OVERRULED IN PART by City of Roseville (2016)
PERB Decision No. 2505-M

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 2001, Charging Party, v. COACHELLA VALLEY MOSQUITO & VECTOR CONTROL DISTRICT, Respondent.	Case Nos. LA-CE-123-M LA-CE-178-M PERB Decision No. 2031-M May 29, 2009

Appearances: Christina C. Bleuler, Attorney, for California School Employees Association & its Chapter 2001; Liebert Cassidy Whitmore by Lisa G. Copeland and Jeffrey C. Freedman, Attorneys, for Coachella Valley Mosquito & Vector Control District.

Before McKeag, Neuwald and Wesley, Members.

DECISION

NEUWALD, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the Coachella Valley Mosquito & Vector Control District (District) of a proposed decision by an administrative law judge (ALJ). The complaint alleged that the District violated the Meyers-Milias-Brown Act (MMBA)[1] by: (1) retaliating against employees for filing a unit modification petition when it laid off Red Imported Fire Ant (RIFA) services employees prior to the California School Employees Association & its Chapter 2001 (CSEA) election; (2) interfering with the rights of RIFA employees by threatening them with layoff prior to the CSEA election; and (3) failing to meet and confer in

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

good faith with CSEA by refusing to negotiate employee access to its email system.[2] CSEA alleged that this conduct constituted a violation of MMBA sections 3503 and 3506.

The ALJ found that the District retaliated against RIFA employees because of their protected activities when it laid off the employees. The ALJ found that the District did not fail to meet and confer in good faith regarding employee access to its email system, but, found that the District did interfere with unit employees right to communicate with the union by denying access to email. The ALJ further found that the District coercively threatened RIFA employees with layoff if they were to unionize.

We reviewed the entire record in this case, including but not limited to the original and amended unfair practice charges, the post-hearing briefs, the proposed decision, and the parties' exceptions and responses to exceptions. Based on this review, we find that the District retaliated against RIFA employees by laying them off prior to the CSEA election subject to the discussion below. We further find that the District unlawfully threatened RIFA employees with layoff. Additionally, we do not reach the merits of the email access issue because we find this issue to be an unalleged violation, the consideration of which is not warranted based on the facts of this case, and reverse that portion of the proposed decision on this basis.

FACTUAL BACKGROUND

The District is a public agency within the meaning of MMBA section 3501 subdivision (c), and CSEA is a recognized employee organization within the meaning of Section 3501 subdivision (b). CSEA represented a bargaining unit of vector technicians, shop

[2] While there were a myriad of allegations, we do not review those allegations not excepted to.

mechanics, laboratory assistants, and a utility worker (Vector Unit). As explained further below, CSEA sought and later became the exclusive bargaining representative for RIFA employees.

On January 11, 2000, the District board passed Resolution No. 2000-04 authorizing a contract with the California Department of Food and Agriculture (CDFA) establishing RIFA to be funded entirely by the state. Stated in the resolution was that the contract was "contingent upon full funding for services as requested in the District's proposal." The District's first contract with the state for RIFA services covered a period of 18 months with a budget of $1,540,130.

Originally, the District intended to "jump-start" the RIFA program by using current vector technicians to begin the RIFA work by working overtime hours. The District and CSEA, however, were unable to reach an agreement regarding overtime. As such, the District hired seasonal or limited term, non-unit employees to perform the work. The District later converted these employees into full-time RIFA premise inspectors (PIs). In January 2000, the RIFA program consisted of approximately 16 PIs, one clerical, two supervisors, and one program coordinator.

On March 22, 2001, in response to instructions from CDFA to reduce the budget, District General Manager Donald Gomsi (Gomsi) submitted two budget proposals to CDFA for the 2002-2003 fiscal year. In his cover letter to CDFA, Gomsi noted that "[t]he first [budget proposal], which totals $871,202.66 will require a reduction of personnel and other expenses from the current level of operations" while "[t]he second budget proposal [of $1,094,318.41] will maintain staff at the current levels and allow for some increase in program activities over the current level."

On May 18, 2001, Gomsi sent CDFA a letter requesting to roll over $221,147.11 of the contract unexpended by June 30, 2001. CDFA denied this request.

On July 9, 2001, the state approved an extension of the District's initial RIFA contract incorporating a budget that included expenses for utilities, attorney fees, janitorial expenses, uniform expenses, motor fuels, worker's compensation insurance, and other items. Specifically, the following expenses were budgeted as follows:

Attorney Fees	$1,000.00
Utilities	$4,000.00
Janitorial Expense	$1,000.00
Equipment Parts & Supplies	$2,000.00
Staff Training	$6,000.00
Field Supplies	$5,500.00
Control Products	$65,000.00

The District submitted a budget to the state on July 31, 2001. While the budget projected income of $910,400 for fiscal year 2002-2003, the state only granted it $810,400. The District thereby suffered a shortfall of $100,000. A second modification extending the RIFA program through June 30, 2004 was signed by the state on October 24, 2001. The state approved another extension on February 27, 2002.

