**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| MODESTO CITY EMPLOYEES' ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>CITY OF MODESTO,<br><br>Respondent. | Case No. SA-CE-469-M<br><br>PERB Decision No. 2022-M<br><br>May 12, 2009 |

Appearances: Rose Law Firm by Joseph W. Rose, Attorney, for Modesto City Employees' Association; Liebert Cassidy Whitmore by Gage C. Dungy, Attorney, for City of Modesto.

Before Rystrom, Chair; Neuwald and Dowdin Calvillo, Members.

DECISION

RYSTROM, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Modesto City Employees' Association (Association) to the proposed decision of an administrative law judge (ALJ) (attached). The amended unfair practice charge filed by the Association alleged that the City of Modesto (City) violated Meyers-Milias-Brown Act (MMBA)[1] sections 3502, 3503 and 3509(b), as well as PERB Regulation 32603(a) and (b)[2] by: (1) refusing the request of an Association member, Herb Neuman (Neuman), for representation during two meetings he was required to attend with his supervisors; and (2) discriminating against Neuman for requesting union representation at a third meeting by failing to complete an investigation of a hostile work environment complaint filed by Neuman.

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

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

The ALJ found that no violation occurred based on the City's denial of the requests for representation because the meetings which Neuman was required to attend without union representation were not investigatory interviews giving rise to representation rights. No discrimination by the City against Neuman was found by the ALJ based on her conclusion that no adverse action had taken place against Neuman because of his request for union representation.

The Board has reviewed the entire record in this case, including the original and amended unfair practice charge, the complaint, the post-hearing briefs and the proposed decision, as well as the Association's exceptions and the City's response to the exceptions. Based on this review, we affirm the dismissal of the unfair practice charge.

We find that all but one of the Association's exceptions were also raised before the ALJ and are addressed in the ALJ's well-reasoned proposed decision which correctly determines the facts and applies the law. On this basis, we adopt the ALJ's proposed decision as that of the Board itself. We add to this decision our discussion below which addresses the one exception not presented to the ALJ in the Association's closing brief. The Association also requests to present oral argument based on its exceptions without providing further reasons. We deny this request on the basis that oral argument in this case is unnecessary.[3]

## DISCUSSION

It its exceptions to the ALJ's proposed decision, the Association contends that the ALJ erred in denying its motion at the hearing to amend the complaint to conform to the proof that

[3] The Board has historically denied oral argument when an adequate record has been prepared, the parties have had ample opportunity to present briefs, have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Modesto City Employees' Association* (2008) PERB Decision No. 1994-M.)

Neuman's supervisor discriminated against him by removing him from a specific position which caused Neuman a $200 to $300 loss in wages every three to four weeks.[4]

The complaint alleged, in pertinent part: "On or about March 22, 2007, Respondent, acting through its agent, Janice Stewart, took adverse action against Neuman by failing to complete the investigation of the complaint [of a hostile work environment]." This is the only adverse action alleged in the complaint. The Association's motion to amend would have added a charge of discrimination based on an adverse action occurring in August 2007 taken by another person, Neuman's immediate supervisor.

The testimony on which the Association relies in claiming that the ALJ improperly denied its motion to amend occurred towards the end of the second and final day of the hearing. The Association's attorney, Joseph W. Rose (Rose), attempted to put on evidence of a conversation between Neuman and his supervisor, Kahazzo Maksoud (Maksoud), which took place in August 2007. The City's attorney objected to the question on the basis that it was outside the scope of the complaint which involved an adverse action which allegedly occurred on March 22, 2007. Noting that the alleged adverse action took place long before August 2007, the ALJ asked for an offer of proof. Rose responded that the August 2007 testimony was relevant because, as Neuman would explain after learning of Neuman's hostile work place complaint, not only was it not processed by City representative Janice Stewart, but Maksoud also retaliated against Neuman. The ALJ responded that the adverse action in the complaint was not by Maksoud and that it consisted of the City's failing to complete the investigation of Neuman's hostile work environment complaint. Rose responded that he wanted to offer

[4] The Association also argues that the ALJ erroneously failed to find that this removal imposed an adverse action against Neuman. Because we find that this issue was not before the ALJ, we do not address whether said removal constitutes an adverse action for purposes of finding the City discriminated against Neuman.

additional proof and that after such proof he would make a motion to amend the complaint to conform to proof. The ALJ ruled that he could not offer additional testimony and then move to amend the complaint because that would deprive the City of due process. Rose asserted "Okay."

