OVERRULED IN PART by Contra Costa Community College District (2019) PERB Decision No. 2652

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME LOCAL 146, Charging Party, v. CARMICHAEL RECREATION & PARK DISTRICT, Respondent.	Case Nos. SA-CE-370-M SA-CE-379-M PERB Decision No. 1953-M April 17, 2008

Appearances: Robert C. Bowman, Jr., Attorney, and Felix Huerta, Jr., Business Agent, for AFSCME Local 146; County of Sacramento by Timothy D. Weinland, Deputy County Counsel, for Carmichael Recreation & Park District.

Before Neuwald, Chair; McKeag and Rystrom, Members.

DECISION

NEUWALD, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by AFSCME Local 146 (AFSCME) to the proposed decision (attached) of a PERB administrative law judge (ALJ). In these consolidated cases, AFSCME alleges that the Carmichael Recreation & Park District (District) violated the Meyers-Milias-Brown Act (MMBA)[1] by: (1) interfering with protected employee rights; (2) discriminating against an employee for engaging in protected activity; and (3) refusing to provide requested information.[2]

We have reviewed the entire record in this case, including the unfair practice charges, complaints, transcript and exhibits, post-hearing briefs, proposed decision, AFSCME's

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

[2]AFSCME did not appeal the ALJ's determination that the District did not violate its duty to provide requested information.

exceptions and the District's response. The Board finds the ALJ properly dismissed the case and we hereby adopt the proposed decision as the decision of the Board itself.

ORDER

The unfair practice charge and complaint in Case Nos. SA-CE-370-M and SA-CE-379-M are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Rystrom joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME LOCAL 146, Charging Party, v. CARMICHAEL RECREATION & PARK DISTRICT, Respondent.	UNFAIR PRACTICE CASE NOS. SA-CE-370-M SA-CE-379-M PROPOSED DECISION (May 10, 2007)

Appearances: Felix M. Huerta, Jr., Business Agent, American Federation of State County and Municipal Employees (AFSCME) Council 57 for AFSCME Local 146; Robert A. Ryan, Jr., County Counsel, and Timothy D. Weinland, Deputy County Counsel, for Carmichael Recreation & Park District

Before Christine A. Bologna, Administrative Law Judge.

PROCEDURAL HISTORY

These consolidated cases allege interference with a bargaining unit employee and a non-represented employee, retaliation against the represented employee, and refusal to provide requested information. The employer denies committing any unfair practices.

On November 17, 2005, AFSCME Council 57, Local 146 (AFSCME) filed an unfair practice charge (UPC or charge) against the Carmichael Recreation and Park District (CRPD or District) in Case No. SA-CE-370-M. On January 19, 2006, the Public Employment Relations Board (PERB or Board) General Counsel's Office issued a complaint alleging interference with a bargaining unit employee and another employee not represented by AFSCME when, after they filed grievances, their supervisor showed them a cartoon,[1] with derivative violations in denying AFSCME's right to represent bargaining unit employees, in

[1]The complaint also alleged the derivative violation of AFSCME's right to represent bargaining unit employees.

violation of Government Code sections 3503, 3506, and 3509(b) of the Meyers-Milias-Brown Act (MMBA),[2] and PERB regulations 32603(a) and (b).[3]

On January 5, 2006, AFSCME filed an second charge against CRPD in Case No. SA-CE-379-M. On February 27, 2006, the PERB General Counsel issued a complaint alleging retaliation against the bargaining unit employee who had filed grievances, complaints, and UPCs[4] by placing her on paid administrative leave, requiring her to submit to a fitness for duty examination (exam), continuing her on paid administrative leave after she was found fit for duty, issuing her a notice of intent to discipline/five days suspension, and scheduling her for a fitness for duty re-evaluation,[5] and refusal to provide information from the fitness for duty exam requested by AFSCME that was relevant and necessary to its representation of the employee in a predisciplinary *"Skelly"* (Skelly v. State Personnel Board (1975) 15 Cal.3d 194) hearing, thereby refusing to meet and confer in good faith,[6] with derivative violations of denial of AFSCME's rights to represent bargaining unit employees and denial of unit employees' rights to be represented by AFSCME, in violation of MMBA sections 3503, 3505, 3506, and 3509(b), and PERB regulations 32603(a) and (b).

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

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

[4]The complaint alleged that the employee exercised rights guaranteed by MMBA in filing the two charges, but AFSCME filed both UPCs.

[5]The second fitness for duty evaluation allegations were the basis of an amended complaint which issued on August 30, 2006 following the Board's denial of AFSCME's request for injunctive relief filed June 6, 2006.

[6]This complaint also alleged derivative violations of denial of AFSCME's rights to represent bargaining unit employees and denial of unit employees' rights to be represented by AFSCME.

On February 2, 2006, the District answered the complaint in Case No. SA-CE-370-M. On March 10, 2006, CRPD answered the complaint in Case No. SA-CE-379-M, and filed an answer to the first amended complaint on September 7, 2006. Two informal settlement conferences were conducted on April 20 and in June 2006, but the disputes were not resolved.

