STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CARMEN FEGER, Charging Party, v. COUNTY OF TEHAMA, Respondent.	Case No. SA-CE-500-M PERB Decision No. 2122-M June 28, 2010

Appearances: Weinberg, Roger & Rosenfeld by J. Felix De La Torre and Gary P. Provencher, Attorneys, for Carmen Feger; Renne, Sloan, Holtzman & Sakai by Timothy G. Yeung, Attorney, for County of Tehama.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Carmen Feger (Feger) of a proposed decision (attached) by an administrative law judge (ALJ) and on cross appeal by the County of Tehama (County). The unfair practice charge alleged that the County violated the Meyers-Milias-Brown Act (MMBA)[1] by discriminating against Feger for testifying on behalf of a co-worker at an arbitration hearing and by failing to provide information. Feger alleged this conduct constituted a violation of MMBA sections 3502 and 3506.

With regard to the discrimination claim, the ALJ found that Feger failed to establish a prima facie case of discrimination. Additionally, the ALJ found that even if a prima facie case was established, the County demonstrated legitimate non-discriminatory reasons that it would

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

have taken the same action in the absence of protected conduct. Accordingly, the ALJ dismissed the discrimination claim. With regard to the failure to provide information claim, the ALJ found that Feger failed to use the pre-discovery procedures set forth in PERB Regulation 32150[2] and, therefore, was not entitled to the information requested. Accordingly, the ALJ dismissed Feger's motion to exclude documentation and strike testimony based on the County's failure to provide information.

We have reviewed the entire record and agree with the ALJ that Feger failed to establish a prima facie case of discrimination. However, we disagree with the ALJ that the destruction of the Eligibility Worker III (EW III) list constituted an adverse action. Accordingly, we hereby adopt the proposed decision as the decision of the Board itself, subject to the discussion below.

BACKGROUND

The proposed decision contains a thorough and accurate recitation of the facts underlying the instant unfair practice charge and is hereby adopted by the Board in its entirety. The following is a brief summary of the relevant facts to provide context for our discussion below.

Feger began her employment with the County's Department of Social Services (DSS) as an Office Assistant II in July 1998 and was later promoted to Office Assistant III. In 2000, Feger was appointed as an Eligibility Worker I and was assigned to one of the Intake Units. She was automatically elevated to Eligibility Worker II after she passed probation and continues to work in the Intake Unit.

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

The executive management of DSS consists of Director Christine Applegate (Applegate) and Deputy Director Teresa Curiel (Curiel). They have held their positions since 2002 and 2005, respectively. Curiel oversees all program managers of the various DSS divisions, including the DSS Eligibility Division, and is responsible for all personnel matters. The DSS Eligibility Division is managed by Program Manager Melody Finwick (Finwick) and consists of six units which include multiple Intake and Continuing Units, and a Medi-Cal Unit. Each of the six units has a supervisor and a leadworker. The leadworkers hold EW III positions.

A. DSS Hiring Practices

The DSS operates under the Local Agency Personnel Standards (LAPS) regulations.[3] In regards to the examination and selection of candidates for employment, LAPS Regulation 17110 provides:

> Recruiting, selecting and advancing employees shall be on the basis of their relative ability, knowledge and skills, including open consideration of qualified applicants for initial appointment.

Candidates for employment with a LAPS agency must participate in an examination for each specific classification they desire employment. Once the examination is conducted, ratings are assigned to the candidates and "eligible" lists are established. (LAPS Regs. 17444 and 17458.)

When a local agency operating under LAPS elects to fill a vacancy in a classification, it notifies the State Personnel Board (SPB) and the SPB will certify to the agency the names of the five candidates with the highest ratings on the eligible list for that classification. (LAPS Reg. 17470.) The local agency is allowed to contact candidates on the eligible list as to their

[3] LAPS regulations are codified at California Code of Regulations, title 2, section 17010 et seq.

"interest" in appointment and give them a "reasonable time to respond." (LAPS Reg. 17473.) Overall, appointments are made on the general requirement of competition. (LAPS Reg. 17481.) If fewer than five of the candidates on the eligible list are "available to the appointing authority," the SPB "may" consider that eligible list to be "exhausted." (LAPS Reg. 17468.)

