STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WANDA R. SHELTON, Charging Party, v. SAN BERNARDINO COUNTY PUBLIC DEFENDER, Respondent.	Case No. LA-CE-390-M PERB Decision No. 2058-M September 3, 2009

Appearance: Wanda R. Shelton, on her own behalf.

Before McKeag, Neuwald and Wesley, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Wanda R. Shelton (Shelton) of a proposed decision (attached) by an administrative law judge (ALJ). The unfair practice charge alleged that the San Bernardino County Public Defender (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by denying her the right to union representation and retaliated against her by placing her on administrative leave. Shelton alleged that this conduct constituted a violation of MMBA sections 3502, 3503 and 3506. The ALJ found that Shelton failed to satisfy her burden of proof and consequently dismissed the complaint and underlying unfair practice charge.

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

The Board has reviewed the entire record in this case, including but not limited to, the unfair practice charge, the complaint and answer, the hearing transcripts and exhibits, the ALJ's proposed decision, and Shelton's exceptions and supporting brief. Based on this review, we find the proposed decision was well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board hereby adopts the proposed decision as a decision of the Board itself, subject to the following discussion regarding the right to union representation.

DISCUSSION

As indicated in the proposed decision, Shelton was called into a meeting with County Supervising Deputy Public Defender Jennifer Cannady (Cannady) and Chief Deputy Public Defender Christopher Gardner (Gardner) on April 18, 2007. Shelton claims she was wrongfully denied representation at this meeting.

The Board has held that an employee who is required to attend an investigatory interview with the employer is entitled to union representation if the employee has a reasonable basis to believe discipline may result from the meeting. PERB adopted the *Weingarten*[2] rule in *Rio Hondo Community College District* (1982) PERB Decision No. 260. In order to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation; (b) for an investigatory meeting; (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. (See *Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984)

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

159 Cal.App.3d 617; *Fremont Union High School District* (1983) PERB Decision No. 301; see also, *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382.)

A. Shelton Requested Union Representation

With regard to the first element of the representation test, the ALJ found that Shelton satisfied her burden of proof noting that "[i]t thus appears that Shelton at least expressed her reluctance to attend the meeting without union representation." We find this statement is inconsistent with long-standing PERB precedent that requires employees to affirmatively request union representation in order to invoke their rights to representation at an investigatory interview. (*Regents of the University of California* (2006) PERB Decision No. 1843-H; *Bay Area Air Quality Management* (2006) PERB Decision No. 1807-M.) Accordingly, we find that expressing reluctance to attend an investigatory interview without union representation is insufficient, standing alone, to invoke the right to union representation.

Notwithstanding this ruling, we agree with the ALJ that the first element of the representation test was satisfied. In the instant case, Shelton testified that she requested representation at the time she was ordered by Cannady to attend the meeting, but Cannady denied her request. We find this testimony credible and, therefore, conclude Shelton requested representation for the April 18, 2007 meeting.

B. The April 18, 2007 Meeting Was Not Investigatory

With regard to the second element of the representation test, the ALJ concluded that the April 18, 2007, meeting with Cannady and Gardner was not an investigatory interview. Accordingly, the ALJ found that Shelton failed to establish all of the elements of the representation test and dismissed the allegation that Shelton was wrongfully denied union

representation. Based on our review, we find the ALJ's analysis and conclusion regarding this element well-reasoned and adequately supported by the record. We, therefore, conclude the ALJ's dismissal of this allegation was appropriate.

ORDER

The complaint and unfair practice charge in Case No. LA-CE-390-M are hereby DISMISSED.

Member Wesley joined in this Decision.

Member Neuwald's dissent begins on page 5.

NEUWALD, Member, dissent: Unlike my colleagues, I find that the San Bernardino County Public Defender (County) violated the Meyers-Milias-Brown-Act (MMBA) when it denied Wanda R. Shelton (Shelton) union representation. As the majority correctly notes, to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation; (b) for an investigatory meeting; (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. In regards to the first element, I agree with the majority that Shelton requested representation.