However, later in the hearing, Rose asked Neuman on redirect examination what duties he was removed from in August 2007. This question was again objected to by the City on the basis of relevance. The ALJ allowed this inquiry to be made based on related cross-examination questions. Neuman then testified that he was removed from the nutrient bench by Maksoud, which had a financial impact on Neuman because of loss of overtime pay.[5] Rose did not make any motion after this testimony to amend the complaint to add discrimination allegations based on the additional adverse action by Maksoud in removing Neuman from the nutrient bench.[6]

In a footnote in her proposed decision after discussing Neuman's claims of informal discipline in August 2007, the ALJ held: "[The Association's] motion to amend the complaint to include this allegation was denied on due process grounds as outside the allegations of the June 8, 2007 complaint."

PERB Regulation 32648 provides that the charging party may move to amend the complaint by oral motion on the record and that, in ruling on such a motion, the ALJ should

[5] Neuman went on to testify that Maksoud explained to him that he had a failure of filters which was being monitored and Neuman had contaminated it, and for that reason she was taking his duties away. According to Neuman, Maksoud would not allow him to show proof "of it" and that she also said to him that he was too cheap to hire a lawyer against "John and Robert" and that now he is going after her.

[6] Additionally, the Association made no contentions in its post-hearing brief regarding the testimony about the August 2007 removal of Neuman being an additional adverse action or that it had made a motion to amend the complaint to this effect which had been improperly denied.

consider prejudice to the respondent, among other factors.[7] In this case, the ALJ found that to grant the Association's request to amend would be prejudicial to the City because it would be denied its due process rights. Under the circumstances of this case, we agree.

The Association's amendment would have in effect resulted in a very late, new charge of discrimination. Although the protected activity and employers' knowledge of Neuman's exercise of his rights of requesting union representation would be the same as the discrimination charge in the complaint, the new discrimination charge would be based on totally different alleged facts regarding what adverse action had occurred and the requisite nexus factors linking the new adverse action to the protected activity. The lateness of the motion to amend is another compelling factor in finding that the City would have been prejudiced. As stated above, the Association waited until late in the second day of a two-day hearing to make an attempt to adduce the new adverse action evidence and make the request to amend the complaint.

A similar conclusion results when this case is analyzed under PERB's well-established test for an unalleged violation. PERB has consistently held that an unalleged violation can only be considered when: "(1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on this issue."

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[7] PERB Regulation 32648 provides:

> During hearing, the charging party may move to amend the complaint by amending the charge in writing, or by oral motion on the record. If the Board agent determines that amendment of the charge and complaint is appropriate, the Board agent shall permit an amendment. In determining the appropriateness of the amendment, the Board agent shall consider, among other factors, the possibility of prejudice to the respondent.

(*Fresno County Superior Court* (2008) PERB Decision No. 1942-C.) In this case we need not go beyond the first criteria in that, given the lateness of the Association's request to amend, the City would not have had adequate notice or an opportunity to fully defend against the additional discrimination charge.

## ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-469-M are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Neuwald and Dowdin Calvillo joined in this Decision.

**STATE OF CALIFORNIA**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| MODESTO CITY EMPLOYEES ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>CITY OF MODESTO,<br><br>Respondent. | UNFAIR PRACTICE<br>CASE NO. SA-CE-469-M<br><br>PROPOSED DECISION<br>(June 5, 2008) |

Appearances: Joseph W. Rose, Esq., Rose Law Firm, P.C., for Modesto City Employees Association; Liebert Cassidy Whitmore, by Gage Dungy, Esq., for City of Modesto.

