OVERRULED IN PART by Walnut Valley Unified School District (2016) PERB Decision No. 2495

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN BREWINGTON, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	Case No. LA-CE-261-M PERB Decision No. 2090-M December 31, 2009

Appearances: Tomlinson, Nydam & Prince by Alan J. Leahy, Attorney, for John Brewington; The Zappia Law Firm by Edward P. Zappia, Attorney, for County of Riverside.

Before Dowdin Calvillo, Acting Chair; McKeag and Neuwald, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the County of Riverside (County) to a proposed decision of an administrative law judge (ALJ). The complaint alleged that the County violated the Meyers-Milias-Brown Act (MMBA)[1] by taking several adverse actions against John Brewington (Brewington) in retaliation for having engaged in protected activities. In this decision, the Board concludes that the County unlawfully retaliated against Brewington for having engaged in protected activity.

PROCEDURAL HISTORY

On March 28, 2006, Brewington filed an unfair practice charge alleging that the County took adverse action against him in retaliation for having engaged in protected activity. After the charge was amended several times, PERB's acting General Counsel issued a complaint on

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

August 21, 2006. After the matter was assigned for hearing , the ALJ issued an amended complaint on November 28, 2006.[2] Thereafter, the matter was deferred to the grievance/arbitration procedure of the memorandum of understanding (MOU) between Service Employees International Union (SEIU) and the County, but was revived when the contractual procedure failed over a dispute as to who would pay the cost of arbitration. The ALJ issued the proposed decision on April 25, 2008. The County filed timely exceptions to the proposed decision.

The amended complaint alleges that Brewington exercised rights guaranteed by the MMBA by: (1) speaking with his supervisor on November 9, 2005, about a co-worker's behavior; (2) meeting with his union representative on November 9, 2005; (3) having his union representative write to the County's human resources office on February 13, 2006, regarding his working conditions; (4) meeting with his supervisor on February 14, 2006, regarding his working conditions; and (5) attending a meeting on March 30, 2006, with his union representative and the County's representatives to discuss his complaints. The amended complaint further alleges that the County violated MMBA section 3506 and committed an unfair practice under MMBA section 3509(b) and PERB Regulation 32603(a)[3] by taking the following actions because of Brewington's protected activities: (1) issuing a memorandum on February 16, 2006, entitled "job duties and responsibilities" that indicated that violations of the memo may subject Brewington to discipline; (2) issuing Brewington a Directive Memorandum on March 30, 2006; (3) issuing Brewington a Medical Certification Directive on June 13, 2006; (4) docking Brewington's pay on July 5, 2006; (5) informing Brewington on June 7, 2006, that

[2] The complaint was further amended at the hearing to reflect correct dates for the alleged adverse actions.

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

he was the subject of an investigation which may have criminal implications; (6) placing Brewington on paid administrative leave on July 10, 2006; (7) conducting an investigatory interview on July 18, 2006, in the absence of Brewington's counsel, whom he had requested to be present; (8) issuing Brewington a Notice of Proposed Termination on August 9, 2006; and (9) terminating Brewington's employment on August 23, 2006.

BACKGROUND[4]

The County is a public agency within the meaning of MMBA section 3501(c). SEIU is a recognized employee organization within the meaning of section 3501(b), representing a bargaining unit that includes the County's engineers. At all relevant times, SEIU and the County were parties to an MOU, which was effective from 2006 to 2009.

Brewington was hired by the County in 1984, and since 1986 was a soil grading engineer in the Department of Building and Safety, a division of the County's Transportation and Land Management Agency (TLMA). When he was first hired, he was a civil engineer by education, and received his state engineer's license thereafter in 1992.

Brewington's duties as a soil grading engineer included ensuring that soil grading plans submitted by various contractors, civil engineers, landowners, etc., in preparation for building construction were properly written, ensuring that the plans were properly implemented, and certifying the completion of the final plans, a prerequisite to beginning construction. He worked mainly in an office, but if there were problems with the plans, he would come out to the front counter and speak with whomever submitted the plans, e.g., the architect, contractor, or landowner. He thus had daily contact with the public, as well as with fellow engineers and others in his department.

[4] The Board adopts the ALJ's findings of fact, including credibility determinations, to the extent they are consistent with this decision.

Brewington was first assigned to the County's Riverside office. Because of his expertise and with his consent, he was transferred to the Indio office in June 1999. By 2000, he began complaining to Indio Regional Office Director, Bob Lyman (Lyman), about the Indio office. In particular, Brewington felt that the building inspectors were too lenient in approving building projects that did not have proper drainage plans. As a result of an alleged conflict between Brewington and a fellow employee, he was transferred back to Riverside in 2000. While there, in September 2002, he and eleven fellow employees sent a memo to the TLMA director complaining that non-licensed engineers were directing the work of licensed engineers. In October 2005, over his objection, he was transferred back to Indio. He testified that Indio was a "tough, tough reassignment," because the "rules seemed to change" with regard to interpretation and application of the relevant state codes and ordinances.

Brewington's Complaints

From the beginning of his second tenure at Indio, Brewington was critical of its office procedures and expressed his views several times to Lyman, both verbally and in writing. On November 3, 2005, Brewington had an altercation with a coworker, Garry Shopshear (Shopshear). Shopshear, who was not a trained or licensed engineer, presented a final site grading plan to Brewington for his certification. Brewington was not satisfied that the plan carried sufficient inspection verification and refused to sign off on it, believing that to do so would be illegal, unsafe, and a violation of his state license. Shopshear demanded that Brewington clear the plans. Brewington repeated that he would not. Finally, Shopshear said, in a low tone of voice and with a "direct cold stare" according to Brewington, "Oh yes, you will." Brewington claimed he felt threatened and challenged. Although Shopshear was the office supervisor, Brewington did not believe he had the authority to direct Brewington's work. Shopshear did not testify at the hearing.

Following this incident, Brewington contacted his direct Supervisor, Greg McCombs (McCombs), and Lyman. Lyman told him he would look into it. The next day, Brewington, believing the problems would not be resolved, began the paperwork necessary to retire from the County. However, he then decided not to retire but instead to seek advice from his union. He was not a union activist and had never before asked for the union's help, but he went to the SEIU office on November 28 and spoke with Business Representative, Chris Swanson (Swanson). He told her about the Shopshear incident and related several of his complaints about the Indio office, especially his concern that non-licensed engineers were clearing site inspections and issuing building permits. Swanson then phoned Human Resources (HR) Services Manager, Peter Morelli (Morelli), to ask for the proper form to file a complaint about Shopshear[5] and to set up a meeting. Morelli was not in, so Swanson left messages. Brewington also left a few messages, but Morelli never responded to him or to Swanson. Because SEIU was then heavily involved in contract negotiations with the County, Swanson was unable to do any follow-through at that time.

Brewington also shared his complaints about the Indio office with McCombs, who responded by e-mail on December 16, 2005.[6] The e-mail, a copy of which was sent to Lyman, begins:

> I feel it necessary to clarify the grading plan review process in the Indio office after observing some of the grading plan reviews that are occurring.

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[5] SEIU did not believe the incident was grievable as it was not a matter covered by the MOU.

[6] McComb's e-mail is not alleged as an unfair practice, nor are Brewington's complaints to him alleged as protected activity.

It instructs Brewington to use the proper grading forms, and criticizes him for insisting on certain drainage procedures, using other employees for assistance, not prioritizing his work to get plan checks completed, billing his time to overhead instead of to "permits or planning cases," and being confrontational with Shopshear. The e-mail ends:

> Please, step back, stop the bitterness, and just simply do your job. I will support you 100%.

Brewington testified that McCombs later "backed off" some of the criticisms, but he did not provide any specific details of what McCombs said, or when, or under what circumstances. McCombs left his employment with the County in early 2006 and did not testify at the hearing.