In April 2002, the District laid off seven RIFA employees. CSEA took no legal action in protest of these layoffs.

On May 29, 2002, CSEA filed an unfair practice charge in Case No. LA-CE-65-M (hereinafter "overtime lawsuit"), alleging, inter alia, that the District unilaterally transferred unit work to seasonal employees, unilaterally converted seasonal employees to permanent status, told RIFA employees to urge CSEA to waive bargaining regarding implementation of the RIFA program in exchange for their ability to earn overtime pay, and failed to meet and confer regarding the distribution of overtime.

In August 2002, CSEA initiated a campaign to organize the RIFA employees. CSEA representatives contacted RIFA employees and held meetings. CSEA organizer, Andy Evano (Evano), collected authorization cards.

On September 17, 2002, CSEA filed a unit modification petition with PERB, requesting that the existing CSEA unit of vector technicians be modified to include the RIFA employees. There were eleven RIFA premise inspectors at the time the petition was filed. On October 2, 2002, CSEA withdrew the PERB unit modification petition and, subsequently, on October 11, 2002, submitted a written demand on the District requesting recognition under MMBA section 3507.1 subdivision (c). On October 19, 2002, the District denied CSEA's request for recognition pursuant to Section 3507.1 subdivision (c).

On November 5, 2002, CSEA submitted a unit modification petition pursuant to District Resolution 87.2, along with cards showing majority support. Because of an incorrect zip code, the District did not receive the petition until November 21, 2002. On December 19, 2002, the District rendered a decision denying CSEA's request to modify the unit to include the RIFA employees in the same unit as the vector control employees but offered to create a separate bargaining unit of employees "entitled to independent self-determination," i.e., to an election after the expiration of the 30-day open period. CSEA agreed to proceed to an election but did not agree to give up its right to pursue the District's legal obligation to recognize the RIFA unit as part of the Vector Unit based on a card check pursuant to MMBA section 3507.1 subdivision (c). The District attempted to set an election for January 2003. The RIFA election was delayed until March 13, 2003. Between December 19, 2002 and March 13, 2003, the District met three times with CSEA.

After the unit modification petition was filed, but before the RIFA election, Gomsi met with the RIFA employees in the RIFA room. RIFA employees Diane Greeman (Greeman) and Luz Ginn (Ginn) both testified that Gomsi, who did not customarily come to the RIFA office area, appeared there and told RIFA employees that he was disappointed and that if they went with the union, funds would be depleted and there would be layoffs.[3] Gomsi testified that what he said to the employees was that the District was having some difficulties with CSEA, which were creating legal expenses and the only budget item those expenses could come from was salaries and benefits. He testified that he assured employees they were free to join the union and he wanted the RIFA program to continue, but he was disappointed that the program might die. Gomsi further testified that he was not anti-union but was troubled by "the costs associated with it."

Brian Passaro (Passaro), the District Supervisor for the Eye Gnat/Fly and Rat Program, took over the duties of RIFA Program Director, after the October 5, 2002, resignation of Program Director Rob Garcia.[4] Passaro testified that upon becoming the RIFA program Coordinator, he inherited financial issues. Both Passaro and Gomsi blamed the problems on Garcia, stating that Garcia had underbudgeted for the program. Passaro stated that he had to redo the entire budget because Garcia budgeted on the presumption that the program was going to get an additional $100,000 from SB 204 (1999-2000 leg. sess., ch. 1010). This did not come to fruition. As a consequence, Passaro needed to reduce the budget by $100,000. In addition,

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[3] Greeman specifically testified, Gomsi "did advise everyone there that the budget would really suffer if they chose to vote to be in the Union, and that there would be layoffs." She further testified that when CSEA "came in . . . Don did change his demeanor . . . something had happened that day with the Union, . . . he did come into -- He was disappointed, were his words."

[4] Passaro took over these duties half time and remained a District supervisor as well.

Passaro testified that he was told that the Vector and RIFA were to split everything fifty-fifty. Although he could not remember who told him this, he believed it was an internal District decision, and that the state did not tell RIFA how to spend its money. In reviewing the budget, Passaro realized that the RIFA program was not supporting itself but rather that the Vector budget carried the lion's share of expenses. Passaro, working with Gomsi, thereby changed line items and adjusted monies around to create a revised budget. The revisions included increasing the annual RIFA budget for utilities from $6,000 to $16,000, janitorial expenses from $500 to $7,000, equipment parts and supplies from $1,500 to $3,000, staff training from $200 to $1,200, field supplies from $3,000 to $4,500, attorney fees from $900 to $45,000, and control products from $40,000 to $80,000. The budget also included a $100,000 contingency representing monetary claims relative to the existing overtime lawsuit. As a result of the increases in these other areas, the District decreased salary and benefits from $638,973 to $402,923.