On September 11, 12, and 13, 2006, formal hearing was held in Sacramento. On November 21, 2006, the case was submitted for decision following receipt of the parties' post-hearing briefs.

FINDINGS OF FACT

Jurisdiction

Respondent District admitted that Charging Party AFSCME is an exclusive representative of an appropriate bargaining unit of employees within the meaning of PERB regulation 32016(b), and CRPD is a public agency under PERB regulation 32016(a) and MMBA section 3501(c). The District also admitted that Penny Kelley (Kelley) is a public employee within the meaning of MMBA section 3501(d).

Background

The District employs 20 full-time employees and 250 seasonal, temporary, and/or part time employees. There are four CRPD managers, including District Administrator and Finance Director; there are also two to four Park Maintenance and Recreation Supervisors. The District Administrator reports to a four-member advisory Board which meets at least monthly. Clerical and administrative employees report to Finance Director Ingrid Penney (Penney).

Until October 2005, the District Administrator was Ronald Cuppy (Cuppy) who held the position for almost 30 years. Jack Harrison (Harrison) became Interim District Administrator in March 2006. Penney, the former Financial Administrative Assistant, now

Administrative Services Manager, has held her position for 19 years. Cuppy/Harrison and Penney work at the Dist. office at Carmichael Park.

Richard Murray (Murray), now Senior Recreation Services Manager, formerly General Recreation Supervisor, has 32-plus years with CRPD. Murray works at the La Sierra (La Sierra) office, less than a mile from the District office. Tracy Kerth (Kerth), Murray's counterpart, is a Recreation Services Manager and former Recreation Services Supervisor with 19 years of service. Kerth works in the District office.

Sharon Reneau (Reneau) is a part-time Office Assistant employed 2 1/2 years by the District; she works for Murray at La Sierra. Gaye Massey (Massey), a Secretary, also works for Murray at La Sierra; Massey has 20 years of service with CRPD. Walter "Jack" Webb (Webb), a Custodial Assistant with 4 1/2 years of District service, works at La Sierra.

Kelley is a Bookkeeper, employed by the District for three-plus years. Her last day of work was July 19, 2005. Mardi Wally (Wally) is the Administrative Secretary to the four CRPD managers; she has six and one-half years of District service. Kelley and Wally work in the District office and report to Penney.

Wally is not represented by AFSCME. Kelley is in the bargaining unit represented by AFSCME. The record does not reflect the scope of the bargaining unit represented by AFSCME.

Grievances and Cartoon (Case No. SA-CE-370-M)

On May 19, 2005,[7] Wally filed a grievance on her own behalf alleging health benefit information was "misrepresented" to the CRPD Board; the grievance was filed directly with

[7]All dates occurred in 2005 unless otherwise specified.

the Board. Cuppy and Penney learned about the grievance from the Board Chairperson (Chair) before the Board meeting that evening.[8]

On May 20, Kelley filed a grievance on behalf of Wally alleging that on May 19, Penney harassed Wally, retaliated against Wally for filing a grievance, held Wally to a different standard in reporting her time, and violated privacy laws. The grievance was filed directly with the Board. Cuppy testified that he and Penney learned about this grievance from the Board Chair at the Board meeting on June 1. The Board referred the grievance to Cuppy for response. Cuppy advised Kelley of this by electronic mail message (e-mail) on June 3.[9] Penney testified that she first learned about Kelley's grievance after June 3 when Cuppy asked her about it.[10]

On the morning of May 26, Penney gave a New Yorker cartoon[11] to Kelley, suggested Kelley share it with Wally, and placed it outside her office in view of the work stations of the two employees. Kelley subsequently showed the cartoon to Kerth in Penney's presence.

Kelley and Wally considered the cartoon a "threat" to their continued employment with the District. Kelley admitted, however, that she did not complain about the cartoon at the time. Wally admitted that Penney did not make any statement threatening her employment. Kelley

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[8]Penney requested a copy of the grievance but it was never supplied to her. She did not know the subject matter of Wally's' grievance until Wally testified. Penney's testimony was not controverted. Thus it is credited.

[9]On June 27, Cuppy denied the grievance on the grounds that Kelley could not file a grievance on behalf of "someone else," and the union was not involved.

[10]Cuppy's and Penney's' testimony regarding when they learned of Kelley's grievance was uncontroverted. Their testimony is therefore credited.

[11]The cartoon shows a person with a cart of computers, with the top shelf containing thin monitors, and the bottom shelf having thick monitors. An employee is receiving a thin-monitor computer. Another employee is looking at his thick-monitor computer, with several figurines placed atop the monitor. The caption states: "I'm going to have to let some of you go."

testified that Penney overheard her comment to Wally, "She's not going to threaten to fire us for telling."; Penney responded, "I'm not threatening to fire you."; and Kelley replied, "I feel like you are."