On February 9, 2006,[7] after contract negotiations were completed and Swanson could spend more time on the Brewington matter, Swanson spoke by phone with Senior HR Analyst, Lenore Reyes (Reyes). Reyes told her there was no complaint form relevant to the Shopshear incident, but Swanson could put her complaint in writing and send it to HR. Swanson sent a letter addressed to Morelli dated February 13, by mail and by fax, stating:

> It has come to the attention of SEIU Local 1997 that John Brewington, Associate Civil Engineer of the Indio County Administrative Center may be directed and intimidated into approving and/or granting permits that are a violation of County rules and regulations as well as a violation against Mr. Brewington's licensure and possibly a violation of State law. We have requested a meeting with you to resolve the situation; however, to date we have been unsuccessful in scheduling a meeting with you.
>
> We realize the seriousness of these allegations and, as such, are again requesting to meet with you to resolve this situation.
>
> Please contact me at your very earliest convenience so that we may meet and discuss the above in hopes of an agreeable resolution.

[7] All dates hereafter refer to the year 2006 unless otherwise specified.

Swanson sent the letter by fax to Brewington at 5:18 p.m. on February 13. She sent it sometime thereafter to Morelli, but the record does not clearly reflect when it was sent to Morelli or when he received it. The letter eventually reached HR, but it is unlikely anyone in HR saw it before February 16. Morelli left his position with the County in early 2006 and did not testify at the hearing.

February 16 MOU

On the morning of February 14, after several previous conversations, Lyman met with Brewington. The only matters discussed were Brewington's assigned County vehicle and his overtime requests. On February 16, Lyman sent Brewington an MOU entitled "Job duties and responsibilities." The memo instructs Brewington to report directly to Lyman, to submit requests for time off three days in advance, to phone him or Shopshear if he is sick or late, to keep a daily log of time spent on each project, and to limit his overtime. The memo also states the following:

> 4. Job duties – This includes and is not limited to the following:
>
> a. Plan check–all grading that is submitted to the Indio office is to be reviewed by you. Plan check is to be conducted on a first in-first out basis. The Regional Office Manager has the authority to prioritize your work load based on County and office needs.
>
> b. Conditioning of projects–it is your responsibility to condition projects for grading. These conditions and approvals including routing are to be done [on] a timely basis and must be ready for TRC. I expect the review to be reasonable and justifiable. Attendance at TRC may be required and if requested, you will attend and contribute at the TRC meeting. This is not an optional program.
>
> d.[8] Technical issues are to be addressed through Greg McCombs or Kack Sung. Greg and Kack are to be

[8] There is no item "c" in the original memo.

kept informed as to any cases that are experiencing problems.

e. Clients are not to be directed to Ann Nicholas for technical matters. She can only address administrative issues and clearances may still require your intervention.

f. E-mail addressed to you is to be opened and responded to in a timely manner.

g. Clients are not to be told that you are not doing TRC.

h. Interface with Garry Shopshear on various matters.

i. You are to communicate with all applicants regarding grading issues and not just Engineers.

Effective with this memo, you and I will meet on Wednesday mornings at 8:00 a.m. to discuss projects, issues and any other outstanding issues or problems.

You are to keep this memo in a convenient place and refer to it when you need to refresh your memory.

Violations of this memo of understanding will not be tolerated and may result in disciplinary action.

Lyman did not testify at the hearing.

Brewington testified without contradiction that, before the memo issued, prior approval was not needed for time off or overtime, he was not previously required to attend TRC meetings, no daily log was required, assistants were assigned to help him with his plan checks, and he received too many e-mails to make timely responses.

A week after Lyman sent his memo, he met with Swanson and Brewington. Brewington testified that Lyman retracted a number of the points in the memo, but he did not specify which points or what Lyman said about them. Brewington responded to Lyman's memo by e-mail of February 22, stating that the directives were neither acceptable nor accomplishable, and requested that they meet again with HR. Swanson tried to set up a

meeting with Reyes for March 22, but Reyes was unavailable, so it was scheduled for March 30.

With Swanson's assistance, Brewington filed the instant unfair practice charge on March 28, complaining about Shopshear's conduct and Morelli's failure to take action, and alleging retaliation because he had gone to the union for assistance. The unfair practice charge was served on HR Director, Ron Komers (Komers) on March 27.

March 30 Meeting at Human Resources

The March 30 meeting was held at the HR office, attended by Brewington, Swanson, Reyes, and her Supervisor, Terri Stevens (Stevens), who succeeded Morelli as HR services manager. Following an agenda he prepared, Brewington presented his complaints about the alleged threat by Shopshear as well as several problems he saw with the operation of the Indio office, and cited violations of County ordinances and policies. He illustrated his complaints with several files of individual building projects he had brought with him. Reyes and Stevens asked some questions but mostly listened. At the end of the meeting, they asked Brewington for the files he brought, but he said they were official files that he could not leave with them. After they told him they would need some documentation to support his complaints, he said he would put something together for them.

After the meeting, Brewington began assembling a large volume of documents and later gave them to Swanson to review before forwarding them to HR. The record reflects that Swanson was unable to confirm that she actually sent the documents to Reyes, and Reyes and Stevens testified that they never received them; therefore they did not pursue any investigation of the Shopshear incident or any of Brewington's other complaints.

Within a week after the March 30 meeting, Reyes and Stevens met with Director of Building and Safety, Jim Miller (Miller). They related to him Brewington's complaints about

the Indio office and the Shopshear incident, although they testified that they did not mention Brewington's claim that Shopshear threatened him with violence.

Reyes and Stevens testified that Miller conceded that licensed engineers frequently did not want to take direction from unlicensed engineers; however, they also said that Miller, as well as Lyman and Shopshear, complained to them at various times that Brewington had problems taking direction from any supervisor, that he was not properly reporting his time, was frequently away from his work station, and had low productivity. Stevens suggested to Miller that Brewington be issued a directive and be transferred back to Riverside.

Miller retired from the County in the Spring of 2007 and did not testify.

HR did not conduct any investigation of the Shopshear incident or of Brewington's other complaints. Reyes and Stevens contend this was because Brewington never provided supporting documentation. They testified that they were not concerned about the incident because it was a situation in which a supervisor was giving directions to a subordinate.

June 6 Directive Memorandum

On May 23, Brewington received a "Directive Memorandum" from Miller reassigning him to Riverside as of Tuesday, June 6, to work under supervisor Kack Sung (Sung). When Brewington reported to work at Riverside on the morning of June 6, Miller gave him a second memo that recited his new job duties, including daily time-reporting and closing out hundreds of old files, and a third memo entitled "Directive Memorandum." Miller then read the Directive Memorandum aloud to Brewington, asking him several times whether he understood the directives. This third memo required him to bill a minimum of seven hours per day, cited the order of supervisors to whom he must report, his work schedule and break times, and stated the following:

- All requests for time off must be submitted and approved by a supervisor a minimum of 48 hours in advance. [Emphasis in original.]
- When calling in sick you must talk directly to a supervisor within one hour of your reporting time. Phone messages are not allowed.
- You are not to leave the 12th floor without first getting permission from a supervisor.
- In the event of a personal emergency and none of the reporting supervisors are available you are to send a detailed e-mail to all of the above supervisors as to why it was necessary to deviate from your work schedule.
- While working you are prohibited from going to the second floor. If you need file information you are to make a request to a supervisor who will make arrangements to retrieve the information for you.
- You are not to use your personal cell phone while at work. It is to be turned off at all times while you are working. If you need a cell phone one will be issued to you.
- You are not to use your personal lap top computer at work. If you bring it to work it must remain out of site [sic] at all times.
- Your new job assignment does not require you to leave your work station or discuss grading issues with staff. Socializing directly, through e-mail or the internet with other employees will no[t] be allowed.
- You will not be providing direct services to the general public as a function of your job and are instructed to refer any and all public contacts and inquiries to a supervisor.

Stevens testified that she recommended these memos and participated in drafting them. In so doing, she did not review Brewington's prior evaluations, but relied solely on information provided by Miller.