Before Christine A. Bologna, Administrative Law Judge.

## PROCEDURAL HISTORY

This case alleges denial of the right to be represented during two investigatory interviews of an employee, and discrimination/retaliation against the employee for requesting representation at a third interview. The employer denies commission of any unfair practices, and contends that no right to representation attached at any of the meetings.

On March 27, 2007, the Modesto City Employees Association (MCEA, Association, or Union) filed an unfair practice charge (UPC or charge) against the City of Modesto (City or Employer). On May 17, MCEA filed a first amended charge. On June 8,[1] the PERB General Counsel's Office issued an unfair practice complaint (complaint) alleging that a bargaining unit employee requested union representation during two meetings he was required to attend with supervisors but representation was denied, and discrimination against the employee when the City failed to complete the investigation of his hostile work environment complaint after he

[1]Also on June 8, the Public Employment Relations Board (PERB or Board) General Counsel's Office issued a Notice of Partial Dismissal, based on an April 23 Warning Letter, that the alleged denial of the employee's right to be represented at a March 22 meeting did not state a prima facie case.

requested representation during that interview.[2] The complaint further alleged that the City's conduct violated Government Code sections 3502, 3503, and 3509(b) of the Meyers-Milias-Brown Act (MMBA), and PERB regulation 32603(a) and (b).[3]

On June 27, 2007, the City answered the complaint, denying all substantive allegations and asserting affirmative defenses. On August 24, an informal settlement conference was conducted but the dispute was not resolved.

On January 8 and 9, 2008, formal hearing was held in Sacramento. On March 24, the case was submitted for decision following receipt of the parties' post-hearing briefs.

## FINDINGS OF FACT

### Jurisdiction

The City admits that it is a public agency within the meaning of Government Code section 3501(c) of MMBA and PERB regulation 32016(a). The City also admits that MCEA is an exclusive representative of an appropriate bargaining unit of employees within the meaning of PERB regulation 32016(b), and Herb Neuman (Neuman) is a public employee within the meaning of MMBA section 3501(d).

### Background

MCEA is the exclusive representative for the Miscellaneous unit of approximately 440 employees, the largest bargaining unit in the City. Tom McCarthy (McCarthy) has been President of the Association since January 1, 2006. McCarthy is a Waste Water Collection

[2]The complaint also alleged derivative violations of denial of the Association's rights to represent employees, and the employee's right to be represented by MCEA.

[3]Unless otherwise indicated, all references are to the Government Code. The MMBA is codified at Government Code sections 3500 et seq. PERB regulations are codified at California Code of Regulations, title 8, sections 31001 et seq.

Systems Operator in the City's Public Works Department (Department), Waste Water Division. Robert Phibbs (Phibbs) is the former attorney for the Union.

Neuman is a Laboratory Analyst II in the Waste Water Division of the Department. Neuman has worked for the City for 29-plus years and is a member of MCEA. Neuman's direct supervisor was Laboratory Supervisor Khazzo (Kay) Maksoud (Maksoud) until she retired in October 2007. Maksoud and Neuman worked together for 23 years, and Maksoud supervised Neuman and eight other employees for seven years. Neuman's second line supervisor was Dan Wilkowsky (Wilkowsky), Deputy Director of the Department, Waste Water Division, from February 2006 to April 2007.

Janice Stewart (Stewart) has been an hourly employee in the Administrative Services Division of the Department since June 2006. Stewart retired in April 2006 as the Deputy Personnel Director for the City. Stewart reports to Gail Wax (Wax), Department Administrative Services Officer.

Barbara Santos (Santos) succeeded Stewart as the City's Deputy Personnel Director in May 2006. Dawn Perez (Perez) is the Equal Employment Opportunity (EEO) Analyst for the City, and a paralegal in the City Attorney's Office. Perez investigates employee complaints of harassment or discrimination under Title VII of the Civil Rights Act (42 U.S.C. sections 2000 et seq.) and the City's policy prohibiting harassment or discrimination.