I, however, respectfully disagree with the majority as to whether the meeting was investigatory. The Public Employment Relations Board (PERB) has found a right to representation where: (1) the employee is expected to respond to questions concerning her work performance (*Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617; *State of California (Department of Highway Patrol)* (1997) PERB Decision No. 1210-S); (2) the employer clearly goes beyond merely informing the employee of the imposition of discipline (*Rio Hondo Community College District* (1982) PERB Decision No. 260); (3) the statements were not declaratory (*State of California (Department of Corrections)* (1998) PERB Decision No. 1245-S); and (4) disciplinary action is contemplated and occurs (*Regents of the University of California* (1984) PERB Decision No. 449-H). Within this framework, I believe that the meeting was investigatory. Shelton was required to provide information about whether she was going to move. Chief Deputy Public Defender Christopher Gardner's (Gardner) statement was not rhetorical. Further, the purpose of the meeting was not simply to deliver a predetermined disciplinary action, such as a letter of written reprimand. Last, the meeting did ultimately result in discipline.

In regards to the final two elements, Shelton had a reasonable belief of impending disciplinary action at the meeting because she refused to move her desk. Gardner and Supervising Deputy Public Defender Jennifer Cannady (Cannady) denied the request. As such, I find that Gardner's and Cannady's refusal was a denial of Shelton's right to representation and was therefore in violation of MMBA sections 3501, 3503, and 3506.[1]

[1]Because I found that the County denied Shelton representation, it is unnecessary for me to further analyze and determine whether the meeting presented the type of "highly unusual circumstances."

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

WANDA R. SHELTON, Charging Party, v. SAN BERNARDINO COUNTY PUBLIC DEFENDER, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-390-M PROPOSED DECISION (5/12/2008)

Appearances: Wanda R. Shelton, on her own behalf; Kenneth C. Hardy, Deputy County Counsel, for San Bernardino County Public Defender.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a public employee alleges that a public agency denied her the right to union representation and retaliated against her, in violation of the Meyers-Milias-Brown Act (MMBA).[1] The agency denies any violation.

Wanda R. Shelton (Shelton) filed an unfair practice charge against the San Bernardino County Public Defender (County) on July 31, 2007. The General Counsel of the Public Employment Relations Board (PERB) issued a complaint against the County on October 31, 2007. The County filed an answer to the complaint on November 29, 2007.

PERB held an informal settlement conference on December 18, 2007, but the case was not resolved. PERB held a formal hearing on March 11-12, 2008. At the conclusion of the hearing, the case was submitted for decision on the basis of oral argument, without the preparation of transcripts.

[1] MMBA is codified at Government Code section 3500 and following.

FINDINGS OF FACT

Shelton is a public employee under MMBA, and the County is a public agency under MMBA. Prior to April 6, 2007, Shelton was regarded as a good employee. Events beginning on that day, however, led to Shelton being placed on administrative leave on April 18, 2007, and later terminated.

On April 6, 2007, Chief Deputy Public Defender Christopher Gardner (Gardner) decided that Shelton, an Office Assistant III, should move over one workstation, so that she would be at a reception window. Gardner told Supervising Deputy Public Defender Jennifer Cannady (Cannady), Shelton's direct supervisor, to have Shelton move, and Cannady orally ordered Shelton to move. For reasons that are not entirely clear, Shelton resisted the order.

On April 12, 2007, Cannady gave Shelton a memo stating in part:

> As of today's date, you have failed to move. You are ordered to relocate to the adjacent workstation at the reception window. Your workstation will be at the desk at the reception window effective Monday April 16, 2007 at 8am [sic]. Failure to relocate to the adjacent workstation at the reception window is insubordination and will subject you to discipline.

Despite several opportunities to comply, Shelton continued to resist the order, until she was placed on administrative leave on April 18, 2007.