Brewington testified that the Directive Memorandum made several changes to his working conditions: it was a great inconvenience for him to leave work at 5 p.m. as traffic is very heavy at that time; he did not need either an hour for lunch or a work break; he never previously had to speak directly with a supervisor when calling in sick; he never had a problem with visiting the second floor, where his wife worked, or with his cell phone or his laptop, or with socializing with fellow employees. Brewington also stressed the importance

of his daily contact with the public in order to resolve permit problems, which the memo restricts. Brewington testified without contradiction that Miller had never raised these issues before.[9]

Events of June 7

Brewington finished his shift on June 6. On June 7, he was late to work because his son was having trouble at school. He left messages for Sung the night before and again that morning informing Sung that he would be late. Before arriving at work, he called Lyman, who was no longer his supervisor, and left a voice-mail message complaining about Miller. Lyman called Stevens, who advised him to file a workplace violence report with HR claiming that he and Miller had been threatened. Lyman filed a report the same day. In the report, Brewington is quoted as saying:

> You got off the railroad tracks. Remember a while ago I told you that you were on the track and the train was coming? Does Jim Miller know what you did to him? I don't know how you did it. You got off the track and there is a line of buses waiting for Mr. Miller. I want to thank you for several things you did for me. Again, [I] don't know how you did it. You know that I filed against you with the state.

Reyes reviewed Lyman's report, but she did not seek to hear the actual voice-mail recording. At the hearing, she claimed that she asked Lyman what he thought Brewington meant by his reference to trains and buses, but she could not recall his answer, except that he said Brewington meant some unspecified harm to himself and Miller.

Brewington did not deny leaving the message quoted in Lyman's violence report. He claimed that his reference to a train was not a threat but a "metaphor" that he had used in a

[9] Although Reyes testified that Miller had discussed some performance issues with her concerning Brewington, neither Miller, Lyman or McCombs testified about any of these issues. Therefore, we cannot rely on uncorroborated hearsay to make a finding that Brewington's performance was deficient. (PERB Reg. 32176.)

prior conversation with Lyman. In that prior conversation, Brewington said things were tough on both of them, there was a "train," i.e., a problem, on the tracks, and that Lyman could take shelter under the train or get out from under it when it starts to move, and that Lyman understood it that way. Brewington contended that his June 7 message was a continuation of the prior conversation; he meant that Lyman got himself out from under the train and now the problem was Miller's. Given that Lyman did not testify and Reyes did not recall what Lyman said to her, we adopt the ALJ's credibility determination that Brewington did not threaten Lyman.

Shortly after Brewington arrived at work on June 7, Miller again summoned him to Miller's office. Miller told Brewington that he was in violation of the June 6 directive for calling in late, because he had not reported it in person to any supervisor. According to Reyes, Miller subsequently told her that Brewington responded by yelling, "You need to change your call in procedure!" Reyes further testified that Sung, who was also present in Miller's office, told her that Brewington responded in a "loud, raised voice." Against this uncorroborated hearsay testimony, Brewington testified that he did not complain about the call-in procedure in general, but told Miller that he (Brewington) should not have been faulted for the June 7 tardiness.[10] He admitted that his voice was loud, but said that he was not yelling. Given that neither Miller nor Sung testified, Brewington's testimony that he was not yelling is credited over Reyes' hearsay testimony.

Elevator Incident

At lunchtime the same day, Brewington got into an elevator heading down. Miller and Deputy Director, Environment Programs Department, Greg Neal (Neal), got in the elevator.

[10] Pursuant to PERB Regulation 32176, hearsay evidence is admissible, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

When they all got to the ground floor, Brewington said, "Be careful." Miller phoned Stevens, who told him that Lyman had already filed a workplace violence report and suggested that he do the same, which he did, claiming that Brewington had threatened him. She also advised Miller that Brewington be "admonished."

The record reveals numerous inconsistencies in the testimony of the County's witnesses concerning this incident. According to Reyes, both Miller and Neal told her that they and Brewington were the only ones in the elevator, and that they took Brewington's comment "Be careful" as a threat. Reyes also testified that Miller told her Brewington was staring at him on the way down. She testified that Neal told her that Brewington was already in the elevator when he and Miller got on, but he could not confirm the stare because he was facing forward. She also testified that Neal told her that Brewington's comment was unusual because there was no other conversation preceding it in the elevator. Neil, however, testified that he did not know whether Brewington was already in the elevator when he and Miller got in or whether Brewington was staring at Miller. He also did not know whether there were others in the elevator, but admitted that there could have been others, including Majeed Farshad (Farshad), an engineer.[11] There are surveillance cameras outside the ground floor elevators at the Riverside facility, but Reyes did not seek to determine whether the cameras were facing the elevators or whether this incident was recorded.

Brewington, on the other hand, testified that when he entered the elevator, two women were already on the elevator and he stood between them. At the next stop Miller and Neal got on. He and Miller looked at each other; he felt uncomfortable and thought about getting off, but stayed on. At the next stop Farshad got on. Farshad was very loud and demonstrative, and made numerous comments about Brewington having cut his hair and his beard. When the

[11] Neal did not offer this name; he was asked about Farshad on cross-examination.

elevator stopped at the ground floor, Farshad got off first and Brewington got off last. Before Brewington exited he looked toward Farshad and said to him, "You be careful now." Brewington testified that this was a common salutation to engineers like Farshad who work in the field.

Given the inconsistencies in Neal's testimony and the failure of Miller to testify, we adopt the ALJ's credibility determination that Brewington's comment was directed not to Miller or Neal but to Farshad, and that Brewington was not staring at Miller but rather they were looking at each other.

June 7 Administrative Investigation Memo

That afternoon, Miller called Brewington into his office. Sung and Supervisor, Ed Nichols (Nichols) were also present. Miller gave Brewington a fourth memo entitled "Administrative Investigation," informing him that he was under investigation because of unspecified misconduct. Reyes, who wrote the memo under Miller's name, testified that it is standard practice to omit specific allegations of misconduct or reasons for the investigation. The memo instructed Brewington that he must be available to be interviewed by HR, that because it is not a criminal investigation he has no Fifth Amendment right to remain silent, and that he is not to discuss the matter with anyone except the investigators, his "union representative, legal representative or counsel." The memo also warns that failure to comply may be considered insubordination and may result in disciplinary action separate from any other charges that may be brought against him as a result of the investigation.

Brewington had no idea what the memo referred to, or what misconduct he was being accused of. He asked Miller for clarification, but Miller did not respond except to say that it could lead to criminal charges. Miller also gave him another memo stating that he was to be interviewed by HR at 4:30 p.m. that day. At the start of the 4:30 meeting Brewington

requested counsel, so Reyes, who was to conduct the interview, postponed it. On June 9, Alan Leahy (Leahy) called Reyes to say he was Brewington's new counsel, and the interview was set for June 13.

Shortly after Brewington reported to work on June 8, Miller summoned him to his office once again, with Nick Anderson (Anderson) present, to discuss his assigned duties. It seemed to Brewington that Miller was overloading him with responsibilities that could not be fulfilled. He felt very pressured and told Miller he had to leave work. Miller said he could not leave unless he was sick. Brewington then filled out a vacation slip, left the premises and went to the emergency unit of the County's medical clinic. He received some medication for indigestion, but he continued to have chest pains that night. The next morning, he returned to the clinic and was admitted to the cardiac unit of the nearby hospital where he stayed for a few days. Brewington's wife phoned the County the following Monday, June 12, and he himself called on Tuesday June 13 to report that he was on sick leave.[12] Because of Brewington's absence for medical reasons, the interview with HR scheduled for June 13 had to be postponed a second time. Brewington was treated at the clinic on June 13 or 14.

Neither Sung, Anderson, or Nichols testified at the hearing.