According to both Applegate and Curiel, DSS usually requests the abolishment of an eligible list and a new examination when less than five candidates remain on the list or when less than five candidates express interest in competing for a position when one vacancy exists or when less than six candidates express interest in competing for a position when two vacancies exist. DSS also requests the abolishment of an eligible list when the current eligible list is over one-year old. In the past, when DSS asked for a new eligible list, SPB usually granted the request; however, on one occasion, SPB denied such a request when five candidates remained on the list.

B. Creation of March 15, 2006 Eligible List

On March 15, 2006, following an open examination, an EW III eligible list was issued by SPB. Twelve individuals were on the list. Feger received the lowest rating of the candidates and, therefore, was ranked at the bottom of the list. Prior to the issuance of this list, Feger applied for at least one EW III position but was not selected.

C. Arbitration Proceedings

On December 16, 2006, and January 30 and 31, 2007, an arbitrator conducted a hearing on disciplinary grievance regarding Donna[4], an employee who allegedly made threatening statements to her supervisor. Although she did not witness any of the events set forth in the

[4] The last name of Donna as well as the last names of the candidates for Eligibility Worker III positions are not used herein to protect their privacy as third parties to this matter.

disciplinary notice, Feger was subpoenaed by Donna's union representative to testify at the January 30, 2007, hearing. Both Finwick and Curiel were aware that Feger was subpoenaed to testify at the hearing. At the hearing, Feger testified that Donna had a strong personality, was loud in her use of profanity, had a "potty mouth," and would rant and vent when she got passed over for promotion, but Feger never heard Donna threaten others. Feger admitted that she had been passed over for promotion before and was still upset about it. At that time, Feger believed she had been "targeted" by Finwick.

D. January 2007 Certification List

On January 8, 2007, the March 15, 2006 EW III eligible list was certified again for appointment(s). The list consisted of nine candidates, and Feger was ranked ninth.

At some point after January 8, 2007, Finwick approached Curiel with concern about the list. Finwick told Curiel that since several candidates on the list had already been appointed to other DSS positions, she did not believe five candidates would express interest in the two vacancies. Curiel instructed Finwick to send out contact and waiver forms to determine who was interested in the position. On or about January 30, 2007, DSS sent out the forms and requested the candidates to complete the forms and return them by February 8, 2007. Feger received the form in the mail, completed it on January 31, 2007, and indicated on it that she was interested in the vacancy.

As of February 8, 2007, only four of the nine candidates on the certification list responded that they were interested in the two vacancies: Marilyn, who was ranked third on the list; Cami, who was ranked fifth; Luanne, who was ranked seventh; and Feger, who was ranked ninth. Curiel asked Cami if she was truly interested in the vacancy as she had already received an appointment to a Social Worker position. Cami replied that she was not interested,

but was asked by Marilyn to express her interest so the certification list would have at least five candidates who expressed interest. Curiel then decided that Cami was not interested in the vacancy. After discovering that only three candidates expressed interest, Curiel instructed Finwick to request SPB to abolish the existing eligible list and conduct another examination so that DSS could have a candidate pool of at least six candidates to fill the two EW III vacancies. Curiel testified that neither Curiel or Finwick discussed Feger's arbitration testimony when discussing whether to abolish the eligible list.

On February 8, 2007, Finwick completed the SPB form requesting a new examination for the EW III classification. SPB granted Finwick's request and conducted a new examination. A new EW III list consisting of nine candidates was issued on April 16, 2007. Feger was ranked seventh. Eventually, two people were selected from the list to fill the vacancies. Feger was not one of the two candidates selected. Feger filed her original unfair practice charge alleging the County's conduct constituted unlawful discrimination on August 9, 2007.