March 22, 2007 Request for Representation

On January 26, 2007, Neuman filed a complaint of harassment or discrimination against Maksoud, alleging a hostile work environment since December 7, 2006 due to preferential treatment of a coworker. The complaint attached an electronic mail message (e-mail) and listed the names of two witnesses, but did not include the protected category/status/activity

claimed as the basis of harassment or discrimination.[4] On February 9, Perez sent Neuman written Notice of Confidential Administrative Investigation (Notice) into his complaint, scheduling an interview at 10:00 a.m. on February 20 in the City Attorney's Office.

In preparing for the interview, Perez discovered that Neuman's complaint failed to allege harassment or discrimination based on a protected category. On February 13, 2007, Perez sent a confidential memorandum (memo) to Stewart, including Neuman's complaint and the Notice of interview on February 20, and referring the complaint to the Department to investigate.[5]

On March 6, 2007, Neuman sent an e-mail to Perez inquiring about the status of the "hostile environment grievance." Perez forwarded the e-mail to Stewart, asking who should respond to Neuman. Stewart replied that she would contact Neuman. Stewart called Neuman and scheduled an interview to discuss his complaint on March 22 at the Department satellite office where she and Wax worked.

Prior to March 22, 2007, Neuman approached McCarthy at a Union meeting and asked McCarthy to accompany him to the interview. McCarthy agreed.

On March 22, 2007, before the interview, Neuman called Wax and advised that McCarthy would be his Union representative at the interview. Wax informed Stewart. Stewart

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[4]The protected categories on the City's harassment or discrimination complaint form are: race/color; ancestry; religion/creed; sex; national origin; marital status; age; mental/physical/perceived disability; medical/pregnancy related condition; sexual orientation; political/affiliation belief; and other. Neuman's complaint did not mark any of these criteria, and left the entire section blank.

[5]Perez' memo advised Stewart that Neuman's interview would have to be changed, and inquired whether she should inform Neuman that the Department was now handling his complaint, or Stewart would contact him. Before sending the Notice of interview, Perez spoke with Neuman once by telephone, asking if he notified his supervisor about the complaint; Neuman responded no. Neither Perez nor Stewart notified Neuman that his complaint had been transferred to the Department and the interview rescheduled before February 20. That day, Neuman appeared for the interview at the City Attorney's Office but Perez was not there.

called Perez and left a voice-mail message. Stewart and Wax spoke with Santos. The three agreed that Neuman was not entitled to representation because the interview would only address his hostile work environment complaint against his supervisor, and no possible disciplinary action could result.[6] Stewart then escorted Neuman and McCarthy into the interview room to meet with her and Wax.

Neuman requested that McCarthy be allowed in the interview as his Association representative. Stewart denied the request, stating that the purpose of the "complaint intake" interview was to assist Neuman in resolving his workplace concerns. Stewart further asserted that no possible discipline could result from the interview[7] unless Neuman were to lie, and such a determination would involve a separate administrative investigation where representation would be granted. Stewart had confirmed the practice to deny representation to complainants with the City Personnel Department, and it was based on a desire to maintain confidentiality.

Stewart suggested several alternatives. Because the Department would tape-record the interview, and Neuman planned to tape-record the meeting, Neuman would have a record and the Department would provide him a transcript so nothing would be misinterpreted. McCarthy could remain outside the interview room so Neuman could consult with him. If Neuman somehow mentioned any wrongdoing, Stewart would stop the interview and allow representation. McCarthy responded that Neuman was concerned that he would get in trouble and wanted representation.

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[6]Perez later called Stewart and agreed with the conclusion to deny representation.

[7]Neuman admitted that he was told that he was not the subject of the interview, and he did not believe he was the subject of any investigation on March 22. McCarthy testified that Stewart assured Neuman that discipline would not result from the meeting.

