the hearing was conducted. He was not called as a witness. The parties stipulated that one of the defenses raised before the Council was denial of Weingarten rights, and there was some questioning of witnesses regarding that issue.

The parties also stipulated that Helms remained in the City Council hearing as a designated representative of the City and testified in the proceeding. In reaching the stipulation, Conners took the position in this proceeding that Helms was permitted to remain in the hearing because he was a party and could not be excluded, "even though in a sense it does present unfairness." Conners compared Helms' status with the status of Trujillo, who could not be excluded from the room by virtue of his status as a party.

[5] The Brown Act is codified at Government Code section 54950, et seq.

In this proceeding, McCormick testified that he was Trujillo's "chosen representative" in the City Council hearing. He said that Crowley "was representing the union. He was employed by the union, he was representing me as the union representative, not Mr. Trujillo, correct." In his testimony, McCormick emphasized that Crowley advocated for Trujillo, but he was not Trujillo's designated representative. According to McCormick, "you [Connors] were raising procedural arguments, and I wanted an attorney who has passed the bar there to be able to argue procedural arguments because you were trying to exclude the union and other issues that you were raising, . . . and I wanted somebody there to argue the case for me." Asked by counsel for the City if he recalled saying to the City Council that Crowley represented Trujillo and the Union, McCormick responded, "[a]bsolutely not, he couldn't have said that because Mr. Trujillo was not paying Mr. Crowley, Local 270 was paying Mr. Crowley. He represented the union, only the union."

ISSUES

1. Did the City, by excluding McCormick from the hearing before the City Council, interfere with Trujillo's right to representation by an employee organization under the MMBA?

2. Did the City, by excluding McCormick from the hearing before the City Council, interfere with the Union's right to represent its members under the MMBA?

CONCLUSIONS OF LAW

The rights at issue in this proceeding are found primarily in sections 3502 and 3503. Section 3502 provides in relevant part that "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." Section 3503

provides that "recognized employee organizations shall have the right to represent their members in their employment relations with public agencies."

The MMBA prohibits a public agency from interfering with employee representational rights. Specifically, section 3506 provides in relevant part that "public agencies . . . shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502." And PERB Regulation 32603(b) provides that it is an unfair practice for a public agency to interfere with the rights of an employee organization granted by section 3503.

The test for whether the City has interfered with rights guaranteed by the MMBA does not require that unlawful motive be established; it requires 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 Association of Tulare County, Inc. v. Board of Supervisors of Tulare County (1985) 167 Cal.App.3d 797, 807 [213 Cal.Rptr. 491] (Tulare).]

McCormick's unrebutted testimony is that Trujillo designated him as his "chosen representative" in the termination hearing before the City Council, and he (McCormick) attempted to represent Trujillo. McCormick also testified without rebuttal that Crowley "absolutely" was not Trujillo's designated representative; Crowley was present to represent "the union, only the union." Therefore, it cannot be disputed that Trujillo participated in protected conduct under section 3502 when he designated McCormick as his representative during his termination hearing before the City Council. It similarly cannot be disputed that McCormick engaged in protected conduct under section 3503 when he attempted to act as

Trujillo's representative in his capacity as a representative of a recognized employee organization. The exercise of these rights is protected under the MMBA. (Civil Service Association v. City and County of San Francisco (1978) 22 Cal.3d 552, 565-568 [150 Cal.Rptr. 129] (City and County of San Francisco).)

McCormick had represented Trujillo throughout the disciplinary process and was the person most familiar with the facts of the case and the issues raised at the various levels of the appeal process. These included, for example, Trujillo's blood-alcohol content, the extent of his consumption of alcohol on the day in question, and the settlement discussions pursued by McCormick. McCormick also had heard Trujillo's version of the Weingarten defense, the claim that the City had obtained evidence improperly and the assertion that the City had acted improperly when law enforcement officers entered the picture. Indeed, Conners' proposed stipulation of facts was first presented to McCormick, not Crowley. And Crowley entered into the stipulation only after McCormick reviewed it for accuracy. It is, therefore, reasonable to conclude that McCormick was designated as Trujillo's representative precisely because he had the kind of knowledge about the case that would be most helpful at the hearing. The exclusion of McCormick from the hearing interfered with the Union's and Trujillo's rights and impacted Trujillo's defense in a practical way.