June 13 Medical Certification Directive; July 5 Dock in Pay

Also on June 13, Miller mailed to Brewington's home address a memo, issued on the recommendation of Reyes and Stevens, entitled "Medical Certification Directive" stating that "good cause exists for believing you may be abusing your sick leave privilege." Reyes and Stevens testified that the good cause was that Brewington had failed to file the proper sick leave documentation. However, Stevens conceded that medical documentation is not required

[12] Brewington did not call in sick on Friday, June 9, as that was his day off.

until an employee returns to work from sick leave. Stevens contended that good cause also existed because Brewington "took off" when he learned of the administrative investigation. Reyes testified that it is common for employees to take sick leave upon learning that they are under investigation. However, neither Reyes nor Stevens denied that Brewington and his wife had phoned the County on June 12 and 13 to report his sick leave and hospital stay.

The medical directive memo directs Brewington to provide, upon his return to work, a doctor's certificate explaining the reason for his sick leave, and states:

> Failure to provide a satisfactory certificate, as described above, will be considered insubordination and absence without leave, and you will be carried on the payroll as absent without pay.

The memo also requires him to speak in person with either Sung, Anderson, or Miller within an hour of his start time when calling in sick, and concludes:

> Insubordination and absence without leave may result in disciplinary action up to and including termination.

On June 15, Brewington sent a handwritten note to Miller via his home fax machine stating that he had been ill, accompanied by a discharge form from the hospital dated June 10 and a certificate from the clinic stating that he was under doctor's care from June 14 to 17 and could return to work on June 18; he also faxed the note to Sung and Anderson. On June 19 he faxed another handwritten note to Miller and Sung attaching a slip, signed by the psychiatric unit of the clinic, putting him off work until July 3. In addition, Brewington testified that he spoke several times with Reyes and told her that, pursuant to Miller's instructions, he was reporting his sick leave through the proper chain of command. However, his pay stub for July 5 cited him as being AWOL (absent without leave), and his pay was docked.

After Brewington submitted further medical reports, the payroll records were corrected by mid-July and a make-up check was issued and sent to him by certified mail. Brewington never signed for the certified mail and never received the check.

In the meantime, by letter dated June 12, Swanson informed Brewington, as she had done verbally a number of times before, that because he engaged his own attorney, SEIU could no longer represent him. Swanson did, however, send a letter on June 7 to PERB, with documents attached, in support of the instant charge, and sent a copy of the letter to Komers on June 13.

July 10 Placement on Administrative Leave

Brewington returned to work on July 10. Shortly after his arrival, he was summoned once again to Miller's office; Sung and Anderson were again present. Miller gave him a letter dated July 10, which he had signed, and read it aloud. It states that he is being placed on paid administrative leave effective immediately, "pending investigation of allegations of misconduct by you relating to threats of workplace violence." It prohibits him from entering County buildings or property without prior approval, from discussing the investigation or the allegations of misconduct with any County employee, and from engaging in "harassment, reprisal, or an attempt to influence a witness." It orders him to be available during normal working hours for telephone contact, meetings, or an order to return to work, to report each day to management, and to turn in his County identification and any "equipment, supplies or items issued to you (keys, pagers, cell phones, etc.)." In conclusion, it states:

> Failure to comply with the above directives will be considered insubordination and will result in disciplinary action.

Brewington did not say anything or ask any questions; he testified that he had no idea what threats he was being accused of. He was escorted to his work station to gather his belongings, then escorted out of the building. He immediately phoned his doctors for appointments.

According to the County's Workplace Violence, Threats and Securities policy, item II:

> The supervisor to whom an incident is reported shall immediately provide security for the threatened individual, co-workers, and the public at the worksite by:

a. Immediately placing an employee alleged to have made threats or engaged in violent behavior on paid leave pending the outcome of an investigation.

However, Brewington was not immediately placed on leave on June 7, the date when his two alleged threats were made, but rather was allowed to work the rest of that day and to return to work on June 8 without any mention of the two incidents. When questioned about this at the hearing, Reyes and Stevens stated that they first had to investigate the incidents and that, after June 7, Brewington was only at work for a short time on June 8 and then was out on sick leave until July 10, when he was placed on administrative leave.

Reyes testified that it was Komers who made the decision to place Brewington on administrative leave. She did not give Komers her investigative material nor provide him with any input toward his decision, and she did not know the reasons for his decision.

Komers did not testify.

July 18 Investigatory Interview

Within a few days after July 10, while on administrative leave, Brewington received several phone messages at home from both Miller and Anderson informing him that the investigatory meeting at HR was rescheduled to July 18. Reyes also phoned him, and he told her that he could not confirm the date until he verified that Leahy would be available. On July 14, Leahy sent Reyes a letter stating that Leahy would be out of town from July 17 through July 22, and proposed July 24, 26, or 31 as alternative meeting dates. Leahy also sent the letter by fax at 3:10 p.m. to HR. The same day, Brewington told Reyes that Leahy was unavailable on July 18 and asked her to postpone the meeting, but she insisted it would go forward. Reyes also phoned Leahy's office and told his secretary that the meeting would go forward on July 18. Reyes advised Brewington that he had the right to engage another attorney

or a union representative instead of Leahy, but he responded that "they [SEIU] won't touch it."[13]

Brewington nonetheless appeared at HR on July 18 and again requested a postponement, to which Reyes again refused, telling Brewington that the County needed to proceed with its case. Brewington repeatedly told the interviewers that he would be happy to answer any questions they asked provided his attorney was present. Reyes and Stevens insisted that the meeting was going forward and told him he would not have another chance to present his defense. They proceeded to ask him several questions from a prepared list, and he repeated his willingness to answer questions provided his attorney was present. The meeting lasted approximately 45 minutes, after which Brewington left the facility.

Both Reyes and Stevens testified that they did not further postpone the interview because they had to go forward with the investigation. However, when questioned about whether a short postponement would have impeded the investigation, Reyes responded that she did not know, while Stevens conceded that the investigation would not have been impeded.

On July 19, Leahy's associate filed a second amended charge with PERB and faxed a copy to Reyes.

Reyes' Investigation[14]

At some point after June 7, Reyes interviewed Lyman, Miller, Neal, and Sung by telephone. Reyes did not take or receive from these witnesses any written statements, and testified that County policy did not require her to do so. She took her own notes during the

[13] We adopt the ALJ's credibility determinations that, despite her testimony to the contrary, Reyes knew that SEIU would not represent Brewington, that he did not have a viable representative available for the July 18 meeting, and that Leahy would be available beginning July 24. Reyes admitted that she knew "the union was not an option" and that she received Leahy's letter advising her that he would be available the following week.

[14] Reyes' investigation is not alleged as an unfair practice.

interviews, but testified that they no longer existed, because "I imagine that they were disposed of." When she began her investigation she knew only about the two reports of workplace violence, one from Lyman and one from Miller.

The Cell Phone

Reyes testified that, during her investigation, Miller also told her that when Brewington was placed on administrative leave he was told to return his County-issued cell phone and other equipment, and that he told Miller it was in a box in the Indio office, but that it could not be found there. Reyes obtained telephone invoices showing that a few calls were charged to that phone after June 6, when Brewington was transferred from Indio to Riverside, and that a few calls were charged to that phone after July 10, when Brewington was put on administrative leave. The invoices show that these calls were made to Brewington's home phone, of which Reyes was aware, and they contain the notation "CF," which she testified she did not understand but did not question. Reyes concluded that Brewington lied about the whereabouts of the phone and continued to use it in violation of the order to return it.

Brewington testified that he never used that phone except to forward calls to his home phone. He further testified that he did not tell Miller on July 10 that it was in a box in Indio, but rather that it was probably in a box he packed in Indio, i.e., for his transfer to Riverside; as of July 10 he did not know exactly where the box was, but it might have been in his garage along with other boxes from Indio; and he returned it to the County on August 23 at his exit interview. Given that Miller did not testify, Brewington's account is credited.[15]

[15] We do not adopt the ALJ's conclusion that Reyes' claim that she lacked knowledge that "CF" meant "call forwarding" must be discredited as "lack[ing] common sense," but we do conclude that Reyes failed to adequately investigate the possibility of a legitimate explanation for the charges.