Passaro testified that while making the budget adjustments, he was aware of, but not completely familiar with the unionizing efforts of the RIFA employees. Passaro further testified that the budget adjustments were not motivated by the RIFA employees attempts to unionize. Nonetheless, as a result of these budget cuts, the District announced that it was going to lay off two RIFA employees immediately and, most likely, more in the future.

The District met with CSEA and RIFA employees on January 9, 2003. Prior to this meeting, the District circulated a memorandum to CSEA and RIFA employees regarding "Issues for RIFA Unit Meeting January 9, 2003." The issues included establishing a separate bargaining unit, the secret ballot election, RIFA wages, potential monetary damages from the pending overtime lawsuit, and layoffs. CSEA organizer Evano and CSEA Field Director, Julie

Kossick (Kossick) testified that prior to this memorandum, they were unaware of any claim that the budget needed to be adjusted or of the possibility of the layoffs. Gomsi and Lisa Garvin Copeland, attorney for the District, represented the District. Kossick, Evano, CSEA Representative Tim Taggart, and CSEA Chapter President Mike Martinez (Martinez) represented CSEA. In addition, RIFA employees also attended the meeting. The District presented Passaro's revised mid-year RIFA budget.

CSEA objected to the District's revisions. In an attempt to alleviate the budget deficit, CSEA stated its intent not to seek any monetary damages from the overtime lawsuit. CSEA claimed that the main issue in that case was the District's bypassing the representative to speak to the Vector Unit employees regarding overtime.

In a follow-up memo dated January 13, 2003, from the District to CSEA, the District stated in part:

> 6. As a result of the meeting on January 9, 2003 the following issues were discussed and, in some cases tentative agreement reached, subject to written confirmation.
>
> a. Regarding the $100,000 contingency built into the RIFA budget, the District explained that the contingency represents overtime claims of an uncertain nature that are included in CSEA's pending RIFA unfair practice complaint (case no. LA-CE-65-M). The following general agreement was reached subject to a formal signed agreement that I will be providing for signature as follows:
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> 1. CSEA agrees to withdraw any claims for overtime from any fund of the District including the District's general fund and the RIFA state funding.
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> 2. The issue of overtime in the pending ULP is restricted to the issue of the District's alleged negotiations directly with District employees . . . .

There was a board of trustees meeting on January 16, 2003, where the District board adopted the revised budget.

On January 17, 2003, the District issued a memo announcing that two RIFA employees were going to be laid off. Additionally, the memo stated that the District and CSEA were considering a settlement of all outstanding legal issues in connection with the RIFA program.

The District and CSEA exchanged emails pertaining to the agreement not to seek overtime. The District directed CSEA to draft the formal terms. On January 20, 2003, CSEA forwarded this suggested language:

> 4) Here is the proposed release of the issue of the $100,000 overtime issue. CSEA hereby withdraws any and all claims for overtime against the RIFA budget, or for claims that the district failed [to] pay overtime to the Mosquito Vector Control Technicians in or about 2000 when the RIFA contract with the state was being initiated. CSEA does not seek any monetary compensation for overtime arising from any claims that CVMVCD failed to pay overtime to the unit members in or about 2000. The only claim that CSEA asserts is that the district negotiated directly with the unit members on the overtime issue and seeks orders directing the district to cease and desist in such conduct in the future.

On January 28 and 30, 2003, the District laid off two RIFA employees.

The parties met again on February 6 to commence negotiations for a RIFA bargaining agreement. The District presented another spreadsheet containing the same revisions as the January 9, 2003, revised budget increases to: utilities, attorney fees, janitorial expense, equipment parts and supplies, staff training, field supplies, and control products. This spreadsheet, while containing similar information to the revised budget distributed by the District at the January 9 meeting, was more detailed. The February 6 budget showed the actual expenses from July through January, the amount budgeted for July through January, the budget

variance, and the projections for each remaining month of the fiscal year. Additionally, the $100,000 contingency fee for pending RIFA litigation remained in the budget. Gomsi testified that he never knew whether CSEA was actually dropping the claim for overtime monies, especially considering Taggert's request for overtime records on October 25, 2008.

At the February 14, 2003, meeting, the District presented a written agreement regarding the RIFA overtime claim. CSEA never ratified the agreement claiming it was over-inclusive and could be read to dismiss all pending claims.

On February 20, 2003, the District laid off four more RIFA employees.

