STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ALHAMBRA FIREFIGHTERS ASSOCIATION, LOCAL 1578, Charging Party, v. CITY OF ALHAMBRA, Respondent.	Case No. LA-CE-262-M PERB Decision No. 2036-M June 9, 2009

Appearances: Arnold Furr, President, for Alhambra Firefighters Association, Local 1578; Burke, Williams & Sorensen by Donald C. Potter, Attorney, for City of Alhambra.

Before McKeag, Neuwald and Dowdin Calvillo, Members.

DECISION

NEUWALD, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the Alhambra Firefighters Association, Local 1578 (Association) to an administrative law judge's (ALJ) proposed decision. The charge alleged that the City of Alhambra (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally changing its policy regarding firefighter duties and driver's license requirements without giving the Association prior notice or opportunity to bargain. The Association alleged that this conduct constituted a violation of MMBA sections 3503, 3505 and 3506, thereby committing an unfair practice under Section 3509, subdivision (b).

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

Having reviewed the proposed decision in light of the exceptions and the entire record in this case, the Board affirms the proposed decision in part and reverses in part for the reasons discussed below.

FACTUAL BACKGROUND

We find the ALJ's factual determinations to be correct and adopt them herein as our own:

> The City is a public agency within the meaning of MMBA section 3501(c). The Association is a recognized employee organization within the meaning of section 3501(b), representing a unit of firefighters, engineers, firefighter/paramedics, and fire captains in the City's Fire Department (Department).[2]
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> Department vehicles are driven by the engineers, who are required to hold California Class B noncommercial driver's licenses. In addition, it is undisputed that at least since 1992, all firefighters have been trained in, have obtained, and have maintained Class B licenses, and from time to time have been called upon to serve as relief drivers. However, the Association contends that the Department's official policy had historically required its firefighters to possess only a regular Class C license, that in March 2005 it changed this policy to require them to maintain Class B licenses and to act as relief drivers, and that the Association did not learn of this change in policy until March 2006.[3]
>
> The record contains several documents which relate to driver's license and relief driver requirements. They include firefighter job descriptions which the City issued some years ago, upon approval by the City Council. The job descriptions were not formally distributed to the Association, but the Fire Chief was responsible for notifying the affected employees, i.e., the firefighters. The job descriptions read in part:

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[2] The Department is headed by the Fire Chief. It maintains five fire stations operating on a 24/7 basis, each managed by a Battalion Chief. Unit employees are assigned to one of the five stations and work rotating eight-hour shifts.

[3] The Association's contention regarding March 2006 is discussed in detail below.

> [February 1978] . . . Examples Of Duties . . . may act as relief driver or engineer . . . License Required A valid, appropriate California Driver's License.
>
> [January 1986] . . . Examples Of Duties . . . may act as relief driver or engineer . . . License Required A valid, appropriate California Driver's License.[4]

(Emphases in original.)

Effective January 1, 1989, California's new licensing and testing requirements for drivers of commercial vehicles took effect. Thereafter, in July 1992, the Department added section 404.08 to its Manual of Administrative Policies (Manual), entitled "Driver's License Requirements," which reads in part:

> POLICY: All fire suppression personnel shall possess a minimum requirement of [a] noncommercial Class B license restricted to operating fire fighting equipment only.

A cover memo was sent to all Department personnel instructing them to add section 404.08 to the Manual. Copies of the Manual are kept in the City's personnel office, the Fire Chief's office, and at each fire station. The Association also maintains a copy of the Manual, which it updates upon receiving revisions. However, Robert D'Ausilio (D'Ausilio), Association president until April 2007, and Paul Curtis (Curtis), Association vice president, testified that section 404.08 was not in their copy of the Manual and they had never before seen it or the cover memo. D'Ausilio testified that if he had seen section 404.08 at any time while he was still president,[5] he would not have filed the instant unfair practice charge.