The City contends that because Crowley was present to serve as an advocate for Trujillo in the termination hearing, the City Council did not abuse its discretion; in other words, the City takes the position that the decision to exclude McCormick was reasonable under the circumstances. This claim fails to recognize the specific rights at issue here.

Granted, Crowley was present at the hearing and served as the attorney on the case to represent the Union in presenting the case for Trujillo. However, it bears repeating that Crowley was not the representative designated by Trujillo under section 3502, nor was he the

designated Union representative under section 3503. Crowley was McCormick's attorney, hired by the Union to advise McCormick and represent certain Union interests at the hearing, as well as to serve as an advocate for Trujillo. McCormick convincingly testified that he requested Crowley's presence to represent the Union because Connors had raised procedural arguments and he wanted an attorney to argue on his behalf.

As the Union correctly argues, adoption of the argument advanced by the City would, in effect, permit the City to determine the particular individual who is to serve as an employee or union representative under a standard of reasonableness, as determined by the City. This would run counter to the well established principle that an employee organization has the right to designate its own representatives in dealing with the employer. (See e.g., San Ramon Valley Unified School District (1982) PERB Decision No. 230, p. 16, parties have a right to determine their representatives during negotiations and neither party may dictate selection of representatives.) By excluding McCormick from the hearing under the rationale that Crowley's presence satisfied all MMBA rights, the City interfered with the Union's right to designate a representative to represent a member in an employment-related matter, as well as with Trujillo's right to designate a representative of his choice.

The remaining question is whether the City's conduct in excluding McCormick from the hearing was justified as a legitimate business reason under the Tulare test. At Trujillo's hearing, the City moved to exclude McCormick for two primary reasons. First, the City argued that McCormick's presence in the hearing would violate the Brown Act. As support for this argument, the City relied on 46 Ops.Cal.Atty.Gen. 34 (1965). Second, the City argued, McCormick should be sequestered as a potential witness who would testify about Trujillo's Weingarten defense. For the following reasons, I conclude that the City's arguments in

support of the decision to exclude McCormick from the City Council hearing cannot be justified as a legitimate reason under the statutory scheme of the MMBA.

The MOU between the parties provides in section 34 that

> Personnel Rules and Regulations in effect at the time of ratification of this agreement shall prevail unless superseded specifically by this Memorandum of Understanding or by mutual agreement between the City and the Union. This section does not subject those Personnel Rules and Regulations which would otherwise be excluded from the meet and confer process to any need to meet and confer.

The Code of the City of Monterey, section 25-15.01, contains the procedure to be followed during a disciplinary hearing before the City Council. It provides in relevant part that

> The City Council hearing shall be closed, unless requested to be open by the employee, formal rules of evidence shall not apply, and principles of due process will be applied. Provisions of the Ralph M. Brown Act, the City Charter, and the City Code shall apply to all such hearings.

The City's claim that the Brown Act applies and expressly gives the City Council the authority to exclude witnesses such as McCormick from a termination proceeding is unconvincing. It is true that section 54957(b)(l) of the Brown Act gives the City Council the authority to hold a closed session to consider dismissal of an employee. In relevant part, that section provides

> (b) (1) Subject to paragraph (2), nothing contained in this chapter shall be construed to prevent the legislative body of a local agency from holding closed sessions during a regular or special meeting to consider the ... dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session.

Section 54957(b)(3) gives the City Council the general authority to exclude witnesses from a dismissal proceeding. It provides

> (3) The legislative body also may exclude from the public or closed meeting, during the examination of witnesses, any or all other witnesses in the matter being investigated by the legislative body.