During Shelton's administrative leave, the County investigated her conduct. On May 11, 2007, the County gave her a notice of proposed dismissal for insubordination, and on May 23, 2007, it gave her a predisciplinary hearing, at which she was represented by her union. On June 26, 2007, the County issued an order of dismissal. Shelton appealed to the County Civil Service Commission and received a hearing on October 29-30, 2007, at which she was again represented by her union. On December 13, 2007, the Civil Service Commission sustained the order of dismissal. Shelton did not seek judicial review.

Shelton's dismissal was not mentioned in the PERB complaint and was not litigated at the PERB hearing. Two other issues were in the complaint and were litigated: whether the County denied Shelton the right to union representation, and whether the County placed Shelton on administrative leave in retaliation for protected conduct.

Alleged denial of representation

The PERB complaint alleges in part:

> 3. On April 18, 2007, Charging Party [Shelton] was required to meet with Respondent's [the County's] agents, Jennifer Cannady and G. Christopher Gardner, to discuss her failure to relocate her work station. Charging Party had a reasonable belief that the interview would result in disciplinary action.
>
> 4. Charging Party requested that her employee organization representative be present for the meeting. Respondent, acting through its agents, Ms. Cannady and Mr. Garner, refused to permit the representative to attend the meeting.

The County's conduct is alleged to have violated MMBA section 3502.

There is no doubt that in the afternoon of April 18, 2007, Shelton was called into a meeting with Cannady and Gardner, and that she reasonably anticipated discipline. Shelton had been on notice since at least the April 12 memo that her failure to relocate would subject her to discipline. In the morning of April 18, 2007, Cannady and Gardner had again ordered her to move, by noon, but Shelton had not moved. According to Shelton's testimony, she returned from lunch expecting disciplinary action against her. In the meantime, Cannady had contacted the County's human resources officer, who had advised Cannady and Gardner to give Shelton one more chance to comply with the order.

There is a question whether Shelton requested union representation at the April 18 meeting. At the PERB hearing, she testified that she did, while Cannady and Gardner testified that she did not. At Shelton's civil service hearing, however, Cannady testified:

> When we first got into Mr. Gardner's office, Ms. Shelton, while starting to close the door, said at that time she had called the union and she was waiting to hear back from them, [and] everyone was telling her she shouldn't be meeting with us.

It thus appears that Shelton at least expressed her reluctance to attend the meeting without union representation. Although Cannady and Gardner did not tell Shelton she could not have representation, they proceeded with the meeting despite her expressed reluctance.

At the PERB hearing, Shelton testified that in the meeting Gardner stated to her, "You didn't move," and ordered her to move "right now." Cannady and Gardner testified that Gardner asked Shelton one question: whether she would comply with the order. Shelton herself did not testify that she was asked any questions at all.

There is some question as to whether Shelton actually refused to move, but she did not initially say she would move, and Gardner explained that he would place her on administrative leave if she did not comply with the order. When Shelton complained that she did not know what to move, or could not move it herself, Cannady and Gardner accompanied her to her workstation to show her and to help her. While they were there, Shelton finally made telephone contact with a union representative, and Gardner and Cannady gave her privacy to talk to him. When they returned a few minutes later, Shelton was getting ready to leave the office to go see a doctor. Gardner told her that he would deem her departure a failure to comply and would place her on administrative leave. When she chose to depart anyway, he did in fact place her on administrative leave.

Alleged retaliation

The PERB complaint alleges in part:

> 6. During the period from approximately April 6, 2007 to April 18, 2007, Charging Party [Shelton] exercised rights guaranteed by the Meyers-Milias-Brown Act by engaging in the following protected conduct: discussing with Ms. Cannady and Mr. Gardner her concerns about her new workstation assignment;

> requesting the ability to contact her union representative; and attempting to and subsequently speaking with her union representative.
>
> 7. On or about April 18, 2007, Respondent [the County], acting through its agents, took adverse action against Charging Party by placing her on Administrative Leave.