The record also contains several flyers announcing firefighter job vacancies, written by the City's personnel office since 1992, which contain language incorporating the policy stated in Manual section 404.08. The flyers were posted in the personnel office at City Hall, were available on the City's website, and copies were sent to the Department, which forwarded them to the various fire

[4] The record does not reveal whether more recent job descriptions have issued.

[5] Arnold Furr replaced D'Ausilio as Association president in April 2007.

stations where they were posted and distributed to likely candidates.[6] The flyers were not sent directly to the Association. They read in part:

> [July 1993] . . . other work as required . . . valid California Driver's License . . .
>
> [October 1996] . . . other work as required . . . Must obtain California Class B "Firefighter" specific or Class B License within the first year of employment . . .
>
> [August 1997] . . . other work as required . . . must obtain California Class B "Firefighter" specific or Class B License within the first year of employment . . .
>
> [June 1999] . . . do other related duties as required . . . must obtain a California Class B "Firefighter" specific or Class B License within the first year of employment . . .
>
> [November 2001] . . . may act as relief driver or engineer . . . must obtain California Class B "Firefighter" specific or Class B License within the first year of employment . . .
>
> [January 2005] . . . may act as relief driver or engineer . . . Must obtain California Class B Firefighter specific or Class B License within the first year of employment and must maintain throughout employment.
>
> [March 2005] . . . may act as relief driver or engineer . . . must obtain California Class B Firefighter specific or Class B License within the first year of employment and must maintain throughout employment.
>
> [November 2005] . . . do other work as required . . . must obtain California Class B "Firefighter" specific or Class B License within the first year of employment.
>
> [February 2006] . . . do other work as required . . . must obtain California Class B Firefighter specific or Class B License within the first year of employment and must maintain throughout employment.

[6] Most applicants for new firefighter positions are fire cadets, who are not in the bargaining unit.

Richard Bacio, City Manager/Personnel Director (Bacio) testified that the job specifications are usually more accurate than the job flyers, but that any changes from the former to the latter are minor. He also testified that the job flyers are not "policy," as policy is stated in the specifications.

In addition, Fire Chief Vincent Kemp (Kemp) issued the following memoranda, which were addressed to all Department personnel, including firefighters, but not sent directly to the Association, stating in part:

> [January 12, 1993 entitled "Fire Fighter Driver's License (CDL) Program and Qualifications"] California has developed new licensing and testing requirements for drivers of fire vehicles. . . . They apply to all who operate a commercial vehicle. . . . All fire suppression personnel shall possess a minimum requirement of a noncommercial Class B license restricted to operating fire fighting equipment only.[7]
>
> [June 21, 1996 – essentially repeating the January 1993 memo]
>
> [June 24, 1996 – entitled "Driver's License Applications and Renewal"] Please consider the following suggestions when applying or renewing your noncommercial fire fighter driver's license:
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> 2. You will be applying for a "Class B" . . . license . . .
> [April 16, 1998 – essentially repeating the January 1993 memo]

Kemp could not locate signed copies of these memos, except for the 1993 memo, and could not affirmatively testify that they were distributed throughout the Department.

Also, newly hired firefighters, who serve as probationary employees for their first year, are provided with a handbook which includes reading assignments including the California Commercial Driver Handbook and the Alhambra Fire Department Class B Driver's License Manual; and they are given training to prepare them for obtaining their Class B license. Curtis admitted that he "vaguely" remembers having signed for his own

[7] This memo was sent in Kemp's capacity as Training/Safety Officer, prior to his promotion to Fire Chief.

handbook when he was a probationary firefighter, and that since he became Fire Captain in 1988 he provided probationary firefighters their Class B training and has signed off on their handbooks. Unit member Sergio Cassanova testified that when he was first hired as a firefighter in 2001, he was given a handbook by his captain. He did not receive his Class B training until late in his probationary period, thus his captain extended the probationary period until he received his Class B license, which his captain said was a requirement.

Both Curtis and D'Ausilio testified that they believed Class B training was not a licensing requirement but rather a "training issue" similar to hazardous materials and emergency medical training, where no certificates are issued.