While it is true that section 25-15.01 provides that the Brown Act is applicable to City Council hearings and section 54957(b)(3) gives the City Council the discretion to sequester witnesses, it does not necessarily follow that the general discretion to do so automatically trumps specific MMBA rights. The City Council's authority is permissive; it is not mandatory and thus need not be exercised in every single instance. As the plain language of the statute indicates, the City Council "may exclude" witnesses. Permissive authority such as is included in section 54957(b)(3) may not be exercised in a manner that violates the rights of employees or employee organizations under the MMBA. (cf. McFarland Unified School District v. Public Employment Relations Board (1991) 228 Cal.App.3d 166 [11 Cal.Rptr.2d 405], even though school district has complete authority under Education Code not to reelect probationary teacher, it may not exercise its authority in manner that violates the Educational Employment Relations Act (EERA).[6])

The City insists, nevertheless, that excluding McCormick from the hearing before the City Council was a reasonable exercise of discretion that is not uncommon in administrative hearings. The City asserts that even PERB has the authority to exclude witnesses from hearings under PERB Regulation 32170(d), which gives a Board agent the general authority to "regulate the course and conduct of the hearing, including the power to exclude a witness from the hearing room." As noted above, however, that authority may not be exercised in a manner that interferes with the right to representation under the various collective bargaining statutes administered by the Board. Although evidence about the application of PERB Regulation

[6] EERA is codified at section 3540, et seq.

32170(d) in Board hearings is not in the record and therefore is not determinative of the issues raised here, the City's reliance on the regulation warrants a comment. Under the general practice in PERB hearings conducted by administrative law judges, each party is permitted to designate a representative to assist counsel. Designated representatives who are witnesses are permitted to remain in the hearing room during the hearing, even if a motion to sequester witnesses is granted at the outset.

More importantly, the MMBA itself specifically precludes the kind of Brown Act restriction imposed by the City Council on the right to representation. The California Supreme Court, in a slightly different context, has observed that section 3508 provides "the right of employees to form, join and participate in the activities of employee organizations shall not be restricted by a public agency on *any grounds other than those set forth in this section."* (Italics added; Social Workers' Union. Local 535 v. Alameda County Welfare Department (1974) 11 Cal.3d 382, 387 [113 Cal.Rptr. 461], right to representation attaches to employer-conducted interview which an employee reasonably fears may ultimately lead to disciplinary action because of such union-related conduct.) By excluding McCormick from the hearing room, the City Council exercised its authority in a manner that interfered with guaranteed rights under the MMBA.[7]

[7] The City Council's decision was unreasonable for another reason. In dealing with a motion to sequester witnesses, it is not uncommon for the trier of fact to require a witness to testify first, and permit the witness to remain in the hearing room thereafter, even if it results in calling a particular witness out of order. Also, sequestration of witnesses is not always required. In situations where a union representative is not sequestered and testifies after hearing the testimony of other witnesses, the City Council may consider that fact in weighing testimony prior to reaching its ultimate conclusion. There is no evidence that the City Council considered these or other options prior to excluding McCormick from the hearing. Instead, the City Council excluded McCormick for the entire hearing and thus exercised its discretion under the Brown Act in a manner that interfered with MMBA rights.

The City's reliance on 46 Ops.Cal.Atty.Gen. 34, cited by Conners at the hearing as authority to exclude McCormick, is misplaced. The issue addressed in that opinion was framed by the Attorney General as follows:

> Under the Ralph M. Brown Act, if the legislative body of a local agency properly holds an executive session to consider certain personnel matters, may one member of the press be admitted and all others excluded from such a session?

The Attorney General concluded that "neither members of the press nor any other individuals who are not witnesses in the matter being investigated may be admitted to an executive session held by a local agency pursuant to Government Code section 54957. The Ralph M. Brown Act does not permit exceptions to be made for one or more members of the press or for any other member of the public." (46 Ops.Cal.Atty.Gen. 34, p. 34.) Pointing to considerations of "secrecy, confidentiality, and absence of publicity," the Attorney General reasoned that "the entire purpose of the provisions of section 54957, insofar as they authorize executive sessions, would be rendered nugatory by permitting individuals, other than members of the agency, to attend such so-called 'executive' sessions." The Attorney General observed, moreover, that members of the press are in the same position as members of the public. (46 Ops.Cal.Atty.Gen. 34, p. 35.)