E. Requests for Information in Preparation of a PERB Hearing

On April 4, 2008, prior to the hearing on her unfair practice charge, Feger's union representative, Robert Belgeri (Belgeri), sent a letter to Linda Durrer (Durrer), Personnel Consultant to the County's Chief Administrator, entitled, "Request for Information In the Matter of Carmen Feger—Unfair Labor Practice Charge." In this letter, Belgeri requested copies of Interagency Merit System certification lists for EW III from 2003 to 2008, contact and waiver forms received from prospective candidates for EW III from 2003 to 2008 and any and all documentation and/or correspondence from SPB in which a determination had been made about an existing list being exhausted and a new list being generated. Belgeri admitted

that the requested information was to be used to support Feger's contentions at the PERB hearing.

On April 8, 2008, Belgeri sent another letter to Durrer entitled "Second Request for Information In the Matter of Carmen Feger—Unfair Labor Practice Charge" requesting information regarding those candidates who were interviewed for an EW III position on March 14, 2008, including the certification list, the interview/test scores of the interviewees, the factor as to why no candidates from the certification list would be chosen and the names, titles and contact telephone numbers of any officials of DSS who decided to dissolve the list. Belgeri requested that information be provided by April 14, 2008. Belgeri admitted that he requested the documents in order to prepare for the PERB hearing.

On April 14, 2008, the County's attorney responded to both the April 4 and 8, 2008 requests stating that PERB did not allow a right for pre-hearing discovery, but decided to provide responses to the requests. The County provided some of the documents requested in the April 4, 2008 request, but denied providing any of the documents in the April 8, 2008 request as being irrelevant to the complaint.

At the hearing, Feger's representative moved to exclude any documents or strike any testimony based upon documents which it requested in its April 4 and 8, 2008 letters, and were not provided by the County. The ALJ dismissed the motion based on Feger's failure to use the pre-discovery procedures set forth in PERB Regulation 32150.

DISCUSSION

A. Abolishment of the List

The ALJ found the County's February 8, 2007, request to abolish the EW III list constituted an adverse action. In making this determination, the ALJ explained:

> Being prevented from competing in a selection interview which could result in the increase of an employee's salary actually harms Feger as it deprives her of an opportunity to advance, especially when Feger would have been one of three candidates competing for two vacancies. A reasonable person would conclude that under these specific circumstances and this particular candidate to vacancy ratio, such a deprivation of an opportunity would have an actual adverse impact on an employee's employment. Therefore, the February 8, 2007 request to abolish the eligible list constitutes an adverse action.

The Board has held that 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. For example, the Board has found a counseling memorandum that threatens future discipline to constitute an adverse action. (*City of Long Beach* (2008) PERB Decision No. 1977-M.) The Board has also found that an 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.) However, the Board has held that an adverse action will not be found in situations involving a future adverse impact on employment conditions when such impact is speculative. (*County of San Diego* (2009) PERB Decision No. 2005-M.)

Here, Feger claims that the abolishment of the list constituted an adverse action because it deprived Feger of the opportunity to interview for a promotion, and possible opportunity to advance. However, as indicated above, DSS operates under the merit principles set forth in the LAPS regulations. Consequently, the mere fact that Feger was one of three employees who remained on a depleted eligible list does not necessarily mean she would have been hired. Considering she was ranked last on the list at its inception, it is simply speculative that she would have been hired for the position, regardless of the number of interested candidates. In

fact, in a later hiring cycle (March 2008), Feger was one of only two individuals who interviewed for an EW III position. However, notwithstanding the limited applicant pool, neither individual received the promotion. According to Applegate, neither candidate performed well on the interviews, maintained a record of exceptional job performance or possessed the abilities to merit a promotion. Accordingly, Feger's potential loss of a promotional opportunity is, at best, speculative and, therefore, insufficient to support a finding of an adverse action.

B. The County's Past Practice Regarding Exhausting Eligibility Lists

Feger claims the ALJ erred when he determined that the County had a past practice of exhausting eligible lists when less than five candidates expressed interest in the position. According to Feger, the ALJ wrongfully relied exclusively on hearsay evidence in making this determination. Therefore, Feger claims, the finding is not supported by the record and should be rejected by the Board.