The City contends that firefighters must be prepared in an emergency situation to drive one of the Department's fire vehicles, for which they must have a Class B license. The City argues that the Association was aware, or should have been aware, of all the above documents and of the Department's consistent policy, since 1992, that all firefighters are required to obtain Class B driver's licenses and to serve as needed in any other capacity, including as relief drivers and engineers.

But the Association claims that the City did not follow its own resolutions, ordinances, and policies, e.g.: City Charter, Article XXIVa, entitled "Civil Service," section 192d provides that "appropriate notice . . . shall be given" of all job applicant examinations, yet the Association did not receive direct notice of the job flyers. Also, Administrative Policy Manual, "Modifications and Revisions" requires that whenever the City's policy manual is revised, the City Manager will "send a memorandum to all those [to] whom a manual has been assigned," yet the Association did not receive any memorandum regarding the addition of Manual section 404.08. The Association also argues that Manual section 302.03 conflicts with Manual section 404.08, as the former does not require a Class B license:

> All members must possess the proper current operators license, issued by the Department of Motor Vehicles, State of California before driving any department automotive equipment.

and that Manual section 208.00, which requires only that firefighters "(P)erform other duties as required by the

Department," conflicts with section 207.00 which requires that firefighters "drive and operate apparatus properly and safely during normal driving and emergency response." The Association also contends that Kemp's draft of proposed revisions to the Manual, offered during contract negotiations in August 2005, specifically section 3.110.52, shows that the Department did not have a prior policy requiring firefighters to operate Department vehicles:

> All employees are required to possess the proper current operator's license, issued by the State of California, Department of Motor Vehicles, before operating any city-owned vehicle. Employees shall have the ability to maintain the Drivers [sic] License to keep employment.
>
> Employees will be required to drive Fire Department vehicles in the course of their duties. In emergency situations, any employee may be in a position to have to drive a Fire Department vehicle, thus loss of California driving privilege will disallow employees to be on duty with the Alhambra Fire Department.
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> All Employees are required to immediately notify the Chief-in-Charge of any loss of driving privilege, regardless of the duration of that loss. Failure to notify the Department of a loss of driving privilege and/or operating a city vehicle without a proper license will be grounds for immediate disciplinary action.[8]

D'Ausilio admitted that he has in the past seen firefighters act as relief drivers, and conceded that if he were still Association president, he would not proceed with that portion of the unfair practice charge. However, he said he does not believe firefighters need a Class B license for those limited occasions. He said he and the Association believe that City policies are stated in job descriptions; the job description for firefighter requires only a "valid, appropriate California driver's license," but there is no policy stated therein requiring a Class B license, notwithstanding

[8] These proposed revisions came about at Bacio's suggestion in the wake of Kevin Webster's termination, discussed below.

such language in the various job flyers.[9] D'Ausilio, although not denying having seen the job flyers, testified that the Association does not monitor them, because applicants for firefighter vacancies are cadets who are not in the bargaining unit. D'Ausilio also testified that the Association does not pay attention to how the Department recruits or trains new firefighters.

The Association points to several attempts it made during 2005/2006 contract negotiations to obtain a clear and comprehensive set of City and Department rules, regulations, and policies, but complains that the City provided inaccurate or misleading documents. Letters exchanged between the parties during this period, especially in May and June 2005, show that the Association made various information requests regarding various City policies; the City provided some documents, responded that the Association already had some in its possession, including the Manual, and claimed that some were burdensome or did not exist. In this exchange of letters, the Association did not specifically name any particular policy, except for the City's non-smoking policy, and did not mention driver's license requirements. There is no evidence that the driver's license requirement was a subject of the 2005/2006 contract negotiations.