The County's conduct is alleged to have violated MMBA section 3506.

There is no doubt that Shelton did engage in protected conduct, and there is no doubt that the County, through Gardner, placed her on administrative leave.[2] The question is whether Gardner placed Shelton on administrative leave because of her protected conduct.

Almost all of the evidence in this case, including Gardner's own credible testimony on this point, indicates that Shelton was placed on administrative leave not because of her protected conduct but because she repeatedly failed to comply with the order to move her workstation. The only real evidence to the contrary was Shelton's testimony that at a meeting on April 12, 2007, with Shelton, Cannady and two other employees present, Gardner said, "I don't want to get the union involved."

Gardner testified to the contrary. He testified that in the meeting he said he did not care if Shelton's reception window duties were shared among other employees, but Cannady said other employees were covered by different union contracts, and Gardner then said he did not want to get into that. Gardner testified similarly at Shelton's civil service hearing.

At the PERB hearing, Cannady credibly testified to the same effect. At Shelton's civil service hearing, she similarly testified:

> Mr. Gardner said somebody needs to sit at that reception window. I don't care who sits there. Somebody needs to sit there. At that point I responded with, well, we need to -- you need to be aware that not just anyone can sit at the window, that there are job descriptions and the union could get involved if we have people

[2] There is also no doubt that involuntary administrative leave is a form of adverse action. (Oakland Unified School District (2003) PERB Decision No. 1529, and cases cited.)

whose job description doesn't cover this sitting at the window doing someone else's job.

Earlier, in a memo to Gardner dated April 12, 2007 (signed on May 10, 2007), Cannady recorded that when Gardner said he did not care who sat at the window, she had "pointed out that there were differences between assignments and job descriptions."

At the PERB hearing, Shelton offered in evidence the transcripts of investigatory interviews with the two other employees present at the April 12 meeting. In those interviews, neither employee mentioned Gardner talking about union involvement, but one mentioned Cannady raising issues about job descriptions and union contracts.

In light of all the evidence, I credit the testimony of Gardner and Cannady on this point. The evidence does not show that Gardner expressed animosity towards union involvement. At most, it appears that Gardner and Cannady expressed concern about possibly violating union contracts by asking other employees to share Shelton's reception window duties.

ISSUE

1. Was Shelton denied the right to union representation?

2. Was Shelton placed on administrative leave for retaliatory reasons?

CONCLUSIONS OF LAW

Alleged denial of representation

An employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. (Social Workers' Union, Local 535 v. Alameda County Welfare Department (1974) 11 Cal.3d 382 (Social Workers' Union, Local 535).) In order to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation, (b) for an investigatory meeting, (c) which the employee reasonably believed might result in disciplinary action, and (d) the employer denied the request. (Id.; Civil Service

Assn., Local 400 v. City and County of San Francisco (1978) 22 Cal.3d 552 (Civil Service Assn.).)

In Social Workers' Union, Local 535, supra, at page 391, the Court noted the importance of using federal decisions to guide interpretation of state labor provisions the language of which parallels that of federal statutes. California courts have taken notice of such federal precedent in representation matters, citing with favor the U.S. Supreme Court's ruling in NLRB v. Weingarten (1975) 420 U.S. 251 (Weingarten). (Civil Service Assn., supra, at 556.) In approving the Weingarten rule, the U.S. Supreme Court noted with approval that the National Labor Relations Board would not apply it to "such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques." (Weingarten, supra, quoting Quality Manufacturing Co. (1972) 195 NLRB 197, 199 [79 LRRM 1269, 1271].)