The Attorney General's opinion has little application here. First, the opinion predated the Legislature's decision to establish the MMBA rights at issue in this proceeding. For this reason alone, the Attorney General could not have considered the right of employees and employee organizations under the MMBA and therefore the opinion adds little to the resolution of this dispute. Second, the opinion addresses the right of one member of the press to attend an executive session at the exclusion of others. The Attorney General concluded that "neither members of the press nor any other individuals *who are not witnesses in the matter being*

investigated may be admitted to an executive session" under section 54957. In this case, McCormick was not scheduled to be a mere spectator, a member of the public or a member of the press. Not only was he designated as the representative of Trujillo and the Union, McCormick was to be a witness. Thus, even under the plain language of the Attorney General's opinion, it was improper to exclude McCormick.

It is important to note, moreover, that opinions of the Attorney General are not binding. One court has observed that "Attorney General opinions are not binding authority, but are persuasive authority since we presume the Legislature is aware of the Attorney General's construction and would take corrective action if they believed the legislative intent had been misstated." (Southern Pacific Pipe Lines. Inc. v. State Board of Equalization et al. (1993) 14 Cal.App.4th 42, 54 [17 Cal.Rptr.2d 345], citing Aguimatang v. California State Lottery (1991) 234 Cal.App.4th 769, 791 [286 Cal.Rptr.2d 57].) While the Legislature's enactment of the MMBA may not have been in direct response to 46 Ops.Cal.Atty.Gen. 34, it is worth repeating that the MMBA was enacted *after* that opinion was issued and plainly provided the right of employees to participate in the activities of an employee organization for the purpose of representation in matters of employer-employee relations (sec. 3502), and the right of employee organizations to represent their members in their employment relations. (Sec. 3503.)

It is also noteworthy that the Attorney General is not charged with interpreting the MMBA in the first instance. It is well established that PERB has jurisdiction over conduct that is arguably protected or prohibited by the MMBA. (Sec. 3509;[8] see also El Rancho Unified

[8] Section 3509 provides

> (a) The powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter and shall include the authority as set forth in subdivisions (b) and (c). Included among the appropriate powers of the board are the

School District v. National Education Association (1983) 33 Cal.3d 946, 953-960 [192 Cal.Rptr. 123]: San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893].) It is the Board, moreover, that has broad authority to "investigate unfair practice charges or alleged violations of [the EERA], and to take such action and make such determinations in respect of such charges or alleged violations as the board deems necessary to effectuate the policies of [the EERA]." (Leek v. Washington Unified School District (1981) 124 Cal.App.3d 43, 48-49 [177 Cal.Rptr. 196].) Under section 3509, PERB has the same authority with respect to unfair practice charges alleging violations of the MMBA. It is the Board who is the final arbiter regarding disputes under the MMBA, not the Attorney General. Accordingly, while opinions of the Attorney General may be afforded some weight as a general rule, it would be improper to rely on an opinion of the Attorney General that pre-dated the enactment of the MMBA to resolve this dispute.[9]

> power to order elections, to conduct any election the board orders, and to adopt rules to apply in areas where a public agency has no rule.
>
> (b) A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

[9] Other opinions of the Attorney General cited by the City in its closing argument similarly involve unrelated issues and thus provide little support for its position. In 82 Ops.Cal.Atty.Gen. 29 the Attorney General concluded that an alternate member of a Local Agency Formation Commission, when not serving in place of a regular member, may participate in public hearings and deliberations of the commission, but may not attend closed sessions of the commission. In 83 Ops.Cal.Atty.Gen. 221 the Attorney General concluded that the mayor of a charter city, who is designated as the executive head of the city by the city charter, may not attend a closed session of the city's redevelopment agency when the purpose

The City's argument that the City Council had the authority under California Evidence Code section 777 to exclude McCormick is unconvincing because it overlooks the clear intent of the City Code that the formal rules of evidence not apply in such hearings.[10] The plain language of a local rule will be accepted where it is clear and unambiguous. (Westlands Water District (2004) PERB Decision No. 1622-M, p. 7.) Section 25-15.01 of the City Code states in mandatory terms that "formal rules of evidence *shall not apply."* Therefore, it would be contrary to the plain terms of the City Code for the City Council to rely on a formal rule of evidence as a basis to exclude McCormick from the hearing. A more reasonable interpretation of section 25-15.01 is that the City Council is required to exercise its discretion in conducting a fair hearing while guided by the "principles of due process." The City Council did not do so in Trujillo's hearing for at least two reasons. First, as discussed above, it exercised its authority in a manner that interfered with MMBA rights. Second, it excluded McCormick from the hearing while permitting Helms to remain in the hearing room as a witness and a City representative.