It appears that the driver's license issue arose from the City's discharge of firefighter Kevin Webster, who was terminated in January 2005 when his driver's license was suspended.[10] On January 6, Kemp issued Webster a Notice of Proposed Termination, citing Manual section 302.03, which requires "the proper current operators license," and stating:

> It is a requirement of your position as a firefighter that you possess a valid class B driver's license. Indeed, a valid Class B driver's license is an essential aspect of a firefighter's qualifications.

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[9] Indeed, Bacio testified that City "policy" on job requirements is contained in job descriptions; the language used in the flyers is taken from the job descriptions but is not always entirely accurate or complete.

[10] The California Department of Motor Vehicles suspended Webster's license for two years after he pleaded no contest to a reckless driving charge.

> Curtis testified that he thought the termination notice was ambiguous on whether the requirement was for a Class B license or merely for a "proper current operator's license," which could mean a Class C license. D'Ausilio testified that he did not file a PERB charge at that time because the Association wanted to first exhaust administrative remedies through a Skelly hearing.[11] D'Auslio represented Webster at the hearing; Webster did not present any evidence and there is no indication that the issue of unilateral change in driver's license policy was raised. Webster lost the appeal and the termination was sustained. The Association claims that it did not learn that the Class B or relief driver requirements were "policy" until it received a letter from Kemp dated March 3, 2006. Responding to the Association's request for information on non-smoking regulations, Kemp stated that City and Department policies regarding smoking were contained in, inter alia, job vacancy flyers. The Association contends that it was not until receipt of the letter that it knew the City considered job flyers to contain official policy. The Association then extrapolated Kemp's statement to apply to driver's licenses as well, and filed the instant charge.

ALJ'S PROPOSED DECISION

The ALJ found that the charge was untimely: "[i]n the face of overwhelming evidence of the City's long-established practices, I find the Association's claims of confusion, misunderstanding, and lack of knowledge to be unreasonable and unworthy of serious consideration." The ALJ further refused to extend equitable tolling to the facts of this case under *Long Beach Community College District* (2003) PERB Decision No. 1564 (*Long Beach CCD I*) because equitable tolling does not apply to *Skelly* hearings, but rather to bilaterally agreed upon dispute resolution procedures. Having found the charge untimely, the ALJ did not analyze whether the City's policies represented unlawful unilateral changes. Next, the ALJ awarded sanctions against the Association to compensate the City for its attorney's fees and costs in defending against the charge and complaint.

[11] In Skelly v. State Personnel Board (1975) 15 Cal.3d 194 (*Skelly*), the court held that due process guaranteed to public employees the right to a hearing prior to the imposition of discipline.

ASSOCIATION'S EXCEPTIONS

The Association argues that the ALJ misstated the facts and evidentiary record thereby erring in her conclusions of law. Additionally, the Association argues that the ALJ erred in awarding attorney's fees.

CITY'S RESPONSE

The City argues that the ALJ's factual conclusions were appropriate as well as her conclusions of law. The City further argues that the award of attorney fees in this matter is appropriate.

DISCUSSION

Timeliness

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177 (*Gavilan*).) Charging party bears the burden of demonstrating that the charge is timely filed. (Cf. *Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California* (*Department of Insurance*) (1997) PERB Decision No. 1197-S.)

We find the ALJ properly concluded that the unfair practice charge was filed well beyond the six-month limitations period and, therefore, was untimely. We adopt the ALJ's rationale incorporated herein, subject to the discussion below:

> The unfair practice alleged here is that the City unilaterally changed its policy regarding driver's licenses and relief driver

duties. Unilateral changes are unlawful when: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin Co. Employees Assn. v. City of Stockton (1984) 161 Cal.App.3d 813; Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant).)

Established policy may be reflected in a collective bargaining agreement (Grant), in the parties' relevant bargaining history (Rio Hondo Community College District (1982) PERB Decision No. 279), or in the employer's past practice (ibid; Pajaro Valley Unified School District (1978) PERB Decision No. 51).