On March 12, 2003, the District issued a memo to the RIFA staff entitled "CSEA Petition for Unit Modification," in which it notified the five remaining RIFA employees of the election.[5] The next day, the five employees voted and recognized CSEA as its exclusive bargaining representative.

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[5]The memo stated, in pertinent part:

> The purpose of this memo is to update you on the status of attempts by the [District] to work with CSEA concerning the RIFA program.
>
> 1. You should have received notice that a secret ballot election is to be held next Thursday at 3:00 pm for the 5 RIFA Premise Inspectors to vote about whether they want to be represented by CSEA or not. RIFA Premise Inspectors can also vote to be self represented.
>
> 2. CSEA continues its lawsuit against the District which includes claims of up to $100,000 in overtime that may be claimed by vector employees to be taken from the RIFA budget. The District may be forced to discontinue the RIFA Program if this amount is required to be deducted from the RIFA budget.

Two months later, on May 12 and May 19, 2003, the District issued ~~a~~ recall notices to the six RIFA employees laid off in January and February. Gomsi testified that the timing of the notices was predicated on the District's need to know who would accept the offer prior to the start of the new fiscal year on July 1.

The RIFA program terminated in October 2003. Passaro testified after the RIFA program ended, the only impact to the District operating expenses by RIFA's absence was a slight reduction in utilities because the RIFA side of the building was no longer in use.

ALJ'S PROPOSED DECISION

The ALJ held that the layoffs of six RIFA employees in January and February 2003 were motivated by retaliation against RIFA employees for filing the unit modification petition and to interfere with the election, but not for legitimate business reasons. The ALJ found that the District failed to establish a compelling financial reason to transfer operating costs from the Vector budget to the RIFA budget, and that the District's purported –need to have a $100,000

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3. Even though CSEA representatives have told the District that it is not making claims for up to $100,000 in overtime its attorney has refused to sign an agreement for this.

4. CSEA has filed a new lawsuit against the District in the past few weeks. The legal fees alone for the two lawsuits show a budget deduction for $45,000 in legal fees.

5. CSEA has advised the District's negotiators that RIFA employees have directed CSEA to bring a third lawsuit against the District if it holds the secret ballot election which will cost more in legal fees.

6. CSEA representative Tim Taggart has contacted the State of California about the District's RIFA Program and has falsely accused the District of mishandling RIFA funds. The State of California can terminate the RIFA Program with only 30 days notice for no reason, anytime it wishes. The District believes that CSEA's contact with the State creates a risk that the state could terminate the RIFA Program.

contingency fee put in the RIFA budget was not credible in light of CSEA's assertions that it did not intend to seek monetary damages in settling the overtime claims. Additionally, the timing of the layoffs weeks before the election and offers of recall made within months after the election was indicative of unlawful motive.

The ALJ found that Gomsi coercively threatened RIFA employees with layoff if they exercised rights by unionizing. The ALJ noted that Gomsi only discussed the problems CSEA was creating regarding legal expenses. Gomsi never discussed with RIFA employees the increased operating expenses, the decrease in revenue, or his belief that the budget was in trouble. The ALJ rejected the District's legitimate budget defense.

The complaint alleged that the District violated MMBA sections 3505 and 3506 by refusing to bargain in good faith regarding the issue of email access. The ALJ found that the District did not refuse to bargain in good faith but rather maintained an adamant position that the Vector Unit employees did not need email as they worked primarily out in the field. The ALJ did find, however, that ~~by~~ denying email access to unit employees while providing it for its non-unit employees constituted discrimination against unit employees and interference with their right to communicate with their union. The ALJ noted that while retaliation was not alleged as an independent violation, it was intimately related to the subject matter of the complaint, part of the same course of conduct alleged in the complaint, and was fully litigated by the parties.

DISTRICT'S EXCEPTIONS

The District filed five exceptions. Each exception is discussed in turn.

1. The ALJ erred in finding that "the District's revised RIFA budget and the layoffs of six RIFA employees in January and February 2003 were not for legitimate business

reasons, but rather were motivated by the District's desire to retaliate against RIFA employees for filing a unit modification petition and to interfere with" an election. The District argues that CSEA failed to demonstrate a prima facie case by a preponderance of the evidence. Specifically, CSEA did not establish union animus. The District contends that the ALJ improperly recharacterized the complaint which charged that the District transferred the expenses to substantially increasing the expenses. They argue that CSEA failed to show that the District shifted expenses from the Vector Unit to RIFA for the first time after the unit modification petition was filed. The categories were not transferred because said categories were always in the budget. The District argues that even if the Board were to adopt the ALJ's recharacterization, CSEA failed to demonstrate the baseline expenses to show any increase in the expenses. The District further argues that the ALJ improperly invaded the District's budgetary prerogative when the ALJ found that there was no compelling reason to transfer expenses from the Vector Unit to RIFA. The District also argues that the litigation contingency fee did not impact the layoffs and was necessary because of the confusion concerning CSEA's overtime claims. Finally, the District argues that were the Board to find that the ALJ properly found that CSEA established a prima facie case, the ALJ erred in rejecting the District's business reason. The District laid off employees because of state budget cuts and over expenditures.