A complaint on Kelley's behalf about the cartoon was not made until August 18,[12] when it was included in a grievance packet presented by AFSCME to the CRPD Board. There is no evidence that Wally ever filed a complaint or grievance about the cartoon with the District.

Penney found the cartoon amusing because Cuppy's computer had been changed to a flat screen monitor, and they had to relocate a lizard and skull head formerly on top of his computer. Computers at La Sierra were also being changed to flat screen monitors. Penney denied that she showed the cartoon to Kelley, and suggested she share it with Wally, to threaten or retaliate against the two employees for their previously filed grievances.

Using the standards of credibility set forth in Evidence Code section 780,[13] as well as the testimonial and documentary record evidence, it is concluded that Kelley's and Wally's "beliefs" that the cartoon was threatening and retaliatory are unreasonable. Furthermore, Penney did not even know about Kelley's grievance on Wally's behalf until after she showed the cartoon to the employees. Finally, Kelley did not formally complain about the cartoon until AFSCME presented a grievance on her behalf at the August 18 Board meeting, and Wally never filed a complaint about the cartoon with the District.

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[12]Kelley testified that she mentioned the cartoon to her AFSCME representative within a few days after she received it. The complaint alleged that Kelley complained about the cartoon to the District Board on July 21.

[13]The standards are: demeanor; character of testimony; capacity to perceive/recollect/communicate; bias/interest/motive; prior consistent/inconsistent statements; attitude; admissions of untruthfulness; and existence or nonexistence of facts testified to.

July 19 Incidents (Case No. SA-CE-379-M)

The Invoice

On Tuesday afternoon, July 19, Kelley called Reneau and inquired about the status of an invoice needed to process a warrant check to pay for a summer day camp field trip. Reneau informed Kelley that Massey and the Recreation Supervisor had been trying to send by facsimile transmission (fax) documents to the District office all morning. Kelley told Reneau that it was too late to get a check from the County. Kelley then referred the matter to Penney. The Recreation Supervisor called Murray, who was on vacation, and advised that a check would not be received in time for the field trip.

After receiving a call from Penney which upset her, Reneau personally delivered the invoice documents to Kelley at the District office after 2:00 p.m. Kelley and Wally testified that Reneau "threw" the papers at Kelley, but Reneau denied this. Kelley followed Reneau outside the building, said she knew it wasn't her fault, and hugged her. Reneau returned to La Sierra. Kelley returned to her desk.

"Cupping" Incident

Sometime after 3:00 p.m., Kelley went into the break room and began washing dishes. Kerth entered, followed by Penney. Kerth made copies and left.

Kelley testified that Penney shut the door, pulled her top up around her neck, exposed her breasts, then turned and showed her back which was bruised and chapped. Penney explained that in the "cupping" procedure, a form of holistic/therapeutic medicine, a neighbor overheated the mug and burned her. Kelley stated that Penney trapped her in the corner, against the sink, preventing her from leaving.[14]

[14]Kelley lost her composure after crying out loudly, "Ingrid, you saw you were making me sick!" A lunch recess was then taken.

Kelley and Penney had previously discussed cupping. Penney admitted showing Kelley the middle of her back, and pulling up the back of her shirt. Penney denied exposing her breasts to or trapping Kelley against the sink.

Kelley left the break room and returned to her work station. Kelley told Kerth, who was seated at her desk, and Wally what Penney had done. According to Kerth and Wally, Kelley was "shaken," and "very upset." Penney arrived. There was a second conversation about cupping, during which Penney pulled her top down from her neck showing bruises and marks on her back. Kerth asked Kelley if she wanted her chair back. Kelley said yes, Kerth left, and the conversation ended.

A credibility determination must be made between Kelley and Penney regarding the cupping incident in the break room, because they were the only two percipient witnesses.[15] Using the standards of credibility of Evidence Code section 780, supra, Penney's version is credited over Kelley's for two reasons. First, Kelley's more contemporaneous July 22 complaint about this incident did not mention that Penney trapped her against the sink or exposed her breasts. The complaint stated only that Penney lifted her top, revealing a chaffed, bruised back. Secondly, Kelley's demeanor in breaking down and sobbing while testifying about this episode was melodramatic and overwrought.

Management Meeting Over Invoice

Between 3:30 and 3:45 p.m., Murray entered the Dist. office to meet with Cuppy and Penney about the field trip invoice. They went to Cuppy's office and closed the door. Murray was upset with Penney because he had spoken with her earlier and thought the problem was solved. Murray was also unhappy about Penney's conversation with Reneau. Murray spoke in

[15]Kerth and Wally testified that Kelley told them Penney lifted her top, exposed her breasts, and cornered Kelley, but neither were present in the break room.

a loud, angry voice which could be heard throughout the office. The meeting lasted about an hour. Kerth's office was adjacent to Cuppy's, and she was so "uncomfortable" with Murray's "tirade" that she left work early.