Here, there is no question that the City's long-established practice was that firefighters obtain and maintain Class B licenses and occasionally serve as relief drivers. The Association complains that it was never officially notified of the Class B requirement. However, while an employer's official notice to the union is a factor in determining whether the employer made an unlawful unilateral change (Grant), such notice is not required in determining whether the charge was filed within the statute of limitations; rather, the question is whether the union had or should have had knowledge (Gavilan).

The Association does not deny knowledge of the City's long-standing practice. The Association contends, however, that documents citing the Class B requirement conflict with other documents citing only a "valid California driver's license," and that it did not understand the City's practice was its policy. However, there is no legal distinction between "policy" and "practice," since the former subsumes the latter. Nor does PERB require that a long-standing practice be specifically labeled by the employer as official "policy" for it to be held as a policy, notwithstanding Bacio's testimony that job flyers are not "policy." Further, I find that the job flyers and other documents stating a Class B license requirement are not inconsistent with the job descriptions stating a "valid, appropriate California Driver's License" or with Manual section 302.03 requiring "the proper current operators license." (See, e.g., Trustees of the California State University (2004) PERB Decision No. 1658-H, holding that the university's written policy was not inconsistent with, thus not a change from, past practice.)

Prior to the instant charge, no one had contended that the appropriate or proper California license was anything other than a Class B license, and indeed there is no evidence that firefighters have ever been allowed to maintain anything less than a Class B license. The City's requirements have remained clear and consistent since at least 1992. (Los Angeles Unified School District (2002) PERB Decision No. 1501; County of Placer (2004) PERB Decision No. 1630 (an enforceable past practice must be unequivocal, clearly enunciated and readily ascertainable for a reasonable period of time).)

The Association never challenged the requirements and never indicated that it did not understand them. Indeed, if the Association ever needed clarification, as it contends, it could easily have asked the City, at any time, whether a Class B license was a requirement of the job, and whether firefighters may be called upon to serve as relief drivers. The clear answer would have been "yes." But the City's practices were never questioned until Webster's termination, and now, in an apparently continuing protest of the termination, the Association proffers illogical and unreliable arguments with no basis in fact or reason.

I shall not find that the Association had knowledge of Manual section 404.08, which states as policy that "all fire suppression personnel" must have Class B licenses, as I find no reason to discredit the testimony of both D'Ausilio and Curtis that they had never before seen either section 404.08 or its accompanying cover memo. However, a Class B license requirement has been cited in firefighter job flyers since 1996, and while D'Ausilio contends that the Association does not "monitor" these flyers, neither he nor any other Association witness denied having seen them over the years. The flyers have been posted at the various fire stations and widely distributed; as the Association's officers are all unit employees, I therefore find that the Association had knowledge of the flyers. In addition, the Association did not deny seeing Kemp's 1993 and 1996 memoranda or the handbook distributed to new firefighters since at least 1988, all citing the Class B license requirement. Indeed, as a firefighter Curtis himself received a handbook and was trained for his own Class B license, and as a fire captain he signed off on other firefighters' handbooks and provided them with their Class B training. I therefore find that the Association also had knowledge of the handbook requirements as well as of Kemp's memoranda. Finally, at the very latest, the Association had knowledge of the

Class B requirement because it was cited in Webster's termination notice of January 2005.

As to firefighters serving as relief drivers, this too was cited in job flyers in November 2001, January 2005 and March 2005, as well as in the job descriptions of February 1978 and January 1986. The Association does not deny knowing that this was the City's policy and practice. However, in its post-hearing brief, the Association complains that the City unilaterally changed the policy from one where firefighters "may" act as relief drivers to one where they "must" act as relief drivers. But there is simply no evidence that such a requirement exists. There is no reference to such a requirement in either Webster's termination notice of January 6, 2005, or in Kemp's March 3, 2006, letter to the Association. Should the Association be referring to Kemp's August 2005 draft contract proposal, which states that "(E)mployees will be required [emphasis supplied] to drive Fire Department vehicles in the course of their duties," that proposal was made more than six months before the charge was filed.[12]

In the face of overwhelming evidence of the City's long-established practices, I find the Association's claims of confusion, misunderstanding, and lack of knowledge to be unreasonable and unworthy of serious consideration.