2. The ALJ erred in finding that Gomsi coercively threatened RIFA employees with layoff. The District contends that the ALJ erroneously found a violation based on what Gomsi should have stated as opposed to what he said. The District further argues that the evidence did not demonstrate that Gomsi made the alleged statements that there would be layoffs if the employees unionized. Finally, the District asserts that the ALJ's conclusion

ignores CSEA's legal challenges and argues that it was proper under *Rio Hondo Community College District* (1980) PERB Decision No. 128 (*Rio Hondo*) for the District to relate the impact of CSEA's threatened and pending legal action.

3. The ALJ correctly determined that the District did not fail to negotiate the email access but rather maintained a firm and hard position, however, the ALJ committed prejudicial error by converting the allegation into a discrimination charge. The District argues that CSEA failed to establish it had inadequate access in communicating with bargaining unit members in that (1) Martinez testified he accessed his own email to communicate, (2) other members have personal emails; (3) vector technicians have no email because they work in the field, and (4) there are alternative means of access via the bulletin board and copy machine.

4. The ALJ was biased. The District cites the following conduct as demonstrative of bias:

a. The ALJ refused to stay the hearing while another case concerning the statute of limitations was before the California Supreme Court;

b. The ALJ included alleged inflammatory quotes by Gomsi even though only one person testified to such while failing to include the surrounding facts;

c. The ALJ precluded the District from presenting evidence of the baseline charges to the RIFA program;

d. The ALJ referenced testimony in the proposed decision that was excluded; and

e. The ALJ refused to find vandalism by CSEA.

5. The organizational structure of PERB violates due process rights of parties because it fails to adequately separate its adjudicative from its investigative functions.

Specifically, PERB failed to adequately separate its adjudicative function from its other functions.

CSEA'S RESPONSE

CSEA argues that the ALJ properly found that the District's motive in revising the budget and laying off employees was reprisal for and interference with the unit modification petition and upcoming election, not for legitimate business reasons. CSEA stated that the District knew in 2001 that the fiscal year 2002-2003 budget was $910,000, and that the January 2003 increases to portions of the budget were unnecessary. These increases did not come from CDFA. Additionally, CSEA points out that there was no evidence that RIFA incurred ~~used~~ half of the operating expenses as argued by the District, and that ~~because~~ the expenses remained basically the same after the RIFA program terminated. Further, the District relied on the sole testimony of Gomsi regarding how the previous director under budgeted. CSEA argues that this testimony is suspect because Gomsi signed off on all the previous budgets. CSEA also argues that the contingency fee was unnecessary because CSEA relinquished all claims to $100,000 to prevent layoffs. Lastly, CSEA argues that the ALJ did not invade the District's budgetary business prerogative. Rather, the ALJ examined the District's budgetary figures and rationale for those figures.

CSEA agrees with the ALJ's conclusion that Gomsi interfered with employee rights by informing employees that there would be layoffs if they unionized. Gomsi's statements were not good faith predictions.

CSEA did not respond to the District's third exception.

In response to the fourth exception, CSEA argues that the District failed to demonstrate bias by the ALJ. CSEA asserts that the District does not list any instances of alleged bias, but

rather refers to instances of decision-making by the ALJ in the course of the hearing. For example, the ALJ cited testimony of an alleged inflammatory statement by Gomsi, but also noted that Gomsi denied making the statement. Regarding the alleged reference to excluded evidence, CSEA contends that the District was allowed to introduce evidence regarding allocation of funds without interference by the ALJ as evidenced by a total of 94 exhibits including all the CDFA and RIFA budgets. Additionally, CSEA asserts that the ALJ's statement regarding not finding that CSEA engaged in vandalism was reasonable.

In regards to the District's last exception, that the organizational structure violates the District's due process rights, CSEA points out that the District failed to raise said issue at the hearing. CSEA further notes that the District does not provide any specific facts but simply makes a legal conclusion.

DISCUSSION

I. First Exception: Layoffs

To establish a prima facie case of discrimination in violation of Section 3506 and PERB Regulation 32603(a),[6] 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 Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*).)

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

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, 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 should be present: (1) the employer's disparate treatment of the employee (*Campbell*, *supra*); (2) the employer's departure from established procedures and standards when dealing with the employee (*San Leandro*, *supra*, 55 Cal.App.3d 553); (3) the employer's inconsistent or contradictory justifications for its actions (*San Leandro*); (4) the employer's cursory investigation of the employee's misconduct; (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; or (6) employer animosity towards union activists (*San Leandro*; *Los Angeles County Employees Assn. v. County of Los Angeles* (1985) 168 Cal.App.3d 683).