Neuman and McCarthy left the room to consult. Neuman told McCarthy that he was afraid he would get in trouble, he was nervous he would say something, and he wanted someone on his side. They returned, and McCarthy expressed Neuman's concerns to Stewart and Wax. Neuman also told Stewart he was afraid of discipline for complaining about his supervisor. McCarthy insisted on remaining in the room.

Neuman would not proceed with the interview without McCarthy as his Union representative, and Stewart and Wax would not deviate from their understanding that the City's practice did not allow representation to harassment or discrimination complainants or witnesses in administrative investigations.[8] The meeting was cancelled.[9] Neuman and McCarthy left.

On March 28, 2007, Perez sent a letter to Neuman advising that his complaint of harassment or discrimination and allegations of hostile work environment did not fall "within the purview of Title VII." The City took his complaint "very seriously," and therefore forwarded it to Stewart in the Department to reschedule the administrative interview. Perez "apologized for any confusion" caused by the transfer of the complaint.

On April 5, 2007, Stewart sent a memo to Neuman summarizing the March 22 interview. Stewart advised that no further action could be taken on Neuman's complaint of harassment or discrimination until he provided additional information. Stewart offered to meet

[8]Stewart claimed there was an agreement with Phibbs that witnesses in administrative investigations into discipline, and complainants in harassment or discrimination cases were not entitled to Union representation. Phibbs denied any such agreement, as did McCarthy. Phibbs cited six to eight instances where City employees were witnesses to and subjects of administrative investigations, and were represented by him as the Association's representative. The employees had concluded their investigatory interviews with representation, then were questioned as witnesses with representation. In one case, a complainant was represented by Phibbs in an interview, without a pending administrative/disciplinary investigation.

[9]See footnote 1, ante, p. 1.

with Neuman and Wax, or "just one of us," to process and resolve his complaint of hostile work environment against his supervisor.

April 3, 2007 Request for Representation

On April 2, 2007, Stewart sent an e-mail to various Department employees requesting information about an alleged nitrate sample error by Neuman so she could schedule interviews; a copy of the e-mail was sent to Wilkowsky and Wax.

Also on April 2, 2007, Wilkowsky sent an e-mail to Santos asking when an employee is entitled to representation because there are a lot of missed meetings when employee representatives are turned away, citing Neuman's harassment claim denied by Legal and sent to Personnel where Neuman showed up with McCarthy. Santos responded that she was aware of Neuman's situation and was dealing with the PERB charge.

Wilkowsky thereafter sent an e-mail to Wax, inquiring if someone could do some follow-up soon based on denial of Neuman's harassment claim, sending it to Personnel for resolution, Neuman's refusal to meet without representation, and now the PERB filing. Wilkowsky also advised Wax that he and Maksoud would have a "formal coaching session" with Neuman for leaving work without notification and not being responsive to supervision, but the nitrate issue would not be discussed because it was a separate investigation.

Wax responded to Wilkowsky that Neuman's harassment claim was not denied by the City Attorney's Office, but was determined not to be based on Title VII criteria. As a result, it was referred to the Department for investigation. Had Neuman shared his concerns with Stewart last week, Stewart would have met with Wilkowsky. Wilkowsky then could have directed an investigation of Maksoud, handled it himself, or dismissed the claim as unfounded. Because Neuman was not willing to discuss his complaint without McCarthy as his representative, the Department could not do anything unless Neuman submitted his concerns

on his own without representation, or the City changed its practice and allowed representation. Wax was unsure what the practice was where "complainants choose not to talk to us." Wilkowsky replied, "Good call. Our employees can't make their own rules."

On April 3, 2007, Wilkowsky required Neuman to attend a meeting in his office with Maksoud. Neuman requested a MCEA representative during the meeting. Wilkowsky and/or Maksoud denied the request for representation because the meeting was a "coaching session."[10] Neuman was further informed that he would not be subject to discipline as a result of his participation in the meeting.[11] The meeting continued for about an hour. The supervisors discussed their expectations for Neuman to respond to supervision and provide advance notice before leaving work. Neuman received no discipline as a result of this coaching session.