The Association also argues that the charge is timely because the statute of limitations was suspended while administrative remedies, i.e., Webster's Skelly hearing, were being pursued. The Association relies on Long Beach Community [College] District (2003) PERB Decision No. 1564, which announced the return to the principles of equitable tolling. However, in that case, PERB made it clear that the statute is tolled only while a matter is pending between the same parties covering the issue(s) raised in the unfair practice charge, under a "bilaterally agreed upon dispute resolution procedure," e.g., the grievance procedure of a collective bargaining agreement.

Equitable tolling does not extend, however, to non-contractual disciplinary appeals such as Skelly hearings, which are not bilateral agreements. Further, the Association was not a party to

[12] Kemp's proposal goes on to explain that "(I)n emergency situations, any employee may be in a position to have to drive a Fire Department vehicle." I find that this sentence qualifies the earlier "required" language. Further, there is no evidence that Kemp's proposal was ever implemented. I therefore do not find that any change was made to the long-standing policy that firefighters may be called upon to serve as relief drivers.

> Webster's appeal, and there is no evidence that the issue of unilateral change in policy was raised therein. Nor is there evidence that a grievance was filed on Webster's termination, notwithstanding that in its post-hearing brief the Association inaccurately refers to the Skelly appeal as a grievance. I conclude therefore that the Association's argument fails and that the statute was not tolled.
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> Accordingly, I conclude that the unfair practice charge was filed well beyond the six-month limitations period and is untimely.

The ALJ applied the Board's decision in *Long Beach CCD I, supra*, concluding that the six-month statute of limitations was not equitably tolled while City employee Kevin Webster participated in the *Skelly* process. Recently, the Board reaffirmed the doctrine of equitable tolling in *Long Beach Community College District* (2009) PERB Decision No. 2002 (*Long Beach CCD II*). Additionally, in *Solano County Fair Association* (2009) PERB Decision No. 2035-M, the Board held that equitable tolling applies to cases filed under the MMBA under certain circumstances. Specifically, equitable tolling will apply when parties utilize a negotiated non-binding dispute resolution procedure or a binding dispute resolution procedure contained in a negotiated agreement. Because *Long Beach CCD II* merely refined the equitable tolling test set forth in *Long Beach CCD I*, the ALJ would have reached the same conclusion under the Board's current formulation of the test. Accordingly, the Board affirms the ALJ's conclusion that equitable tolling is not applicable in this case.

Sanctions (Attorney's Fees)

The ALJ granted attorney's fees to the City because it found that the Association's case was "without arguable merit" and its conduct was proscribed by *Hacienda La Puente Unified School District* (1998) PERB Decision No. 1280 (*Hacienda La Puente*). In order to determine whether "without arguable merit" is a sufficient justification to order attorney's fees, the developing PERB history of these types of awards in unfair practice cases must be explored.

In *King City High School District Association, CTA/NEA; King City Joint Union High School District; et al. (Cumero)* (1982) PERB Decision No. 197 (*King City*), the Board decided to adopt the National Labor Relations Board (NLRB) standard for awarding attorneys fees. *King City* provided:

> [A]ttorney's fees will not be awarded to a charging party unless there is a showing that the respondent's unlawful conduct has been repetitive and that its defenses are without arguable merit.

(King City, p. 26, emphasis added.) The two-prong test of demonstrating a party's unlawful repetitive conduct and that its contentions were without arguable merit prior to awarding attorney's fees or litigation costs was followed in subsequent Board decisions. (*Modesto City Schools and High School District* (1985) PERB Decision No. 518, p. 3 (*Modesto I*); *Modesto City and High School Districts* (1986) PERB Decision No. 566, pp. 17 and 18 (*Modesto II*);[13] and *Los Angeles Unified School District* (1990) PERB Decision No. 803, adopted ALJ's proposed dec., pp. 12 and 13.)