Reyes' Final Report

On July 31 Reyes' submitted her final six-page investigative report to TLMA. She included all of the above allegations and added her own accusation of insubordination based on Brewington's refusal to answer questions at the July 18 interview. In that regard, she contended that, as Brewington was on administrative leave, he was obligated to attend all meetings called by the County and to cooperate in any investigation. Reyes stated her conclusions that all allegations against Brewington were justified, that he engaged in misconduct, and that "disciplinary action" should be taken.

August 9 Notice of Proposed Termination

On August 9, Brewington was summoned to the Riverside facility, where TLMA Director Tony Carstens (Carstens) handed him a "Notice of Proposed Termination," written in consultation with Stevens, citing the following causes for termination as listed in the MOU:

A. Dishonesty;

E. Insubordination;

F. Willful violation of an employee regulation prescribed by the Board of Supervisors or the head of the department in which the employee is employed;

I. Discourteous treatment of the public or other employees;

M. Conduct either during or outside of duty hours which adversely affects the employee's job performance or operation of the department in which he is employed;

P. Violation of the County Anti-Violence in the Workplace Policy.

The items are explained in the Notice as follows:

Dishonesty – This alleges that Brewington lied about the whereabouts of his County-issued cell phone and continued to use it after he was placed on administrative leave.

Insubordination - The Notice goes into great detail about the scheduling and rescheduling of the administrative investigation, Brewington's right to have a representative but not to demand any particular representative, his obligation to answer questions, and his refusal to do so on July 18.

Willful Violation of Employee Regulation; Violation of Workplace Anti-Violence Policy – These counts refer to Brewington's June 7 phone message to Lyman and the June 7 elevator incident.

Discourteous Treatment of Employee – This alleges that Brewington yelled at Miller on June 7 regarding the call-in procedure.

Conduct Adversely Affecting Job Performance – According to Reyes, this is a standard charge when anyone has engaged in misconduct.

The Notice was based entirely on Reyes' investigative report. It provides Brewington the right to respond, orally or in writing or both. On August 15 Leahy sent a letter to Stevens advising that he was in the process of preparing a written response on Brewington's behalf. On August 16 Leahy sent a letter to TLMA advising that Brewington would submit a written response and would respond orally to any questions, and that he (Leahy) would clear his schedule for August 18 for that purpose. On August 18 Leahy sent TLMA a detailed letter in response to the termination notice, with documents attached, and faxed a copy of the letter, without documents, to Stevens. Neither Leahy nor Brewington took further steps to schedule a meeting for a verbal response, and none was held.

August 23 Termination

On August 23 Brewington was called back to the Riverside facility where Carstens gave him a Notice of Termination which states, in part:

> We have evaluated your written statement dated August 18, 2006, in mitigation of the charges in the notice of proposed

> Termination. We have further considered the matter and find no reason to modify the disciplinary action in our letter of August 9, 2006. This action is being taken for the causes and acts specified in our letter of August 9, 2006.

The Notice cites Brewington's appeal rights, but no appeal was taken because, according to Brewington, it would be too expensive. Instead, he filed a grievance, which was denied by the County. As discussed above, the grievance did not go to arbitration due to a dispute over the payment of the arbitration fee.

Reyes and Stevens both testified that none of their actions were motivated by Brewington's having sought assistance from SEIU, or by the instant charge, which they claimed they did not learn of until after his termination.

PROPOSED DECISION

The ALJ found that the County retaliated against Brewington for having engaged in protected activities by: (1) issuing the June 6, 2006 Directive Memorandum; (2) issuing the June 7, 2006 Administrative Investigation memo; (3) placing him on administrative leave on July 10, 2006; (4) insisting on going forward with the July 18, 2006 investigatory interview; (5) issuing the August 9, 2006 Notice of Proposed Termination; and (6) terminating his employment on August 23, 2006. The ALJ further found that the County did not violate the MMBA by issuing the February 16, 2006 memorandum or the June 13, 2006 Medical Certification Directive, or by docking his pay on July 5, 2006. The ALJ ordered that the termination be rescinded, that specified records be expunged from the County's records, that the County offer Brewington reinstatement and restoration of benefits and make Brewington whole for financial losses suffered as a result of his termination, and that a notice be posted.

APPEAL AND RESPONSE

The County excepts to several of the ALJ's factual findings and credibility determinations and to the ALJ's determination that it unlawfully retaliated against Brewington

based upon his exercise of protected rights. The County also argues that the remedy ordered by the ALJ is inappropriate. Finally, the County argues, for the first time on appeal, that the matter should have been pursued through the contractual grievance and arbitration process and that the California Constitution prohibits PERB from making a decision in this case. Brewington argues that the ALJ's proposed decision was correct and should be upheld.

DISCUSSION

To demonstrate that an employer discriminated or retaliated against an employee in violation of MMBA 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; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M (*San Joaquin*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained:

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

(*Newark Unified School District* (1991) PERB Decision No. 864 (*Newark*); emphasis added; fn. omitted.)[16]

[16] The test is not, as suggested by the ALJ, whether the action would reasonably lead an employee to fear for his job, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. (*Ibid.*)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*)), 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 (*Moreland*).) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104; *San Leandro*); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S; *San Leandro*); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (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 (*County of San Joaquin (Health Care Service)* (2001) PERB Order No. IR-55-M); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento*; *Novato*.)

Exercise of Protected Rights

MMBA section 3502 gives public employees the right to "represent themselves individually in their employment relations with the public agency." Interpreting similar

language in the Educational Employment Relations Act (EERA)[17] section 3543, PERB has held that individual complaints related to employment matters made by an employee to his superior are protected. (See, e.g., *Pleasant Valley School District* (1988) PERB Decision No. 708 (*Pleasant Valley*).) This right of self representation, however, is not unlimited. For instance, the Board has held that employee complaints to employers are protected when those complaints "are a logical continuation of group activity." (*Los Angeles Unified School District* (2003) PERB Decision No. 1552.) Thus, where an employee's complaint is undertaken alone and for his/her sole benefit, that individual's conduct is not protected. (*Ibid; Oakdale Union Elementary School District* (1998) PERB Decision No. 1246.)

In the instant case, Brewington harbored concerns regarding the use of non-licensed engineers directing the work of licensed engineers. Indeed, in September 2002, Brewington and eleven fellow employees sent a letter to County management expressing this concern. Clearly, Brewington's complaints regarding the use of non-engineers were neither undertaken alone nor taken for his sole benefit. Consequently, Brewington's complaints were a logical continuation of a group activity and, therefore, constituted protected activity.

In addition, Brewington engaged in protected activity when he sought the assistance of SEIU in connection with his complaints over the manner in which the Indio office was being managed as well as his concerns over the County's use of non-licensed engineers to clear site inspections and issue building permits. (*County of Merced* (2008) PERB Decision No. 1975-M (*Merced*) (representation by a union in a work-related dispute is a protected activity); see also, *Regents of the University of California* (1995) PERB Decision No. 1087-H (using a union representative to pursue matters relating to working conditions is protected conduct).) Finally,

[17]EERA is codified at Government Code section 3540 et seq.

Brewington engaged in protected activity by filing an unfair practice charge with PERB. (See, e.g., *Trustees of the California State University* (2008) PERB Decision No. 1970-H.)