Kelley claimed that Murray and Penney blamed her for the invoice problem. Kerth told Kelley that Penney blamed her for the problem. Murray testified that nothing was said about Kelley during the meeting, she was not the subject of the meeting, and he was not upset with Kelley or Kelley would have been at the meeting. Penney's testimony was similar to Murray's.

Kelley and Wally left work at the usual time, 5:00 p.m., while the managers were still meeting. They talked in the parking lot for ten minutes about the meeting.

Kelley's contemporaneous July 22 complaint also mentioned the management meeting.

Alleged Death Threat

Kelley left the District office and drove to La Sierra to pick up her daughter, Leah (Leah), who was a seasonal Recreation Leader at the summer day camp. Kelley arrived at 5:15 p.m., waved to Leah, and went into the office. Kelley spoke with Reneau.

Kelley testified that she told Reneau about Murray's tirade over the invoice at the District office. Both she and Reneau told each other that the situation was "not your fault." Kelley departed with Leah after she got off work at 5:30 p.m.

Reneau testified that Kelley became agitated as she repeatedly stated that she wanted to make sure everyone knew the situation was not her fault. At some point, Webb walked into the office and remained a short time. Kelley pointed/shook/waved her finger in the air, and said that she was going to call the labor board; she had a copy of a sexual harassment claim against Murray, which was in his personnel file; and she intended to call a television station and/or the Dist. Board and have them follow Murray because he works for both CRPD and Sierra College. At some point, Kelley left the office but soon returned. Kelley again asserted

that she wanted to make sure everyone knows "It's not my fault." Reneau responded that the situation had nothing to do with her, but was between Penney, Murray, and herself. Kelley then said, "I should just go home and get my grandpa's rifle/gun and shoot them all." Reneau tried to calm Kelley and assure her that the problem was between Penney, Murray, and herself. Kelley left with Leah. Reneau did not recall whether Leah came into the office or met her mother outside.

Reneau left the La Sierra office and walked to her vehicle before 6:00 p.m., the end of her workday. Murray arrived. Murray and Reneau discussed the invoice problem briefly.

Webb testified that when he entered the La Sierra office to get a drink of water, he heard Kelley talking. Kelley was animated, and aggravated, pointing her index finger in the air. Kelley repeated statements that she was not going to put up with that, always did her job, and was going to go to the union and labor board. Webb left after less than a minute. He did not hear Kelley yell or make any threatening statements.[16]

Leah testified that she observed her mother approaching the La Sierra office and waved to her at 5:20 p.m., ten minutes before the end of her workday. She went to the restroom and returned to the hall to release the day camp students to their parents. From the sign out table ten feet away, she observed her mother talking to Reneau. Leah did not hear any yelling or angry comments. She could overhear a few things, but did not pay attention to the entire conversation because her mother and Reneau talked daily. Leah and her mother left after Leah signed out at 5:30 p.m. Leah did not see Webb.

July 20

Kelley called in sick and did not report for work on Wednesday, July 20.

[16]Webb prepared a handwritten statement on October 14.

Reneau told Murray that Kelley was upset and agitated when she came to La Sierra to pick up her daughter the previous day, before Murray returned from the District office.

July 21

On Thursday, July 21, the District office received a note from Kelley's doctor, placing her off work on stress leave from July 20 through July 31, with a return to work date of August 1.

Murray informed Cuppy after the evening District Board meeting that Kelley was agitated when she spoke with Reneau at La Sierra on July 19.

July 22

On Friday, July 22, Cuppy spoke with Reneau who confirmed that Kelley was upset when she came to the La Sierra office on July 19.

At 5:09 p.m., Kelley sent an e-mail to Cuppy, with a copy to AFSCME Business Agent Felix Huerta (Huerta) and a law firm, complaining about a hostile work environment, citing the July 19 cupping incident with Penney and Murray's tirade during the management meeting.

July 23-24

Reneau did not report Kelley's rifle comment to any CRPD manager or supervisor on July 20, July 21, or July 22. She testified that she knew Kelley had not returned to work since the incident, and she did not want to cause problems or get Kelley in trouble. Over the weekend, she mentioned the episode to her husband and a friend. Both advised her that she could not keep something that important to herself or let it go, and encouraged her to report it.

July 25

On Monday, July 25, at 9:00 a.m., Reneau called Cuppy at the District office and reported Kelley's rifle remark. Cuppy informed Penney about the incident. Cuppy discussed the issue further with Reneau at La Sierra after she reported to work. Cuppy asked Reneau if

she would provide a written statement, and Reneau agreed.[17] Cuppy and Penney called Deputy County Counsel Timothy Weinland (Weinland) for advice, and met with him that afternoon.

After Cuppy spoke with Reneau that morning, he saw Kelley's July 22 e-mail. He retrieved the e-mail on his computer screen and showed it to Penney before they met with Weinland.