In *Chula Vista City School District* (1982) PERB Decision 256 (*Chula Vista I*), after citing *King City*, the Board found that the NLRB standard was appropriate and attorney's fees should be awarded "only where the charge is without arguable merit and was brought in bad faith." (*Chula Vista I*, p. 9, emphasis added.)

In *United Professors of California (Watts)* (1984) PERB Decision No. 398-H (*United Professors*), the Board found that a complaint which is "vexatious and frivolous" satisfied the requirement for awarding attorney's fees. The complaint filed defied a previous Board order not to abuse "the administrative process of the Board." (*United Professors,* at p. 2.)

[13] In *Modesto II* at page 18, the Board found that the defenses were "at least debatable," so they had arguable merit.

In *Chula Vista City School District* (1990) PERB Decision No. 834 (*Chula Vista II*), while citing prior PERB attorney's fees decisions (*King City*, *Chula Vista I*, and *Modesto I*), the Board incorrectly summarized the prior attorney's fees holdings as:

> Attorney's fees and related litigation costs are awarded only if a party's case is without any arguable merit, frivolous, dilatory, or pursued in bad faith.

(*Chula Vista II*, at pp. 73 and 74, emphasis added.) By incorrectly summarizing the prior holdings, *Chula Vista II* eliminated the two-prong test set forth in *King City* and *Chula Vista I* for a single element test.

Subsequent to *Chula Vista II*, some of the PERB decisions followed the two-prong test found in *King City* and its progeny (*California State Employees Association (Hackett, et al.)* (1995) PERB Decision No. 1126-S, pp. 8 and 9; *Alisal Union Elementary School District* (2000) PERB Decision No. 1412, p. 36; and *United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453, pp. 3 and 4 (*United Teachers of Los Angeles*)[14] and some of the PERB decisions followed the single element test of *Chula Vista II* and its progeny (*United Teachers of Los Angeles (Watts)* (1993) PERB Decision No. 1018, p. 2).

In *State of California (Office of the Lieutenant Governor)* (1992) PERB Decision No. 920-S, (*Office of the Lieutenant Governor*),[15] the Board cited to *Chula Vista II* and other cases in again summarizing the holdings made by PERB to a single element test:

> The Board will award attorney's fees and costs where a case is without arguable merit, frivolous, vexatious, dilatory, pursued in bad faith or otherwise an abuse of process.

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[14] In *United Teachers of Los Angeles*, PERB expressly held a party requesting attorney's fees must prove both prongs of the test (unlawful repetitive conduct and without arguable merit). However, *Chula Vista II* and its progeny of cases were not discussed.

[15] The Board overruled *Office of the Lieutenant Governor* on other grounds in *State of California (State Personnel Board)* (2006) PERB Decision No. 1864-S.

(*Office of the Lieutenant Governor,* at p. 2, emphasis added.) Strangely enough, even though *Office of the Lieutenant Governor* frames the single element test in the disjunctive "or" the decision rejected the request for attorney's fees based on the contention that the appeal was only meritless; the employer failed to allege that the case was "frivolous, vexatious, dilatory, pursued in bad faith, or an otherwise abuse of process." (*Office of the Lieutenant Governor,* at p. 2.)

The single element disjunctive test set forth in *Office of the Lieutenant Governor* was repeated again in *Hacienda La Puente*. *Hacienda La Puente* cited an additional basis for awarding attorney's fees: Government Code section 11455.30 subdivision (a). Government Code section 11455.30 subdivision (a) provides:

> The presiding officer may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.[16]

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[16] Code of Civil Procedure section 128.5, subdivisions (b)(1) and (2), the section that sets forth when sanctions can be ordered by trial courts, defines actions or tactics that are frivolous as:

> (a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.
>
> (b) For purposes of this section:
>
> (1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint only if the actions or tactics arise from a complaint filed, or a proceeding initiated, on or before December 31, 1994. The mere filing of a complaint

(Emphasis added.) According to the code section, the presiding officer may award attorneys fees if the "actions and tactics" were taken in "bad faith" and "frivolous." (*Shelton v. Rancho Mortgage & Investment Corp.* (2002) 94 Cal.App.4th 1337, 1346 (*Shelton*).) "Bad faith" is to be determined by a subjective standard. (*Id.* at p. 1347). "Frivolous" is defined as "totally and completely without merit." (Code of Civ. Proc., § 128.5, subd. (b)(2).)