Employer Knowledge

It is clear that Reyes had knowledge of Brewington's protected activity not later than February 9, 2006, when Swanson spoke to her by phone concerning Brewington's complaints. In addition, Lyman had knowledge of Brewington's complaints as early as November 2005, when Brewington complained to him about the Shopshear incident. Komers had knowledge of Brewington's complaints by March 27, when he was served with the charge in the instant case. Stevens had knowledge by March 30, when she attended the meeting with Brewington to discuss his complaints. Miller had knowledge within a week after the March 30 meeting, when Reyes and Stevens related to him Brewington's complaints discussed at the March 30 meeting.[18]

Adverse Actions and Retaliation

As determined by the Board in *Novato* and *Newark*, an employer's action is adverse if a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. Thus, a counseling memorandum that threatens future disciplinary action is an adverse action. (*City of Long Beach* (2008) PERB Decision No. 1977-M (*Long Beach*); *Los Angeles Unified School District* (2007) PERB Decision No. 1930.) The action need not specifically threaten discipline, however, if it otherwise has an adverse impact on the employee's employment. (See, e.g., *County of Yolo* (2009) PERB Decision No. 2020-M (loss of alternative work schedule); *Regents of the University of*

[18] The ALJ found Reyes' testimony was not credible in that she did not recall whether she told Miller about Swanson's attendance at the March 30 meeting. While it seems unlikely that Reyes omitted this fact from her description of the meeting, we need not resolve this credibility issue. Whether or not Miller knew of Swanson's presence at the meeting, he clearly knew of Brewington's protected activity.

California (1984) PERB Decision No. 403-H (loss of flexible work schedule).) PERB has found that the involuntary reassignment of duties is an adverse action when the working conditions of the new position are less favorable than those of the previous position, even if the reassignment does not result in loss of pay or benefits. (*Trustees of the California State University* (2009) PERB Decision No. 2038-H (*Trustees*); *Fresno County Office of Education* (2004) PERB Decision No. 1674.) PERB has also found adverse action when a reasonable person would consider the duties of the new position to be a step down from those of the previous position. (*Trustees of the California State University* (2006) PERB Decision No. 1853-H (warehouse worker reassigned to "count discarded supplies"); *Pleasant Valley* (groundskeeper reassigned from mowing duties to raking, pruning and watering).) Finally, PERB has held that placing an employee on involuntary paid administrative leave is an adverse action. (*San Mateo County Community College District* (2008) PERB Decision No. 1980 (*San Mateo*); *Oakland Unified School District* (2003) PERB Decision No. 1529 (*Oakland*).)

February 16 MOU

In addition to setting out the employer's expectations, the February 16 MOU threatened Brewington with disciplinary action if he violated the MOU. PERB has held that the threat of adverse action and the adverse action itself constitute separate and independent violations of the Higher Education Employer-Employee Relations Act (HEERA).[19] (*Regents of the University of California* (2004) PERB Decision No. 1585-H.) Thus, a threat may constitute an adverse action even if the employer never follows through with the threatened action. Moreover, in some circumstances, placing a document that could support future discipline in an employee's personnel file may also be an adverse action. (*Long Beach* [counseling memorandum addressing

[19] HEERA is codified at Government Code section 3560 et seq.

performance deficiencies]; *Alisal Union Elementary School District* (2000) PERB Decision No. 1412 [letter of reprimand].)

In this case, the February 16 MOU simply informed Brewington of the County's performance expectations and advised him that failure to abide by the expectations set forth in the memorandum may result in disciplinary action. Although the document was placed in Brewington's personnel file, it did not identify any performance deficiencies, but simply set forth reasonable expectations concerning office procedures. The job duties set forth in the MOU are not of a nature that would cause a reasonable person under the same circumstances to consider them to have an adverse impact on the employee's employment. Therefore, we conclude that the February 16 MOU was not an adverse action and did not constitute unlawful retaliation.

June 6 Directive Memorandum

As discussed above, PERB has found changes in working conditions to constitute adverse action if a reasonable person would consider such changes to have an adverse impact on the employee's employment. (*Newark*; *Trustees*.) The June 6 Directive Memorandum made several changes to Brewington's working conditions, including altering his work hours; imposing additional conditions when calling in sick; prohibiting him from leaving his work station or even the floor without permission, going to the second floor (where his wife worked), using his personal laptop and cell phone, discussing grading issues with staff, socializing with other employees, and having public contact in order to resolve permit issues. A reasonable person would consider these changes, taken together, to have an adverse impact on working conditions. Therefore, we conclude that the Directive Memorandum was an adverse action.

We also find that a nexus exists between Brewington's protected activities and the issuance of the June 6 memorandum. Typically, the closeness in time (or lack thereof) between

the protected activity and the adverse action goes to the strength of the inference of unlawful motive to be drawn and is not determinative in itself. (*Moreland*; *Regents of the University of California* (1998) PERB Decision No. 1263-H.) PERB has found a lapse of less than three months between the protected activity sufficient to establish the timing factor. (See, e.g., *Calaveras County Water District* (2009) PERB Decision No. 2039-M [negative evaluation within one to two months of protected activity and termination within 3-1/2 months].) Miller reassigned Brewington to the Riverside office on May 23, less than two months after Reyes and Stevens informed him about the March 30 meeting with Brewington and Swanson at which Brewington presented his complaints concerning the Indio office and about the incident with Shopshear. Brewington also filed the charge in this case on March 28, two days before the March 30 meeting.[20] Upon the recommendation of Reyes and Stevens, Miller then issued the June 6 Directive Memorandum on Brewington's first day of work in his new assignment. Therefore, we find that the timing factor was met in this case.

Additional factors that support a finding of nexus in this case include the County's departure from established procedures and standards, its cursory investigation of the employee's misconduct, and its failure to offer any justification for its actions. Although they quickly investigated the threat allegations against Brewington in July, Reyes and Stevens did not conduct any investigation of the allegation that Shopshear had threatened him or any of Brewington's complaints before recommending to Miller that Brewington be transferred and helping to draft the June 6 memorandum. Brewington testified, without contradiction, that Miller had never raised concerns about the issues identified in the June 6 memorandum, including calling in sick, visiting the second floor where his wife worked, using his personal

[20] We agree with the ALJ that Reyes must have had knowledge of the filing of the charge, given her position in the HR office.

cell phone or laptop, socializing with fellow employees, or having daily contact with the public in order to perform his job duties. Given that Miller did not testify to explain his actions and the only evidence on the basis for the memo came in the form of uncorroborated hearsay testimony by Reyes and Stevens, we must conclude that the County failed to establish any legitimate justification for the June 6 memo and that the decision to reassign Brewington and the imposition of new and onerous restrictions on his working conditions were taken in retaliation for Brewington's exercise of protected rights. (*North Sacramento*; *San Joaquin Delta Community College District* (1982) PERB Decision No. 261; *County of San Joaquin (Health Care Services)* (2004) PERB Decision No. 1649-M; *Oakland* [failure to provide reasons for action supports finding of nexus].)

June 7 Administrative Investigation memo

The initiation of an investigation of an employee for misconduct constitutes an adverse action. (*State of California (Department of Corrections)* (2006) PERB Decision No. 1826-S; *State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S.) This is so even if the investigation does not ultimately result in discipline. (*California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S.) Accordingly, we conclude that the issuance of the June 7 Administrative Investigation memo was an adverse action.

Failure to offer a justification for the memorandum supports a finding of nexus. (*North Sacramento*; *Marin Community College District* (1980) PERB Decision No. 145.) In addition, the County failed to provide any evidence at hearing that would support issuance of the memorandum. Brewington testified credibly that his reference to a "train" during his phone message to Lyman was not a threat of violence, but instead was a metaphor that Lyman understood based upon a previous conversation. In addition, Reyes testified that she did not know whether Brewington's remarks were threats of violence. With respect to the elevator

incident, the ALJ properly credited Brewington's testimony that he was not staring at Miller and that his comment "be careful" was not directed at Miller, but at another employee. Again, the County's case suffers from the virtual lack of any direct testimony by the percipient witnesses other than Brewington to the relevant incidents. Although Neal testified about his recollection of the elevator incident, his testimony contradicted that of Reyes's account of what he told her, and was properly discredited by the ALJ. Thus, the County failed to establish that it acted reasonably in relying on Lyman's and Miller's reports as a basis for initiating an investigation.