April 25, 2007 Request for Representation

On April 25, 2007, Maksoud required Neuman to attend another coaching session on work performance. Neuman requested representation, reading from a preprinted card stating, "If this discussion could lead to . . . adverse effect on my employment, I . . . request my Union representative be present during the meeting." Maksoud denied representation, assuring Neuman it was a coaching session and he did not face discipline. The meeting continued and

[10]MCEA-represented employees are required to attend coaching sessions with their supervisors at least four times a year to discuss and improve their work performance. Administrative investigations into discipline are not conducted by supervisors but are carried out by Department Administrative Services Officers, City Employee Relations Specialists, or outside investigators under contract. There is written advance notice of an administrative investigatory interview, which advises the employee of the right to representation at it. Neuman acknowledged his past participation in coaching sessions.

[11]Wilkowsky did not recall if Neuman requested representation at the meeting. Maksoud and Neuman testified that he did request representation. Maksoud stated that she and Wilkowsky assured Neuman "about 20 times" that the meeting was a routine coaching session and discipline would not come from it.

proper laboratory techniques were discussed. Neuman was not disciplined as a result of this coaching session.[12]

## ISSUES

1. Did the City deny Neuman the right to representation during investigatory interviews on March 22, April 3, and April 25, 2007?

2. Did the City discriminate against Neuman by failing to complete the investigation of his hostile work environment complaint after he asserted the right to representation on March 22, 2007?

## CONCLUSIONS OF LAW

Right to Union Representation

An employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. (Social Workers' Union, Local 535 v. Alameda County Welfare Department (1974) 11 Cal.3d 382; Civil Service Association v. City and County of San Francisco (1978) 22 Cal.3d 552.) PERB adopted the Weingarten[13] rule in Rio Hondo Community College District (1982) PERB Decision No. 260. In order to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation, (b) for an investigatory meeting, (c) which the employee reasonably believed might result in

[12]Neuman was interviewed during the administrative/disciplinary investigation into the nitrate sampling error in April 2007. He was afforded Union representation during the interview, and was not disciplined for the error. Neuman contended that he was "informally disciplined" in August 2007 when his job duties were changed and he was removed from working on a particular machine, losing overtime opportunities. MCEA's motion to amend the complaint to include this allegation was denied on due process grounds as outside the allegations of the June 8, 2007 complaint.

[13]In National Labor Relations Board (NLRB) v. Weingarten (1975) 420 U.S. 251 (Weingarten), the Court granted employees the right to representation during disciplinary interviews.

disciplinary action; and (d) the employer denied the request. (Redwoods Community College District v. Public Employment Relations Board (1984) 159 Cal.App.3d 617 (Redwoods); Fremont Union High School District (1983) PERB Decision No. 301; State of California (Department of Forestry (1988) PERB Decision No. 690-S; State of California (Department of Parks and Recreation (1990) PERB Decision Nos. 810-S and 810a-S.)

In Rio Hondo Community College District, supra, the Board cited with approval Baton Rouge Water Works Company (1979) 246 NLRB 995, [103 LRRM 1056] which provided:

> the right to representation applies to a disciplinary interview, whether labeled as investigatory or not, so long as the interview in question is not merely for the purpose of informing the employee that he or she is being disciplined.[14] However, the right to representation attaches where the employer's conduct goes beyond this purpose, and either (1) seeks facts or evidence in support of the disciplinary action, (2) attempts to have the employee "admit his alleged wrongdoing or sign a statement to that effect," or (3) seeks to have the employee "sign statements relating to such [other] matters as workmen's compensation . . . . See Morris, The Developing Labor Law, 2d ed., pp. 152-153.

In approving the Weingarten rule, the U.S. Supreme Court noted with approval that the NLRB would not apply it to "such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques." Weingarten, supra, 420 U.S. 251, quoting Quality Manufacturing Co. (1972) 195 NLRB 197, 199 [79 LRRM 1269, 1271].