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of the closed session is to conduct a conference with the agency's real property negotiators who are negotiating the disposition and development of certain properties. Neither of these opinions involve MMBA rights and thus will be given no weight here.

[10] Evidence Code section 777 provides as follows:

> (a) Subject to subdivisions (b) and (c), the court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses.
>
> (b) A party to the action cannot be excluded under this section.
>
> (c) If a person other than a natural person is a party to the action, an officer or employee designated by its attorney is entitled to be present.

At the unfair practice hearing, the City conceded that Helms, who had been involved in Trujillo's case from the beginning, testified in the City Council hearing and was permitted to remain in the hearing room throughout the proceeding as a representative of the City. In advancing this argument, the City equated Helms' status with that of Trujillo and asserted at the unfair practice hearing that Helms "can't be excluded, even though in a sense it does present unfairness. The same way Mr. Trujillo was not excluded from the room so he couldn't hear the witnesses either because he is a party, and this was the party." However, even if McCormick did not have the right to be present as a party under the Evidence Code, he had a right under the MMBA to participate in the proceeding on equal footing as Helms by virtue of his status as the representative of the recognized employee organization that negotiated the MOU insuring an appeal procedure would be available for bargaining unit employees, as well as his status as Trujillo's designated representative. As Connors noted at the hearing in this matter, excluding McCormick while permitting Helms to remain in the hearing room did "present unfairness."

In addition, the issues raised here are distinguishable from those in Uplands Police Officers Association et al. v. City of Upland (2003) 111 Cal. App.4th 1294 [4 Cal.Rptr.3d 629] (Uplands), a case relied on by the City. In Uplands, the city attempted to interrogate a police officer who was also president of the association about matters that could lead to adverse action. The officer requested representation by an association attorney. After rescheduling the meeting twice, the attorney informed the department that circumstances still prevented him from attending. The department informed the officer that he could select another representative. The officer claimed he was entitled to his chosen representative, but the department proceeded with the interrogation. The police officer and his association later

sought an injunction to stop the city from conducting interrogations if the chosen representative of the officer was unavailable.

The court held that the right to representation under the Public Safety Officers Procedural Bill of Rights[11] is to be determined under a standard of reasonableness, and it was reasonable for the department to refuse to postpone the interrogation under the circumstances presented to the court. The court reasoned that the association's position could lead to an absurd result; that is, "an officer could prevent any interrogation by simply choosing a representative who would never be available." (Uplands, at p. 1305.) Although the Legislature intended to give police officers procedural rights during interrogations, the court continued, it did not intend to allow the officers to dictate, by their choice of representative, whether an interrogation would occur at all. The court concluded that the officer "must select a representative who is reasonably available to represent the officer, and who is physically able to represent the officer at the reasonably scheduled interrogation." (Uplands, at p. 1306.)

I find that Uplands is not controlling here. First, the central concern described by the court in Uplands ~ that adoption of the association's position would lead to absurd results ~ is not present here. The court was concerned that an officer could prevent an interrogation simply by choosing a representative who would never be available, thus thwarting the legislative purpose in enacting a provision that balances the idea of fundamental fairness for officers against the need for efficient internal affairs investigations. (Uplands, at p. 1302.) In this case, there could have been no realistic concern that the presence of McCormick in the City Council hearing would thwart any legislative purpose. As noted earlier, exclusion of McCormick was not mandatory under the Brown Act. McCormick did not seek to postpone

[11] The Public Safety Officers Procedural Bill of Rights is codified at section 3300, et seq.

the hearing or interfere with the proceeding in any way. He attempted only to remain in the hearing as a representative. It was the exclusion of McCormick, a designated Union representative, from the disciplinary hearing that thwarted the fundamental purpose of the MMBA, which is to provide a "uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies." (Sec. 3500.)