Moreover, the fact that the County allowed Brewington to keep working on June 7 and 8 supports the inference that the June 7 memorandum, purportedly issued because of two threats of workplace violence that day, was pretextual. Had the County truly believed that Brewington had made credible threats of violence, it would not have permitted him to continue working. We agree with the ALJ's conclusion that Reyes distorted the facts as a pretext in order to support the June 7 memorandum. Accordingly, the timing of the memorandum, on Brewington's second day in the Riverside office and only two months after the March 30 meeting and the filing of the PERB charge, plus the lack of explanation or justification for the memorandum, supports an inference that it unlawfully motivated by Brewington's protected activities. (*San Joaquin* [employer's reasons for letter of reprimand do not withstand scrutiny, but are pretextual and suggest an unlawful motive].)

June 13 Medical Certification Directive

As discussed above, a threat to take disciplinary action in the future may constitute an adverse action if it gives the employee unequivocal notice that the employer has made a firm decision to take the threatened action. (*Merced.*) While the issuance of the June 13 directive stating that there was "good cause" to believe Brewington may be abusing his sick leave

privileges was not factually supported, it did not constitute a separate adverse action. The directive merely directed Brewington to provide a doctor's certificate upon his return to work and to contact his supervisor within an hour of his start time when calling in sick. A reasonable person under the same circumstances would not consider the directive to have an adverse impact on his or her employment. (*Newark.*) Nor did it give unequivocal notice that the employer had made a firm decision to take adverse action. Accordingly, we agree with the ALJ that the Medical Certification Directive was not an adverse action and did not constitute unlawful retaliation.[21]

July 5 Dock in Pay

As found by the ALJ, the brief dock in pay was a ministerial mistake that the County corrected shortly thereafter. Accordingly, we agree no violation was established by this incident.

July 10 Placement on Administrative Leave

It is well established that being placed on involuntary administrative leave, even with no loss in pay, is an adverse employment action. (*San Mateo*; *Oakland.*) According to Reyes, Komers, who had knowledge of Brewington's protected activity, made the decision to place Brewington on administrative leave on the first day after Brewington returned from sick leave. Although Reyes testified that she did not know the basis for his decision, the notice refers to "misconduct by you relating to threats of workplace violence." The only such threats identified were those filed on July 7 by Lyman and Miller, with the help of Reyes and Stevens. Therefore, in the absence of any testimony by Komers or most of the percipient witnesses to those incidents, we conclude that the decision to place Brewington on administrative leave was

[21] Because we find that the Medical Certification Directive was not an adverse action, we need not and do not reach the issue of whether it was otherwise valid under the County's attendance policies and procedures.

based upon the same pretextual considerations and unlawful motivation as those which led to the issuance of the June 7 administrative memo.

On appeal, the County asserts that the Board should not rely on the proximate timing between the July 10 leave placement and the filing of the PERB charge because, according to Brewington, his protected activities began much earlier, in 2005. The County, however, offers no authority for its argument that, "as a matter of law, the ALJ's reliance on union activities proximate to this July 10, 2006 administrative leave may not be used to support violations of the MMBA as the county had attenuated knowledge of Brewington's known activities dating back to 2005 or before, well prior to the events leading to his termination." While it is true that no nexus can exist where the adverse action precedes the protected activity (see, e.g., *Metropolitan Water District (Jones-Boyce)* (2009) PERB Decision No. 2066-M; *Berkeley Unified School District* (2004) PERB Decision No. 1702), it is clear that Brewington's protected activities continued into 2006 and that the County began taking adverse actions shortly after his complaints came to a head at the March 30 meeting. Therefore, we find the nexus element satisfied in this case.

July 18 Investigatory Interview

The ALJ found that the County retaliated against Brewington by refusing to delay the July 18 interview due to the unavailability of Brewington's attorney, in violation of MMBA section 3506. That section prohibits a covered employer from interfering with, intimidating, restraining, coercing or discriminating against public employees because of the exercise of their rights under MMBA section 3502. Section 3502, in turn, provides:

> Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall

> have the right to represent themselves individually in their employment relations with the public agency.

It is well established that 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. (*Rio Hondo Community College District* (1982) PERB Decision No. 260 (*Rio Hondo*), adopting *National Labor Relations Board v. Weingarten* (1975) 420 U.S. 251 (*Weingarten*).) 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) 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.)

Construing similar language under the Ralph C. Dills Act (Dills Act),[22] PERB has held that *Weingarten* does not confer a right to representation by private counsel. (*State of California (Department of Consumer Affairs)* (2005) PERB Decision No. 1762-S (*Consumer Affairs*).) As explained by the Board:

> [T]his right is grounded in the employee's right to 'participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations' and the corresponding right of employee organizations to 'represent their members in their employment relations with public school employers.'

(*Ibid*, citing *Rio Hondo* and similar language in EERA.) Accordingly, under *Consumer Affairs*, Brewington had no right to insist on representation by a private attorney at the July 18 investigatory interview.

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[22] The Dills Act is codified at Government Code section 3512 et seq.

August 9 Notice of Proposed Termination and August 23 Termination

The County's investigation and decision to place Brewington on administrative leave based upon the alleged threats of June 7 culminated in the August 9 Notice of Proposed Termination and August 23 Termination based upon the same conduct. In addition, the notices alleged that Brewington was dishonest concerning his cell phone use and whereabouts, that he yelled at Miller, and that he was insubordinate in refusing to answer questions without his attorney at the July 18 interview. As discussed above, the County's accusations were not supported by the evidence presented at hearing.[23] In addition, a finding of nexus is supported by the County's cursory investigation of the alleged misconduct prior to initiating disciplinary action. (*Coast Community College District* (2003) PERB Decision No. 1560.) First, Reyes's failure to keep any notes or take any statements, failure to listen to Lyman's voice mail message, and failure to determine whether a security video of the elevator incident existed, coupled with her lack of recollection of many details purportedly related to her by the witnesses, demonstrates that her investigation into Brewington's alleged threats was less than thorough. Again, the failure of most of the percipient witnesses to testify undermined the County's case, since there was no direct testimony to corroborate Reyes's hearsay testimony.

Second, by refusing to reschedule the July 18 interview to enable Brewington's attorney to attend, she failed to adequately investigate the June 7 incidents by failing to reasonably afford Brewington the opportunity to explain the incidents. In addition, although Brewington had no protected right to representation by an attorney, the County's refusal to reschedule the interview is further evidence of its unlawful motivation. The record establishes that the County had no

[23] While the County may have been justified in considering Brewington to be insubordinate for refusing to answer questions at the July 18 interview, we nonetheless conclude that the decision to take adverse action was unlawfully motivated, based upon a totality of the evidence.

objection to Brewington's use of a private attorney at the investigatory interview. Indeed, Reyes told Brewington that he had the right to engage another attorney and communicated with Leahy's office on July 14 about the interview date. The only objection raised by the County was the assertion that, pursuant to *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, Brewington did not have the right to a representative of his choice, but must choose a representative who is reasonably available and, if unable to do so, should select another representative so that the interrogation may proceed. The County did not, however, provide any explanation of how the short delay requested would have prejudiced its ability to conduct a thorough investigation.

Third, the County failed to adequately investigate the cell phone incident, concluding incorrectly that Brewington had been using his County cell phone. Therefore, we conclude that the decision to terminate Brewington was motivated by the same unlawful retaliation as the County's prior adverse actions toward Brewington.

The County's argument that it followed its own procedures and MOU does not contravene our finding of unlawful motivation. As discussed above, the County failed to conduct an adequate investigation of the alleged misconduct and relied on unsubstantiated allegations of misconduct. Moreover, by refusing to allow a short postponement of the investigatory interview, it failed to afford Brewington a reasonable opportunity to provide information that would have aided in its investigation.

The County's Defense

Once the charging party establishes a prima facie case of retaliation, 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*; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721,729-730 (*Martori Brothers*); *Wright Line* (1980) 251 NLRB

1083.) Thus, "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.)