Weinland advised Cuppy and Penny to send Kelley for a fitness for duty exam and place her on paid administrative leave, consistent with the County policy of treating threats very seriously.[18]

Credibility Determination

Kelley denied making the rifle threat. She admitted that Webb had no reason to fabricate testimony against her. Although Kelley did not have much interaction or any conflict with her, Reneau had a motive to give false testimony due to her very close personal relationship with Murray.[19] Kelley testified that the District did not really believe there was a threat; instead, the threat was manufactured by Reneau, along with Cuppy, Penney, and Murray, the same employees she complained about.[20] If the threat had really been made,

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[17]Reneau prepared a two-page typewritten statement on October 7.

[18]Weinland waived the attorney-client privilege.

[19]Kelley initially testified that Reneau had an intimate relationship with Murray, but later revised that claim, citing her lack of personal knowledge. Reneau testified that she has known Murray for 13 years; both of her children worked for him; she and her husband attended several Sacramento Kings basketball games with Murray; and Reneau went to one game with Murray by herself.

[20]Charging Party AFSCME offered two exhibits dated October 27 and December 9, sent by Reneau to a non-Dist. employee to establish her bias and close personal relationship with Murray. The first, "Penny day!", referred to a meeting which was characterized as the predisciplinary *Skelly* hearing for Kelley, and mentioned "Rich" and "Gaye." The second e-mail, "Hello", also referenced "Rich" and "Gaye." The documents were presented as rebuttal evidence after Reneau testified so they were not authenticated. Charging Party's representative

Reneau would not have waited seven days to report it. The threat was communicated only after Kelley filed the July 22 complaint against Penney and Murray.

Cuppy found Reneau's report credible because she liked Kelley, and did not want to get her in trouble. Cuppy also obtained corroborating information from Webb that Kelley was upset and agitated on July 19, although Webb did not hear any threatening remark. Cuppy did not interview Kelley about the allegations because she was on stress leave, and then paid administrative leave pending the fitness for duty exam.

Using the standards of credibility set forth in Evidence Code section 780, supra, it is concluded that Kelley made the comment and threat attributed to her for the following reasons. Although Reneau did not report Kelley's remark immediately, she did communicate it contemporaneously.[21] Moreover, Reneau's explanation for her delay in reporting the incident was reasonable, and demonstrated absolutely no animus toward Kelley, much less any motive to fabricate her testimony to Kelley's detriment. Independent witness Webb provided partial corroboration that Kelley was upset and agitated at the time, and Kelley admitted there was no reason for Webb to color his testimony against her. The evidence does not establish any concoction of the threat by Reneau, acting in concert with Cuppy, Penney, and Murray. Finally, there is no evidence that Cuppy and/or Penney knew about any friendship between Murray and Reneau at the time Reneau reported Kelley's statement.[22]

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stated that the documents were obtained by Massey, forwarded to herself, and then sent to Kelley. The documents were admitted, but were limited to credibility.

[21]Kelley made the gun comment after the close of business on Tuesday, July 19. Reneau reported the statement at the beginning of the business day on Monday, July 25. Thus, three business days elapsed, July 20, 21, and 22, as well as two weekend days when the District offices are closed, before the threat was reported to Cuppy. This is a total of five days, not the seven days asserted by Charging Party.

[22]Penney testified that she first learned that Murray and Reneau were personal friends at the hearing. Her testimony was not controverted.

By contrast, Kelley has a motive to alter her testimony since she has a direct stake in the outcome of this consolidated proceeding. Kelley's demeanor in losing her composure during testimony, supra, attempt to speak despite having a hearing representative, and the content of numerous documents (grievances, complaints, and civil claims against the District) she authored further undermined her credibility.

Paid Administrative Leave/Fitness for Duty Exam

After consulting with County Counsel and exchanging draft documents, on Friday, July 29, Cuppy prepared a memorandum (memo) placing Kelley on paid administrative leave pending a mental fitness for duty determination. The memo was personally delivered to Kelley at her residence by a park ranger that afternoon.[23] Kelley testified that she believed she was placed on paid administrative leave because of her July 22 "whistleblowing" complaint of misconduct by CRPD management staff.

On August 15, AFSCME filed a grievance for Kelley against her placement on paid administrative leave and requested her return to work.

On August 17, Penney sent an e-mail and attachment to Kelley, providing a letter mailed to Kelley which scheduled a psychiatric evaluation with Dr. Damon Wolcott (Dr. Wolcott) on September 8. The letter was signed by Cuppy. Kelley believed that the fitness for duty exam was motivated by her July 22 complaint against Penney and Murray. She contacted Huerta.

[23]The memo directed Kelley not to visit CRPD offices or contact District employees. On August 1, Leah sent an e-mail to Cuppy, stating that because of the directive and her dependence on her mother for transportation, Leah had to leave her seasonal position with CRPD. Cuppy responded that Leah could talk to her mother, Kelley could transport Leah to and from work, and he hoped Leah would stay on. In a further e-mail exchange, Cuppy explained that the letter was personally delivered, rather than mailed, because it was not finalized until Friday and had to be received by Kelley before Monday morning. Kelley was scheduled to return to work from medical stress leave on Monday, August 1.