Hearsay evidence is evidence of a statement made by someone other than the testifying witness that is offered to prove the truth of the matter asserted. (Evid. Code §1200.) Although inadmissible in civil proceedings, hearsay evidence is admissible in PERB proceedings, but insufficient, standing alone, to support a finding, unless it would be admissible over objection in civil actions. (PERB Reg. 32176.)

In the instant case, both Curiel and Applegate testified about their understanding and knowledge of the County's policy and practice. Although some of their knowledge may have been acquired from third party sources, it was clearly based on their experiences with eligible lists. Simply put, the testimony was not hearsay.

In addition, the District presented unrebutted evidence that Cami, one of the four candidates who expressed interest in February 2007 for the EW III position, was not actually interested in the position. Instead, she indicated interest in the position at the request of Marilyn to ensure at least five candidates on the list expressed interest in the position. Clearly, this conduct supports the proposition that both Marilyn and Cami believed the list would be exhausted if it contained an insufficient number of interested candidates. For the purposes of the hearsay rule, Cami's actions are properly characterized as nonassertive conduct demonstrating knowledge of the County's policy to exhaust lists containing less than five interested candidates. Therefore, this evidence does not constitute hearsay. (See *People v. Jurado* (2006) 38 Cal.4th 72, 129.) Accordingly, we find there was adequate evidence in the record to support the ALJ's finding that the County had a past practice of exhausting eligible lists when less than five candidates expressed interest in the position.

C. The ALJ Properly Denied Feger's Motion to Exclude Documentation and Strike Testimony

At hearing, Feger moved to exclude documentation and strike testimony based on the County's alleged failure to provide requested documents. The ALJ denied the motion, ruling that the union's right to information did not extend to extra-contractual forums such as PERB proceedings. In her appeal, Feger argues the ALJ erred when he denied the motion.

PERB Regulation 32150 sets forth the procedure for obtaining subpoenas to compel to production of documents and the attendance of witnesses. Feger, however, did not follow these procedures. Instead, the charging party sought the information pursuant to a traditional request for information. According to the ALJ:

> Once a complaint is sent to formal hearing before a PERB Board agent, a party's ability to obtain documentation to support its case is set forth in PERB regulations.

Consequently, the ALJ denied the motion based on Feger's failure to follow the Board's pre-hearing discovery procedures.

We find this analysis consistent with a recent Board decision, *Carmichael Recreation & Park District* (2008) PERB Decision No. 1953-M, in which that Board held that a union's right to information does not extend to extra-contractual forums. Consequently, we agree with the ALJ's analysis and conclusion and find the motion was properly dismissed.[5]

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-500-M are hereby DISMISSED.

Chair Dowdin Calvillo and Member Wesley joined in this Decision.

[5] In her appeal, Feger argues that the ALJ erred in ruling the union's request for documents were excluded from the California Public Records Act (CPRA). The ALJ, however, made no such ruling. Instead, the ALJ simply noted that similar to civil actions in which the discovery mechanisms cannot be circumvented by CPRA requests, PERB pre-hearing discovery procedures cannot be circumvented by union information requests. Thus, when read in context, this comparison clearly was not the basis of his decision. Looking to the merits of the argument, the requests were not made pursuant to the CPRA. Moreover, even if such requests were made, PERB lacks the jurisdiction to enforce CPRA requests. Consequently, this argument has no merit and is hereby rejected by the Board.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CARMEN FEGER, Charging Party, v. COUNTY OF TEHAMA, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-500-M PROPOSED DECISION (6/30/2008)

Appearances: Weinberg, Roger & Rosenfeld, by J. Felix De La Torre, Attorney, for Carmen Feger; Renne Sloan Holtzman Sakai, LLP, by Timothy G. Yeung, Attorney, for the County of Tehama.

Before Shawn P. Cloughesy, Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges that a public employer abolished an eligible list in retaliation of an employee's exercise of protected activities. The employer denies committing any unfair practice.