To prove retaliation, CSEA must establish that the District took adverse action against the RIFA employees because they engaged in activity protected by MMBA. The test for an adverse action is "whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (*City and County of San Francisco* (2004) PERB Decision No. 1664-M.)

Within this framework, we now examine the facts of this case. There is no dispute that the District was well aware that the RIFA employees exercised rights under the MMBA when they filed a unit modification petition nor that it took adverse action in laying off RIFA employees. We, therefore, turn to whether the District took the adverse action because of the exercise of protected conduct.

The District received the unit modification petition and cards showing majority support on November 21, 2002. Shortly thereafter, on January 9, 2003, the District met with CSEA and RIFA employees and informed them that budget revisions necessitated the layoff of ultimately six employees in January and February. This closeness in time between the RIFA employees protected activity and the District's adverse actions supports an inference of retaliation.

Having satisfied the time factor, CSEA must also show at least one additional factor to establish retaliation. Exaggerated reasons given by the employer or its agents for the alleged unlawful conduct, also support an inference of retaliation. The District revised its budget shifting expenses from salaries and benefits to attorney fees, utilities, janitorial expense, and equipment parts and supplies. Such action necessitated laying off employees. The District justified revising the budget by its claim that RIFA needed to be self-sustaining (and thus pay for half of the operating expenses) and by its claimed need to include a contingency for the overtime lawsuit.

In regards to the overtime lawsuit, CSEA repeatedly told the District that it did not seek to recover a monetary award. Rather, CSEA simply desired the District to cease and desist from negotiating directly with employees. The District failed to set forth a credible need to continue to include the $100,000 contingency fee in the February 6th revised budget. We, therefore find the District's reason for ~~of~~ including the $100,000 contingency fee exaggerated.[7]

We also find the District's reason claiming that it needed to increase utilities, attorney fees, janitorial expenses, and equipment parts and supplies because RIFA was to be self-

[7] The Board understands that the contingency fee was not actually factored into the budget. However, the contingency fee repeatedly appeared at the bottom of the budget documents and was discussed.

sustaining, exaggerated. First, Gomsi knew of the need for budget cuts on March 22, 2001, when he submitted a budget proposal which ultimately resulted in Gomsi laying off two employees.[8] Next, in regards to the intent of RIFA to be self sustaining, and Gomsi's claim that Garcia under-budgeted, we note that Gomsi was involved with and approved the budget set by Garcia. He cannot turn around and now say that he was unaware that the program ~~it~~ was under-budgeted. Additionally, when approving the budget, Gomsi should have noticed that the RIFA program was not self sustaining as it was clearly only paying a minimal amount of money for utilities, janitorial expense, and equipment parts and supplies. To later increase the amount, so soon after the filing of the unit modification petition, is suspicious. Additionally, the amount of increase was inordinately substantial. For example, the janitorial expense for the prior years was budgeted at approximately $1,000 and now was $7,000. In the past, utilities were budgeted approximately from $4,000 to $14,000 and with the revised budget at $16,000. The District failed to establish any legitimate justification for such large increases.[9] Therefore, we find that CSEA demonstrated a prima face case of retaliation.

Once the charging party establishes a prima facie case of retaliation, as CSEA has done here, the employer then bears the burden of proving that it would have taken the adverse action even if the employee had not engaged in protected activity. (*Novato Unified School District* (1982) PERB Decision No. 210; *Matori Bros. Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730 (*Martori Brothers*); *Wright Line, Inc.* (1980) 251 NLRB 1083.) Thus, where, as here, it appears that the employer's adverse action was motivated by both valid

[8] The April 26, 2002, layoffs are not at issue in this case.

[9] The fact that the RIFA program was not allowed to roll over money or did not receive funding from SB 204 does not change our conclusion because that money was never included in the budget.

and invalid reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers.*) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.)

As stated previously, the District justified its actions noting that the RIFA program was intended to be self sufficient and it was not. RIFA was not paying for half of the utilities, etc. Additionally, the District noted that the previous program coordinator misbudgeted. In regards to attorney fees, the District stated that these fees were estimated costs of possible litigation regarding CSEA's unit modification and its efforts to bring the RIFA employees into the Vector Unit, and CSEA's unfair practice charges and threats to file charges regarding voluntary recognition by card check. The District also asserted that it needed to set aside an additional contingency amount of $100,000 in anticipation of CSEA's claims in the overtime lawsuits. As found above, the District's claims regarding the necessity of these substantial changes are not credible and are without merit. These exaggerated reasons support an inference of retaliation. The Board, therefore, affirms the ALJ's decision that the layoffs of six RIFA employees in January and February 2003 were motivated by retaliation against RIFA employees for filing the unit modification petition and to interfere with the election and not for legitimate business reasons.