On August 18, Kelley sent an e-mail and attachment to Huerta, asking him to present a letter to the CRPD Board at its meeting that evening. Huerta gave a copy of the letter to each Board Director at the meeting. The letter complained about Kelley's placement on paid administrative leave, disparate treatment, personal service of the administrative leave memo by a ranger, and other past and present disputes with District management. At the August 18 meeting, Huerta also presented the Board of Directors with a written packet of documents, including a memo complaining about the May 20 cartoon, supra, the cartoon, Kelley's July 22 e-mail complaint to Cuppy, the July 29 administrative leave memo, the August 15 grievance, the August 17 e-mail and fitness for duty appointment letter, and Kelley's August 18 letter to the CRPD Board.

On August 19, the fitness for duty exam was rescheduled to September 6.

On August 22, Cuppy denied the August 15 AFSCME grievance, stating that the fitness for duty evaluation was justified. The letter was sent to Huerta, with a copy to Kelley and a law firm.

On September 6, the fitness for duty exam of Kelley was conducted by Dr. Wolcott. Kelley testified that this was the first time she learned about the alleged death threat as the reason for her placement on paid administrative leave.

On September 22, Cuppy sent a "Notice of Intent to Discipline" letter to Kelley, copying Huerta and a law firm. The letter stated that Kelley had been found fit for duty and to return to work.[24] Her return was delayed pending a proposed disciplinary action of five days suspension based on the July 19 threat. Kelley was advised of her appeal rights. Kelley remained on paid administrative leave.

[24]Cuppy testified that Kelley was cleared to return to work, but the doctor's report indicated "some issues." Penney testified that Kelley was found fit for duty because she would not injure herself or others in the future.

Request for Documents

On October 5, Kelley appealed the disciplinary notice. Her letter to Cuppy denied threatening anyone, and requested a predisciplinary *Skelly* hearing. The letter also requested copies of documents used in the investigation, including witness statements, mentally fit exam finding, and letter and attachments provided by the Dist. to Dr. Wolcott. On the same day, October 5, Huerta sent a letter to Cuppy advising that AFSCME was representing Kelley in the Notice of Intent to Discipline, and requesting a predisciplinary *Skelly* hearing. AFSCME also requested copies of documents relied upon to issue the proposed discipline, including witness statements, reports, documents, documents submitted to Dr. Wolcott, and documents, reports, and responses from Dr. Wolcott.[25] Both letters stated that the requested documents were necessary to prepare for the *Skelly* hearing.

On October 13,[26] Penney sent a letter to Kelley, copying Huerta and a lawyer, scheduling a predisciplinary *Skelly* hearing for October 19. The letter advised that the proposed discipline was not based on Dr. Wolcott's report but on the enclosed witness statement. Reneau's October 7 statement was attached to the letter.

The District admitted that it did not provide the requested documents sent to or received from Dr. Walcott to Kelley or AFSCME.[27]

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[25]Cuppy testified that less than 50 pages of documents (memos, grievances and other correspondence) were sent by the District to Dr. Wolcott, who issued a three page report. Penney testified that less than 20 pages of documents were sent to Dr. Wolcott: a cover memo, work history, job description, staff observed behavior (rifle threat) and Kelley's behavior observed by Cuppy and Penney.

[26]Cuppy had a heart attack on October 2 and retired from the District. Penney was Acting District Administrator during Cuppy's absence until Harrison was hired in March 2006.

[27]Penney testified that her letter and failure to provide the medical documents requested was based on advice of counsel.

Second FFD Evaluation

As Acting District Administrator, Penney processed nine claims filed by Kelley against the District as a public entity.[28] Penney forwarded copies of each claim and the District Board action to the Joint Powers Agreement insurance risk sharing pool for liability insurance. At some point, the Claims Administrator/Risk Sharing Manager contacted Penney and asked the District to consider evaluating Kelley because he had never seen so many claims filed in a limited time period. Penney consulted with County Counsel. Weinland recommended returning to Dr. Wolcott, and letting the doctor decide if Kelley should be re-evaluated.[29]

Penney contacted Dr. Wolcott on March 20, 2006, and sent him 146 pages of additional documents which included the two UPCs, nine public agency claims, letters regarding the investigation of Kelley's claims and re-evaluation, and a status cover memo. A fitness for duty re-evaluation was scheduled for March 30. On March 23, Kelley's attorney advised Harrison that Kelley would not participate in the mentally fit evaluation.

On April 18, 2006, Dr. Wolcott wrote to Penney requesting an opportunity to re-evaluate Kelley based on "additional material information not presented or available at the time of the initial evaluation." The letter acknowledged receipt and review of the 146 pages of documents.[30]

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[28]These claims must be filed with and acted upon by a public entity before a civil lawsuit can be filed.

[29]County Counsel also recommended a District investigation into Kelley's discrimination and sexual harassment claims. On February 9, 2006, Penney sent a letter to Kelley, with a copy to her attorney, advising that the CRPD board had directed her to contract with a law firm to conduct an investigation into her claims. On February 15, Kelley wrote to the District Board Chair, declining to participate in the investigation.