A disciplinary memorandum such as the August 9 Notice of Proposed Termination and the August 23 Notice of Termination is hearsay and cannot by itself meet the County's burden of proof. (*Escondido Union Elementary School District* (2009) PERB Decision No. 2019 (*Escondido*).) As determined by the Board in *Escondido,* "there must be sufficient independent evidence for us to conclude that the disciplinary action based on the hearsay criticisms would have occurred notwithstanding the employee's protected activity." Accordingly, we must examine the record for supporting independent evidence.

Most of the allegations set forth in the August 9 and August 23 notices are based upon hearsay statements contained in Reyes's investigative report.

Because virtually none of the percipient witnesses to the alleged incidents testified (Shopshear, Lyman, Miller, Komers and Carstens), there is no independent evidence in the record to support any of the allegations, with the exception of the allegation of insubordination related to the July 18 interview.[24] Moreover, the testimony of Reyes and Stevens was discredited on numerous points. Therefore, the County has failed to establish that it would have taken the adverse action even if Brewington had not engaged in protected activity. Accordingly, we find that the County failed to meet its burden of proof under the "but for" test, and therefore retaliated against Brewington by issuing the June 6 Directive Memorandum, the July 7 Administrative Investigation memo, and the July 10 administrative leave memo; and issuing the August 9 Notice of Proposed Termination, and the August 23 termination.

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[24] As noted above, Neal's testimony was substantially discredited.

REMEDY

We agree with the ALJ that the appropriate remedy in this case is to order the County to rescind Brewington's termination, expunge from its records the disciplinary memoranda and notices found unlawful, offer him reinstatement, and make him whole for losses he suffered as a direct result of his termination, including back pay. In accordance with PERB policy, it is also appropriate that the County be ordered to post a notice incorporating the terms of this order. (*Los Angeles Unified School District* (2001) PERB Decision No. 1469.)

The County has excepted to the ALJ's proposed order and remedy on the ground that any award should have properly been made under the grievance process under the MOU. Pursuant to PERB Regulation 32300(b), the statement of exceptions may refer only to matters contained in the record of the case. The record in this case indicates that PERB initially deferred this matter to arbitration, but then removed the case from abeyance due to a breakdown in the arbitration. The parties do not dispute that the arbitration process broke down after a dispute over whether or not Brewington was required to pay for one-half the arbitrator's fee. On appeal, the County contends that, in 2008, the Fourth District Court of Appeal, "ruled that the cost-sharing requirement constituted an unlawful denial of due process to the grievant and ordered the County to cover all arbitration fees and costs associated with arbitration." (Citing *Soto v. County of Riverside* (2008) 162 Cal.App.4th 492.) The County further asserts that it "intends to abide with [sic] this ruling in future arbitration under its various MOU [sic], and this removes any obstacle to completion of arbitration."

We do not find good cause to defer this matter to arbitration at this late juncture. Once this matter was removed from abeyance, the County never objected to proceeding before the ALJ to resolve all issues raised in the complaint, and participated fully in the hearing and

briefing before the ALJ. Moreover, the County has not established that the prerequisites to arbitration under PERB Regulation 32620(b)(6) continue to be met in this case.[25]

Finally, the County asserts that PERB has no authority or jurisdiction to issue its decision, order, or award in this matter because the State Constitution prohibits any external tribunal from making a decision that may affect local County administration or expenditures, including the payment of wages and benefits for County personnel, citing *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 291 (*Riverside*). PERB has no authority to declare a statute unconstitutional unless an appellate court has determined that the statute is unconstitutional. (Cal. Const., art. III, § 3.5). Thus, *Riverside* is inapposite. In that case, the California Supreme Court invalidated as unconstitutional a statute that required counties and other local agencies to submit, under certain circumstances, to binding arbitration of economic issues that arise during negotiations with unions representing firefighters or law enforcement officers, thereby removing the authority of local agencies to set salaries. *Riverside* is inapplicable to this case, which involves PERB's exercise of its authority to remedy unfair labor practices under the MMBA. No court has held that the MMBA's provisions vesting jurisdiction in PERB to decide and remedy unfair practices are unconstitutional. Indeed, the California Supreme Court has twice upheld the constitutionality of the MMBA in the face of challenges to its application to charter cities and counties. (*Los Angeles County Civil Service*

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[25] PERB Regulation 32620(b)(6) requires the Board agent processing the charge to:

> Place the charge in abeyance if the dispute arises under MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act and is subject to final and binding arbitration pursuant to a collective bargaining agreement, and dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act, as provided in section 32661.

Com. v. Superior Court (1978) 23 Cal.3d 55 [requiring county to meet and confer with employee unions under MMBA before amending its civil service rules does not offend the home-rule provisions of Art. XI, §§ 3 and 4 of the California Constitution]; *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 [charter city council must comply with MMBA's meet and confer requirements before proposing amendment to the city charter affecting terms and conditions of public employment].) Accordingly, PERB has the authority and duty to issue decisions and orders to effectuate the purposes of the MMBA.

ORDER

Based upon the entire record in this case, the Public Employment Relations Board (PERB) finds that the County of Riverside (County) violated the Meyers-Milias Brown Act (MMBA), Government Code section 3500 et seq. The County violated the MMBA by issuing John Brewington (Brewington) disciplinary memoranda, placing him under investigation, ordering him on administrative leave, and terminating his employment, all in retaliation for his protected activities.

It is also found that the County did not violate the MMBA by issuing Brewington a memorandum of understanding on February 16, 2006, or a Medical Certification Directive on June 13, 2006, docking his pay on July 5, 2006, or denying his request to postpone the July 18, 2006 investigatory interview due to the unavailability of his attorney, and it is hereby ORDERED that those allegations of the amended complaint in *John Brewington v. County of Riverside*, Case No. LA-CE-261-M are DISMISSED.

Pursuant to MMBA section 3509(b) of the Government Code, it hereby is ORDERED that the County, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

Issuing to employees disciplinary memoranda, placing them under investigation, ordering them on administrative leave, and terminating their employment, in retaliation for their protected activities;

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

1. Rescind Brewington's termination;

2. Expunge from its records, including Brewington's personnel file: (1) the June 6 Directive Memorandum; (2) the June 7 Administrative Investigation memo; (3) the July 10 letter of Administrative Leave; (4) the August 9 Notice of Proposed Termination and the July 31 Investigative Report on which it was based; (5) the August 23 Notice of Termination; and (6) all references to those documents and to the allegations contained therein;

3. Offer Brewington immediate reinstatement to his former position of employment or, if that position no longer exists, then to a substantially similar position, and restore to him all earned benefits as of August 23, 2006;

4. Make Brewington whole for financial losses which he suffered as a direct result of his termination, including paying him back pay augmented at the rate of seven percent per annum;

5. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to County employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 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;

6. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The County

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 John Brewington.

Acting Chair Dowdin Calvillo and Member McKeag 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 No. LA-CE-261-M, *John Brewington v. County of Riverside*, in which all parties had the right to participate, it has been found that the County of Riverside violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by retaliating against John Brewington (Brewington) in retaliation for his protected activities.

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

A. CEASE AND DESIST FROM:

Issuing to employees disciplinary memoranda, placing them under investigation, ordering them on administrative leave, and terminating their employment, in retaliation for their protected activities;

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

1. Rescind Brewington's termination;

2. Expunge from its records, including Brewington's personnel file: (1) the June 6 Directive Memorandum; (2) the June 7 Administrative Investigation memo; (3) the July 10 letter of Administrative Leave; (4) the August 9 Notice of Proposed Termination and the July 31 Investigative Report on which it was based; (5) the August 23 Notice of Termination; and (6) all references to those documents and to the allegations contained therein;

3. Offer Brewington immediate reinstatement to his former position of employment or, if that position no longer exists, then to a substantially similar position, and restore to him all earned benefits as of August 23, 2006;

4. Make Brewington whole for financial losses which he suffered as a direct result of his termination, including paying him back pay augmented at the rate of seven percent per annum.

Dated: _____ COUNTY OF RIVERSIDE

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.