A right to union representation may be held to exist, in the absence of an objectively reasonable fear of discipline, only under "highly unusual circumstances." (Redwoods, supra, 159 Cal.App.3d 617.) The finding of "highly unusual circumstances" in the Redwoods case was based on the requirement that the employee attend a meeting which she no longer sought

[14]Regents of the University of California (1993) PERB Decision No. 998-H.

over her appeal of a negative performance rating; the fact that the interview was investigatory and formal; the interview was held by a high-ranking official of the employer; and the hostile attitude of the official toward the employee. (Ibid.)

In California State University, Long Beach (1991) PERB Decision No. 893-H, PERB incorporated the rationale of Roadway Express, Inc. (1979) 246 NLRB 1127 [103 LRRM 1050], where the NLRB observed that once an employee makes a valid request for union representation, the employer has a choice of one of three options: (1) grant the request; (2) dispense with or discontinue the interview;[15] or (3) offer the employee the choice of continuing the interview unaccompanied by a union representative or of having no interview at all, and thereby dispensing with any benefits which the interview might have conferred on the employee. The employer, however, may not continue the interview without granting the requested union representation unless the employee "voluntarily agrees to remain unrepresented after having been presented by the employer with the choices" described above, or "is otherwise made aware of these choices." (U.S. Postal Service (1979) 241 NLRB 141 [100 LRRM 1520].)

Where an employee requests representation which is denied, and assurances are made that no discipline will result, the employer may not subsequently discipline the employee based on statements made during the investigatory interview. (Lake Elsinore Unified School District (2004) PERB Decision No. 1648.)

The testimony of MCEA President McCarthy sets forth the union's view of the right to representation.

[15]The Weingarten rule requiring representation is inapplicable if no meeting or interview takes place. (Placer Hills Union School District (1984) PERB Decision No. 377; San Bernardino City Unified School District (1998) PERB Decision No. 1270; Los Angeles County Office of Education (1999) PERB Decision No. 1360.)

> Q. So as president of MCEA, did you consider there to be any agreement between MCEA and the City on March 22, 2007 that a complainant was not entitled to a Representative?
>
> A. Absolutely not, and that is not my point of view. It never has been and never will be. If an employee feels that they're in jeopardy of being in trouble in an investigative interview, they are entitled to representation.
>
> Q. And the same question, not as to a complainant but as to a witness.
>
> A. The same thing. If a person is called in as a witness, they are entitled to representation. You never know what somebody's going to say in an investigative interview. If they feel there's a chance they can say something that might get them in trouble, they should have representation. And they should be allowed it.

MCEA's expansive interpretation of an employee's right to representation is not established case law, however. It eliminates the "reasonableness" of the employee's belief that discipline may result from the meeting in favor of personal subjective feelings and speculative unsolicited comments. Moreover, in State of California (Department of California Highway Patrol) (1997) PERB Decision No. 1210-S (St. of Cal. (CHP), PERB found that the right to representation does not attach in an investigatory meeting regarding another employee's conduct, where the employee questioned was a witness to the incident.

March 22, 2007 Interview

It is undisputed that at the beginning of the March 22, 2007 interview, Neuman requested Union representation by McCarthy, and Stewart (and Wax), on behalf of the City, denied the request.

This interview followed Neuman's filing of a hostile work environment complaint of harassment or discrimination against his supervisor. Neuman was informed that no possibility of discipline would come from the interview because he was the complainant who initiated the investigation, rather than being the subject of the investigation. Thus, any "reasonableness" of

Neuman's belief ended after Stewart told him (and McCarthy) that discipline would not result from his participation in the interview.

Moreover, the meeting was not an investigatory or disciplinary interview. No inquiries were made about anything which could result in adverse action. Neuman made no substantive statements, given his assertion of the right to representation. Finally, the interview was not conducted due to Neuman's unwillingness to proceed without Union representation, and the City's denial of representation during it.