[30]The District supplied these documents to AFSCME and Kelley at a PERB informal conference following denial of the request for injunctive relief.

On May 23, 2006, Harrison sent two letters to Kelley scheduling a second fitness for duty evaluation with Dr. Wolcott on June 13. The letter requested notification by June 2 if Kelley would not participate in the mandatory evaluation, and advised that such refusal was insubordination and grounds for discipline.[31]

Kelley served her suspension from July 3-7, 2006.[32] While on paid administrative leave, Kelley received full pay and benefits.

Cuppy and Penney denied that any of the above actions affecting Kelley's employment were taken as a result of or as retaliation for Kelley's exercise of protected activities in filing grievances and complaints, and/or AFSCME's's exercise of its representational rights in filing grievances, complaints, and charges on Kelley's behalf.

ISSUE

1. Did the District interfere with Kelley and/or Wally by showing the cartoon to them?

2. Did the District retaliate against Kelley by placing her on paid administrative leave, requiring her to submit to a fitness for duty exam, continuing her on paid administrative leave after she was found fit for duty, issuing her a notice of intent to discipline/five days suspension, and scheduling her for a fitness for duty re-evaluation?

3. Did the District unlawfully refuse to provide information requested by AFSCME?

CONCLUSIONS OF LAW

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, but only that at least slight harm

[31]The record does not indicate whether Kelley attended the second fitness for duty exam.

[32]Kelley's employment status with the District at the time of the hearing is unclear.

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.

The Board has described the standard similarly[33]:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S; Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad); Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.)

Under the above tests, a violation may only be found if the MMBA provides the claimed rights. In Clovis Unified School District (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

Kelley's and Wally's Claims

Charging Party AFSCME has failed to meet its burden of proving that the May 2005 cartoon harmed employee rights, constituting unlawful interference.

First, it is doubtful that Wally exercised any rights protected by the MMBA since she appears to be a confidential employee. In any event, she is not in the bargaining unit represented by AFSCME.

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

Kelley is a bargaining unit employee represented by AFSCME, and a public employee covered by MMBA. Kelley also engaged in activity protected by the MMBA when she filed a grievance in May 2005. It cannot be concluded that Penney's conduct in showing her the cartoon harmed any of her rights protected by MMBA, however. Kelley's (and Wally's) beliefs that the cartoon was threatening and retaliatory were unreasonable. Moreover, Penney did not even know about Kelley's grievance on Wally's behalf until after she showed the cartoon to the employees. Kelley did not complain about the cartoon until AFSCME filed a grievance on her behalf three months later in August 2005, and Wally never filed a complaint about the cartoon. Finally, Kelley continued to engage in activity protected by MMBA, filing grievances and complaints, as did AFSCME on her behalf, after the cartoon was shown to her in May 2005.

Discrimination/Retaliation

To establish a prima facie case of discrimination in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employee because of the exercise of those rights. (Campbell Municipal Employees Association v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Association v. City of San Leandro (1976) 55 Cal.App.3d 553 (San Leandro POA); Novato Unified School District (1982) PERB Decision No. 210; Carlsbad, supra.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264 (North Sacramento SD)), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct.

(Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following nexus factors must also be present: (1) the employer's disparate treatment of the employee (Campbell, supra; State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro POA, supra; Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro POA, supra; State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (Trustees of the California State University (1990) PERB Decision No. 805-H); (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons (McFarland Unified School District (1990) PERB Decision No. 786); (6) employer animosity towards union activists (San Leandro POA, supra; Los Angeles County Employees Association v. County of Los Angeles (1985) 168 Cal.App.3d 683; Cupertino Union Elementary School District (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato, supra; North Sacramento SD, supra).

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689 (Palo Verde).) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) in a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's

employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

Kelley's Claim

It is undisputed that Kelley engaged in protected activities in filing grievances and complaints in May, July, and August 2005; AFSCME engaged in protected activities in filing two grievances for Kelley in August, and by filing two UPC's on Kelley's behalf in November 2005 and January 2006; and the District knew about these activities. Also uncontroverted are the several actions taken by CRPD in connection with Kelley's employment: initial and continued placement on paid administrative leave, requiring the initial and second fitness for duty exam, and issuing a notice of intent to discipline/suspension for five days.[34] Charging party failed to meet its burden of proving that the District took these adverse actions against Kelley **because of** these protected activities, however.

The only factor raising an inference of unlawful animus is timing. Although Kelley filed the e-mail complaint on July 19 against Penney and Murray, she sent it after the close of business that day. Cuppy and Penney first learned about the complaint on July 22, **after** Cuppy received Reneau's report of the threat.

Charging party also argues that Cuppy's failure to ask Kelley if she made the threat demonstrates a cursory investigation. The evidence does not support this claim. When Cuppy learned of the threat, Kelley had been placed on medical leave for stress by her doctor. This off-duty status was followed by her placement on paid administrative leave pending a fitness for duty exam. Cuppy also obtained more information from Reneau, and corroboration from

[34] The district denied that these actions were adverse to Kelley, but admitted that it took them. Under Palo Verde, supra, although Kelley received full pay and benefits while on ATO, these actions were adverse to her employment.