In *Hacienda La Puente*, the Board awarded attorney's fees as the district's efforts to comply with the Board order were tantamount to an absolute refusal to comply with the Board order. In subsequent cases, the Board cited Government Code section 11455.30 as a basis for its authority to award attorneys fees. (*Los Rios College Federation of Teachers, Local 2279 (Deglow)* (2003) PERB Decision No. 1515; *Marin County Law Library* (2004) PERB Decision No. 1655-M (*Marin*).) In *Marin*, the Board awarded attorney's fees against a charging party's advocate who addressed the Board members in an offensive and demeaning manner. Attorney's fees were justified as the advocate's conduct went "far beyond" a frivolous filing. (*Marin,* at p. 3.)

As Government Code section 11455.30, subdivision (a) incorporates the elements of the prior NLRB standard of "only where the charge is without arguable merit and was brought in bad faith" (*Chula Vista I, supra*, PERB Decision No. 256, at p. 9) and the "bad faith" actions

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> without service thereof on an opposing party does not constitute 'actions or tactics' for purposes of this section.
>
> (2) "Frivolous" means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.

(Emphasis added.)

described in Government Code section 11455.30, subdivision (a) and the existing case law incorporates conduct which is vexatious, dilatory, and an abuse of process, we find the standard set forth in Government Code section 11455.30, subdivision (a) is an appropriate framework for determining whether sanctions (attorneys fees) should be awarded. Thus, PERB will award attorney fees only if the charge is without arguable merit and pursued in bad faith.[17] For the purposes of this test, the term "bad faith" includes conduct that is dilatory, vexatious or otherwise an abuse of process. To allow a less restrictive standard that a moving party only need to show that the case had no arguable merit, would be to differentiate PERB cases as having some need for a less restrictive standard from that which is commonly accepted in civil courts. No such justification has ever been set forth in any PERB decision.

In the instant case, the ALJ admitted that the Association had not violated a Board order or repetitively filed charges that had been dismissed. However, the ALJ found that:

> The evidence is substantial that the City has long had a policy, by established practice, requiring that firefighters obtain and maintain Class B driver's licenses and that they may be called upon to serve as relief drivers. The Association has long been aware of the policy, and its arguments to the contrary, both factual and legal, are without any arguable merit.

(Proposed dec. at p. 16, emphasis added.) While the ALJ found the Associations' arguments to be "without any arguable merit," she stopped short of designating them as being made with some subjective "bad faith" intent. Based on our review of the record, we find that the

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[17] In *Los Rios College Federation of Teachers, Local 2279 (Deglow), supra*, the Board stated that "the Board may order sanctions only after it has ordered the party to cease and desist from filing frivolous charges over the same factual and legal issues previously addressed by the Board." However, Government Code section 11455.30, subdivision (a) does not require repetitive filing of frivolous charges before attorneys fees may be awarded. Accordingly, PERB has the authority to award attorneys fees based on a single filing of a frivolous charge in bad faith.

Association did not pursue this unfair practice charge with bad faith. Therefore, the award of attorney's fees must be reversed.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-262-M are hereby DISMISSED WITHOUT LEAVE TO AMEND. The administrative law judge's order that Alhambra Firefighters Association, Local 1578 pay to the City of Alhambra reasonable attorney's fees and costs incurred in defending the unfair practice charge and complaint is hereby REVERSED.

Members McKeag and Dowdin Calvillo joined in this Decision.