April 3 and 25, 2007 Coaching Sessions

It is uncontroverted that on April 3 and 25, 2007, Neuman requested representation by an Association representative during both meetings, and Wilkowsky and/or Maksoud, as the City's agents, denied both requests.

The coaching sessions were not investigatory or disciplinary interviews. The evidence demonstrates a clear distinction between coaching sessions where employees are given work performance direction by their supervisors, and administrative investigations conducted by personnel or labor relations specialists or investigators outside the employee's chain of command where the right to representation is afforded. Neuman admitted participating in both settings and acknowledged the difference between them. Finally, any "reasonableness" of Neuman's belief ended after he was repeatedly told by his supervisors that discipline would not result from the coaching sessions.

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); County of San Joaquin (Health Care Services) (2003) PERB Decision No. 1524-M; Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89.)

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, 131 Cal.App.3d 416; 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, 55 Cal.App.3d 553; 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, 55 Cal.App.3d 553; 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, 55 Cal.App.3d 553; 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, PERB Decision No. 210; North Sacramento SD, supra, PERB Decision No. 264).

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. [Emphasis added; footnote omitted.]

(Newark Unified School District (1991) PERB Decision No. 864 (Newark).)

Neuman's Claim

It is undisputed that on March 22, 2007, Neuman asserted his right to representation by McCarthy during the interview into his harassment or discrimination complaint alleging a hostile work environment. It is uncontroverted that Stewart (and Wax), as agents of the City, knew about this activity. MCEA failed to meet its burden of proving that the City took adverse

action against Neuman by failing to investigate his complaint because of his protected activity in requesting Union representation,[16] however.

First, there was no evidence of any impact on Neuman's employment with the City, much less any adverse impact, as a result of his invocation of the right to representation.[17] Neuman was to be interviewed as a complainant against his supervisor, similar to the witness questioned in St. of Cal. (CHP). (St. of Cal. (CHP), supra, PERB Decision No. 1210-S.) Stewart offered options to Neuman on March 22, 2007, but he rejected them. Stewart subsequently reiterated the Department's willingness to meet with Neuman to investigate and resolve his complaint, but he did not respond. The Department was in unchartered territory where "complainants choose not to talk to us." It is difficult to understand how the City could complete its investigation of the complaint[18] without obtaining further details from Neuman,

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[16]The City contends that Neuman's request for representation is not protected activity because he was not entitled to Union representation at his complainant interview. In Simi Valley Unified School District (2004) PERB Decision No. 1714 (Simi Valley), the Board rejected this argument, stating:

> The Association argues that the request itself is protected conduct notwithstanding whether he was entitled to representation under the circumstances in this case. The District agrees with the proposed decision that the April request was not protected because Bishop was not entitled to representation under the circumstances. The District appears to confuse Weingarten rights with the protected nature of the request for representation itself.

[17]In Simi Valley, the proposed decision concluded that the cancellation of a meeting between the employee and his supervisor was not adverse action, relying on Palo Verde and Newark. In reversing the proposed decision and finding discrimination against the employee, the Board declined "to speculate" whether the cancelled meeting comprised adverse action. (Simi Valley, supra, PERB Decision No. 1714.)

[18]The processing of Neuman's complaint by the City's EEO Office, resulting in its transfer to the Department, could have been handled much more effectively and with greater notice to Neuman. PERB does not have jurisdiction over the City's policy and procedures against harassment or discrimination except as these constitute unfair practices, however. There is no evidence that the City EEO Office investigated the harassment or discrimination complaints of other employees who did not state a protected category on the complaint form.

the initiating party-complainant, who refused to provide them without representation. In essence, Neuman created the alleged "adverse action" of the City's failure to complete its investigation of his harassment or discrimination complaint when he refused to discuss it without representation.

Because the element of "adverse action" is absent, there is no concomitant "nexus" between it and any exercise of protected activity by Neuman.

## PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SA-CE-469-M, Modesto City Employees Association v. City of Modesto, 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 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 95811-4124
(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