II. Second Exception: Interference

The District contends that the ALJ erred in finding Gomsi's statements to the RIFA employees, regarding potential layoffs, to be interference. The District first argues that the ALJ's factual conclusions were not supported by the record testimony. We disagree and agree

with the ALJ's factual conclusions that Gomsi stated he was disappointed and that if employees chose to be represented, there would be layoffs.

Next, the District argues that it "had an absolute right to relate [to the RIFA employees] the impact of CSEA's threatened and pending legal actions on its RIFA budget" pursuant to *Rio Hondo, supra.* In *Rio Hondo*, the Board held that while a letter "criticized the CTA lawsuit and, based on the arguments contained therein, sought to persuade District employees to convince the Association to withdraw the civil actions[,] [t]he document cannot, however, be read to contain a threat of reprisal or force directed at employees should they disagree with the District's position and/or choose to continue to support maintenance of the lawsuit." Moreover, the Board noted that the hearing officer correctly found that "the Jenkins' letter referred to events which were demonstrably predictable results of the lawsuit and not effects within the District's control." (Emphasis in original, fn. omitted.) Here, Gomsi's statements did contain a threat of reprisal or force directed at employees, that they would be laid off. Further, unlike in *Rio Hondo*, the layoffs referred to by Gomsi were *not* demonstrably predictable results of the lawsuit and effects within the District's control.

We, therefore, find that the ALJ properly concluded that Gomsi coercively threatened RIFA employees with layoff in violation of MMBA section 3506 and adopt the ALJ's rationale incorporated herein:

> The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows: All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in

the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons. (Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County (1985) 167 Cal.App.3d 797, 807 [213 Cal. Rptr. 491.)

As to the employer threatening adverse consequences, in NLRB v. Gissel Packing Company (1969) 395 U.S. 575, 618-619 [71 LRRM 2481], an employer's threat to close the plant if the employees organized was unlawful. The Court held that, while the employer could lawfully predict circumstances beyond its control, its statements "must be carefully phrased on the basis of objective fact." Thus in NLRB v. River Togs, Inc. (2nd Cir. 1967) 382 F.2d 198, 202 [65 LRRM 2987], the court stated that "[c]onveyance of the employer's belief, even though sincere, that unionizing will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." Following the reasoning of the courts, the NLRB has declared that a prediction of job loss without the "necessary objective basis for the claim" (Bi-Lo Foods (1991) 303 NLRB 749 [139 LRRM 1021] and a veiled threat to discharge employees for engaging in union activities for supporting the union (Kona 60 Minute Photo (1985) 277 NLRB 867 [120 LRRM 1313] are unlawful. Similarly, PERB has held that telling employees they will suffer adverse consequences if they seek assistance from their union is unlawfully coercive. (Sacramento City Unified School District (1985). In all these cases, the standard is an objective one, not based on the employer's motive or even his "sincere belief," but rather on the tendency of his statement to coerce employees.

As noted above, shortly after the filing of the UM petition and before the January and February layoffs, Gomsi spoke to the RIFA employees. According to Greeman and Ginn, he told them that he was disappointed and that if they went with the union there would be layoffs. According to Gomsi, he told them that although they were free to join the union, problems with CSEA were creating legal expenses and the only budget item those expenses could come from was salaries and benefits. He also admitted that he was "disappointed" at the costs caused by the appearance of a union. I find that, whether crediting Gomsi or Greeman and Ginn, the reasonable interpretation of Gomsi's statements to the RIFA employees is that unless they reject CSEA altogether or at the least dissuade it from pursuing its legal actions, they would be subject to layoff. The District contends that Gomsi was merely stating an honest and reasonable projection of future layoffs because of budget

> deficits. However, as discussed above, the District did not implement the January and February layoffs because of a legitimate budget deficit, but rather to retaliate against the RIFA employees. But even taking the District's budget defense as legitimate, it is not based solely on legal expenses but on the entire RIFA budget, including the increased operating expenses and the $100,000 decrease in revenue. By his own admission, Gomsi discussed with the RIFA employees neither the increased operating expenses, the decrease in revenue, nor his purported belief that the RIFA budget was in trouble. He mentioned only the legal expenses caused by CSEA. Thus, he did not give his employees an honest and reasonable projection of even his own view of the possibility of future layoffs, but was focusing only on the detrimental effect of unionization.
>
> Accordingly, I conclude that Gomsi coercively threatened RIFA employees with layoff in violation of MMBA section 3506.