In the present case, as previously noted, there is no doubt that on April 18, 2007, Shelton was called into a meeting with Cannady and Gardner, and that she reasonably anticipated discipline. There is a question whether Shelton requested union representation at the April 18 meeting. Based on the evidence, I would resolve that question in Shelton's favor. It appears that Shelton at least expressed her reluctance to attend the meeting without union representation. Under those circumstances, I would say that Cannady and Gardner proceeded with the meeting at their peril. Had they conducted an investigatory interview, I would further conclude that they denied Shelton the right to union representation.

The evidence shows, however, that Cannady and Gardner did not conduct an investigatory interview. According to Cannady and Gardner, Shelton was asked one question: whether she would comply with the order to move that they had already given her. Shelton herself did not testify that she was asked any questions at all. Whatever the precise details, I

believe that Shelton correctly understood what was happening: she was not being questioned, she was being ordered. Cannady and Gardner were giving her one more opportunity to comply, as the County's human resources officer had advised.

Cannady and Gardner did not initiate the sort of inquiry or discussion for which union representation has been found to be a right. Unlike the meeting in Redwoods Community College Dist. v. Public Employment Relations Bd. (1984) 159 Cal.App.3d 617, the meeting in this case was neither investigatory nor formal, and it was conducted by Shelton's supervisors, not by high-level management. Unlike the meetings in Rio Hondo Community College District (1982) PERB Decision No. 260, the meeting here did not involve give and take concerning the possible consequences of Shelton's conduct. The meeting here was more comparable to the one in State of California (Department of Highway Patrol) (1997) PERB Decision No. 1210-S, in which an employee was given work performance direction, and for which no right to union representation was found.

The order for Shelton to move her workstation was the kind of "giving of instructions" that Weingarten excluded from the right to union representation. It was not "run-of-the-mill" in this case only because Shelton resisted the order. Her resistance forced Cannady and Gardner to repeat the order, but it did not thus create a right to representation where none would otherwise exist. I conclude that Shelton has not met her burden of proving that the County denied her the right to union representation where she had such a right.

Alleged retaliation

To establish a prima facie case of retaliation in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to

discriminate, or otherwise interfered with, restrained, or coerced the employee because of the exercise of those rights. (Campbell Municipal Employees Association v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Association v. City of San Leandro (1976) 55 Cal.App.3d 553 (San Leandro Police Officers Assn.).)

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 Police Officers Association, supra); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro Police Officers Association, supra); (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 Police Officers Association, supra; Los Angeles County Employees Association v. County of Los Angeles (1985) 168 Cal.App.3d 683).

In the present case, as previously noted, there is no doubt that Shelton engaged in protected conduct in the two weeks before the County took action against her by putting her on administrative leave. That timing, however, is not enough to prove retaliation. The only other evidence of retaliation was Shelton's testimony that at a meeting with Shelton, Cannady and two other employees on April 12, 2007, Gardner said, "I don't want to get the union involved." On this point, however, I have credited the testimony of Gardner and Cannady over that of

Shelton. At most, it appears that Gardner and Cannady expressed concern about possibly violating union contracts by asking other employees to share Shelton's reception window duties. That is hardly the same thing as expressing animosity towards union activists. I conclude that Shelton has not met her burden of proving that the County retaliated against her.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and the underlying unfair practice charge in Case No. LA-CE-390-M, Wanda R. Shelton v. San Bernardino County Public Defender, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a request for an extension of time to file exceptions or a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

This Proposed Decision was issued without the production of a written transcript of the formal hearing. If a transcript of the hearing is needed for filing exceptions, a request for an extension of time to file exceptions must be filed with the Board itself (Cal. Code Regs., tit. 8, sec. 32132). The request for an extension of time must be accompanied by a completed transcript order form (attached hereto). (The same shall apply to any response to exceptions.)

In accordance with PERB regulations, the statement of exceptions must be filed with the Board itself within 20 days of service of this Decision or upon service of the transcript at the headquarters office in Sacramento. The statement of exceptions should identify by page

citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

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

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

Thomas J. Allen
Administrative Law Judge