Webb, in reaching the decision to place Kelley on paid administrative leave and schedule a fitness for duty exam, consistent with County policy.

All of the District actions taken in connection with Kelley's employment were based on the report of a death threat. It has been found that Kelley made that threat. Thus, CRPD produced a legitimate and substantial business justification for what it required of Kelley.

Refusal to Provide Information

It is well established under PERB and National Labor Relations Board (NLRB), case law that an exclusive representative is entitled to information sufficient to enable it to understand and intelligently discharge its duty to represent bargaining unit members. "Necessary and relevant" information must be furnished for representing employees in contract negotiations and for policing the administration of an existing agreement/grievance-processing. (Stockton Unified School District (1980) PERB Decision No. 143 (Stockton); Chula Vista City School District (1990) PERB Decision No. 834 (Chula Vista); NLRB v. Acme Industrial Co.(1967) 385 U.S. 432; Procter & Gamble Mfg. Co. v. NLRB (8th Cir. 1979) 603 F.2d 1310.) Certain information requested by an exclusive representative is presumed to be relevant. The Board has found various types of information relevant when requested for collective bargaining or contract administration. (Stockton, supra, - health insurance data; Trustees of the California State University (1987) PERB Decision No. 613-H - wage survey data (CSU Trustees); Newark Unified School District (1991) PERB Decision No. 864 - staffing and enrollment projections). Information pertaining to mandatory subjects of bargaining is also presumptively relevant.(State of California (Departments of Personnel Administration and Transportation) (1997) PERB Decision No. 1227-S).

PERB uses a liberal standard, similar to a discovery-type standard, to determine relevance of the requested information. If the employer questions the relevance of the

information, the union must provide an explanation. (Modesto City Schools and High School District (1985) PERB Decision No. 479.) If the relevance of the requested information is rebutted by the employer, the exclusive representative must establish how the information is relevant to its representational responsibilities such as negotiations or contract administration. (CSU Trustees, supra; San Diego Newspaper Guild v. NLRB (9th Cir. 1977) 548 F.2d 863).

Information request cases ordinarily turn on the particular facts involved, so each request is analyzed separately. (Chula Vista, supra.) Failure to provide requested information is a per se violation of the duty to bargain in good faith.

AFSCME's Claim

On October 5, 2005, Kelley, and AFSCME on her behalf, requested essentially the same medical information: mentally fit exam finding, letter and attachments provided by district to Dr. Wolcott (Kelley), and documents submitted to, and documents, reports, and responses from Dr. Wolcott (AFSCME). Both letters requested the medical information to prepare for Kelley's *Skelly* hearing. It is undisputed that the District did not provide the requested documents.

An employer's duty to provide information to exclusive representatives, described above, does not extend to individual employee requests. (State of California (Department of Food and Agriculture) (1998) PERB Decision No. 1290-S; Regents of the University of California (1996) PERB Decision No. 1148-H.) Thus, the District did not violate MMBA in not providing the information requested by Kelley to her.

In Los Angeles Unified School District (1990) PERB Decision No. 835, the Board stated: "There is no precedent to support the incorporation of *Skelly* requirements into the duties required of an employer under the Educational Employment Relations Act (EERA), and we find no basis for adopting such requirements." The case dismissed allegations that the

employer did not provide documents for a *Skelly* hearing, but the decision turned on the failure of the employee organization to request the information, citing Oakland Unified School District (1982) PERB Decision No. 275.

In San Bernardino City Unified School District (1998) PERB Decision No. 1270 (San Bernardino), PERB held that the employer's failure to provide a witness list requested for a Personnel Commission disciplinary appeal hearing did not violate EERA. The Board found the witness list did not relate to a mandatory subject of bargaining or grievance processing, but only to an "extra-contractual forum." The burden was on the exclusive representative to show that the witness list was relevant and necessary to its representational duties, but the union did not meet that burden.[35]

AFSCME requested the medical documentation solely to prepare for Kelley's *Skelly* hearing, an extra-contractual forum. Under the above precedent, it is concluded that AFSCME failed to meet its burden of showing the information it sought was relevant and necessary to the union's representational duties.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaints and underlying unfair practice charges in Case Nos. SA-CE-370-M and SA-CE-379-M, AFSCME Local 146 v. Carmichael Recreation & Park District, are hereby DISMISSED.

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

[35]San Bernardino, supra, did not mention Los Angeles Unified School District (1994) PERB Decision No. 1061. That case found the employer did not violate EERA in refusing to provide magazines to the exclusive representative for use in a Personnel Commission disciplinary appeal hearing. The decision featured three separate written opinions.

Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-8231
FAX: (916) 327-7960

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130; see also Government Code sec. 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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

Christine A. Bologna
Administrative Law Judge