III. Third Exception: Email

We agree with the District's third exception. Discrimination and interference with unit employees right to communicate with the union by denying them email access while providing it for non-unit employees is an unalleged violation. We find no compelling reason to entertain unalleged violations in this case. Should it become necessary to entertain unalleged violations, each of the four requirements for allowing consideration of the unalleged violation must be discussed. In this case, CSEA had ample opportunity to move to amend the complaint prior to hearing, but did not. Therefore, in the absence of clearly articulated rationale in support of the requirements for consideration of the unalleged violation, the issue will not be considered.

IV. Fourth Exception: ALJ Bias

The District asks that the Board reverse certain findings in the proposed decision because the ALJ was biased. In *Gonzales Union High School District* (1985) PERB Decision No. 480, the Board considered a party's appeal of the ALJ's refusal to disqualify himself

pursuant to PERB Regulation 32115 subdivision (d).[10] In finding that the disqualification was inadequate as a matter of law, the Board noted the following:

1. It has long been held that a judge's opinion concerning a question of law or any error of law, no matter how gross, does not constitute bias or prejudice;

2. Erroneous factual rulings against a litigant, even when numerous and continuous, form no grounds for a charge of bias or prejudice, especially when they are subject to appellate review;

3. For bias or prejudice to be found, there must be evidence of a "fixed anticipatory prejudgment" against a party by the judge; and

4. Factual or legal determinations adverse to a party do not establish prejudice or bias.

The District failed to allege any evidence of bias other than the fact that the ALJ resolved factual questions contrary to its position. Similarly here, the District fails to allege any other evidence. Additionally, the District failed to properly request that the ALJ disqualify

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[10] PERB Regulation 32155 subdivision (d) provides:

> If the Board agent does not disqualify himself or herself and withdraw from the proceeding, he or she shall so rule on the record, state the grounds for the ruling, and proceed with the hearing or investigation and the issuance of the decision. The party requesting the disqualification may, within ten days, file with the Board itself a request for special permission to appeal the ruling of the Board agent. If permission is not granted, the party requesting disqualification may file an appeal, after hearing or investigation and issuance of the decision, setting forth the grounds of the alleged disqualification along with any other exceptions to the decision on its merits.

herself pursuant to PERB Regulation 32155 subdivision (c).[11] We, therefore, find that the District's contention that the ALJ is biased groundless.

V. Fifth Exception: Due Process

The Board also rejects the District's exception arguing that the layout of the Los Angeles Office violates its due process. The District does not present any facts in support of this argument. As such, we find the District's exception without merit.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Coachella Valley Mosquito & Vector Control District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3506, and by the same conduct violated Sections 3503 and 3505 by threatening lay offs, and later by laying off six Red Imported Fire Ant (RIFA) services employees in January and February 2003.

Pursuant to MMBA sections 3509 subdivision (a) and 3541.5 subdivision (c), it is hereby ORDERED that the District and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Coercively threatening employees with layoff; and

[11] PERB Regulation 32155 subdivision (c) provides, in pertinent part:

> Any party may request the Board agent to disqualify himself or herself whenever it appears that it is probable that a fair and impartial hearing or investigation cannot be held by the Board agent to whom the matter is assigned. Such request shall be written, or if oral, reduced to writing within 24 hours of the request. The request shall be under oath and shall specifically set forth all facts supporting it. The request must be made prior to the taking of any evidence in an evidentiary hearing or the actual commencement of any other proceeding.

2. Laying employees off in retaliation for their filing a unit modification petition.

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

1. Within twenty (20) workdays following the date this Decision is no longer subject to appeal, provide back pay to all former RIFA employees who were laid off in January or February 2003 from the date of their layoff until the District's offer of recall on May 19, 2003, augmented by interest at the rate of 7 percent per annum.

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

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the California School Employees Association & its Chapter 2001.

Members McKeag and Wesley joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case Nos. LA-CE-123-M and LA-CE-178-M, *California School Employees Association & Its Chapter 2001 v. Coachella Valley Mosquito & Vector Control District* , in which all parties had the right to participate, it has been found that the Coachella Valley Mosquito & Vector Control District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3506, and by the same conduct violated Sections 3503 and 3505 by threatening lay offs, and later by laying off six Red Imported Fire Ant (RIFA) services employees in January and February 2003.

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

A. CEASE AND DESIST FROM:

1. Coercively threatening employees with layoff; and

2. Laying employees off in retaliation for their filing a unit modification petition.

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

1. Provide back pay to all former RIFA employees who were laid off in January or February 2003 from the date of their layoff until the District's offer of recall on May 19, 2003, augmented by interest at the rate of 7 percent per annum.

2. Mail a copy of this Notice to all former RIFA employees at their last known address.

Dated: _____

COACHELLA VALLEY MOSQUITO & VECTOR CONTROL DISTRICT

By: _____
Authorized Agent

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