Second, even under a so-called reasonableness standard, the exclusion of McCormick from the hearing does not withstand scrutiny. As discussed above, excluding McCormick from the hearing room while permitting Helms to remain was unreasonable.

Regarding a related point, the City claims that the City Council acted reasonably out of a concern that the Union's request for multiple representatives at a hearing may prove disruptive. The City advances this concern in its prehearing brief as follows: "To thwart the clear intent of the Brown Act that closed sessions *not* be open to any persons but those who must be there, all the Union need do is appoint as many of its members as it wants to be present in the hearing. So, all of the public could be excluded, yet 50 or 100 Union members could be allowed to attend the confidential session by simply being designated as a representative. This notion is key, since the Union discounts the fact the employee was represented by a Union provided representative, his counsel." (Italics in original.)

The City's concern is, of course, highly exaggerated and need not be addressed here in detail. Suffice it to say that if the Union designated "50 or 100" representatives we would have a different case. But that is not what happened here. In this matter, the Union and Trujillo designated only one representative, McCormick, and he was excluded from the hearing. The concern that the Union may disrupt a disciplinary hearing with multiple representatives is not a valid basis to interfere with protected representational rights.

The City next points out that it is the respondent in this matter, and the City Council participated merely as a quasi-judicial body, "a neutral decider of cases." The City contends that it did not interfere with McCormick's or Trujillo's representational rights; rather, the City Council in its capacity as a neutral body took the complained of action. Therefore, the City argues, it has taken no unlawful action. I find this argument unpersuasive for the following reasons.

As the City concedes in its answer, the City attorney prosecuting the disciplinary action against Trujillo initiated the arguments upon which the City Council relied in excluding McCormick. And the City Council did not act as a totally independent entity in this matter. The Council is a component of the City government and acts on behalf of the City under authority of applicable laws and regulations. In this instance, its decisions in Trujillo's hearing were binding on the City. Moreover, an agency relationship exists where the principal grants an agent the express authority to perform a contested act or the alleged agent had the ostensible authority to do so. (Inglewood Unified School District (1990) PERB Decision No. 792.) Under this standard, it is fair to characterize the City Council as an agent of the City and to hold the City responsible for its actions.

REMEDY

Pursuant to section 3509(a), the PERB under section 3541.3(i) is given the authority

> To investigate unfair practice charges or alleged violations of this chapter, and take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

It has been found that the City interfered with Trujillo's right to designate a representative of his choice to represent him in a dismissal hearing before the City Council, in violation of section 3502. It has also been found that the City interfered with the Union's right

to represent a member in his employment relations with the City, in violation of section 3503. By its conduct, the City has also violated section 3506. It is therefore appropriate to order the City to cease and desist from interfering with protected rights under the MMBA.

It is further appropriate that the City be directed to post a notice incorporating the terms of the order. Posting such a notice, signed by an authorized agent of the City, will provide employees with notice the City has acted in an unlawful manner, is being required to cease and desist from such activity, and will comply with order. It effectuates the purposes of the MMBA that employees be informed of the resolution of this controversy and the City's readiness to comply with the ordered remedy. (County of Sacramento (2004) PERB Decision No. 1581-M.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is found that the City of Monterey (City) violated Government Code sections 3502, 3503, 3506 and 3509, provisions of the Meyers-Milias-Brown Act (MMBA), and Public Employment Relations Board (PERB or Board) Regulations 35603(a) and 35603(b). (Cal. Code Regs., tit. 8, sec. 31001 et seq.) The City violated the MMBA by interfering with the right of an employee to designate an employee organization representative for the purpose of representation on a matter of employer-employee relations, and by interfering with the right of a recognized employee organization to represent a member in his employment relations with the City.

Pursuant to sections 3509(a) and 3541.3(i) of the Government Code, it is hereby ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with the right of employees to designate an employee organization representative for the purpose of representation on a matter of employer-employee relations.

2. Interfering with the right of a recognized employee organization, Laborers Local No. 270, to represent a member in his employment relations with the City.

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

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. 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 other material.

2. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board (PERB or Board) in accord with the director's instructions.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
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. (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 Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Fred D'Orazio
Administrative Law Judge