On August 9, 2007, Carmen Feger (Feger), filed an unfair practice charge against the County of Tehama (County). On November 16, 2007, the PERB Office of General Counsel issued a complaint alleging that the County violated Meyers-Milias-Brown Act (MMBA)[1] sections 3506 and 3509(b) and Public Employment Relations Board (PERB) Regulation 32603(a) by abolishing a March 15, 2006 eligible list[2] for Eligibility Worker III in retaliation for Feger testifying on behalf of the exclusive representative in a coworker's disciplinary

[1] Unless otherwise indicated, all statutory references are to the Government Code. MMBA is codified at Government Code section 3500 and following. PERB regulations are codified at California Code of Regulations, title 8, section 31001 and following.

[2] The complaint actually refers to the abolishment of a January 8, 2007 certification list, but according to the County's local regulations it is an eligible list which is abolished, not a certification list.

arbitration. On December 6, 2007, the County answered the complaint and denied committing any unfair practice.

An informal settlement conference was set for December 12, 2007, but was continued to January 15, 2008. The case was not resolved.

The formal hearing was heard on April 15, 2008. Post-hearing briefs were initially set to be received on June 2, 2008, but the submission date was extended to June 9, 2008.

FINDINGS OF FACT

Jurisdiction

The County is a public agency under MMBA section 3501(c) and PERB Regulation 32016(a). The County Department of Social Services (DSS) is an entity within the County. DSS Director Christine Applegate (Applegate) and Deputy Director Teresa Curiel (Curiel) constitute DSS executive management and have held their positions since 2002 and 2005, respectively.

Under PERB Regulation 32016(b), the Joint Council of International Union of Operating Engineers, Stationary Engineers, Local 39 and Service Employees International Union, Local 1292 (Union) is the exclusive representative of the County's miscellaneous bargaining unit which includes the classifications of Eligibility Worker II and III. Feger is a public employee under MMBA section 3501(d).

DSS Civil Service Rules

The DSS is an agency that is operated under the Local Agency Personnel Standards (LAPS) regulations.[3] In regards to examination and selection of candidates for employment, LAPS regulations generally require:

[3] LAPS regulations are codified at California Code of Regulations, title 2, section 17010 and following.

> Recruiting, selecting and advancing employees shall be on the basis of their relative ability, knowledge and skills, including open consideration of qualified applicants for initial appointment. (LAPS Regulation 17110.)

More specifically, candidates for "career service"[4] or employment with a LAPS agency must participate in an examination for each specific classification they desire employment. An "open" examination is to be competitive.[5] (LAPS Regulations 17430 and 17444). Once the examination is conducted, ratings are assigned to the candidates and "eligible" lists are established. (LAPS Regulations 17444 and 17458.)

Once a local agency operating under LAPS wants to fill a vacancy in a classification, it notifies the State Personnel Board (SPB) and the SPB will certify to the agency the names of the five candidates with the highest ratings on the eligible list for that classification. (LAPS Regulation 17470.) The local agency is allowed to contact candidates on the eligible list as to their "interest" in appointment and give them a "reasonable time to respond." (LAPS Regulation 17473.) Overall, appointments are made on the general requirement of competition. (LAPS Regulation 17481.) If fewer than five of the candidates on the eligible list are "available to the appointing authority," the SPB "may" consider that eligible list to be "exhausted." (LAPS Regulation 17468.)

Applegate and Curiel testified as to the DSS past practice of requesting the abolition of an eligible list. DSS usually requested that the SPB abolish an eligible list and hold a new examination whenever less than five candidates remained on the eligible list or less than five candidates responded that they were interested in competing for the position of one vacancy

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[4] "Career service" is defined as all positions in a local agency except for the "executive head" and "deputy executive head" of an agency, a confidential assistant, and unskilled labor. (LAPS Regulations 17030 and 17200.)

[5] An "open" examination is one that is open to the public to apply. (LAPS Regulation 17444.)

and less than six candidates expressed interest in two vacancies. DSS also requested SPB abolish an eligible list and conduct a new examination after one year passed from the date the current eligible list was established. In the past, when DSS asked for a new eligible list, the SPB usually granted the request, but on one occasion SPB denied the request when five or more candidates remained on the eligible list.

After DSS conducts selection interviews and reference checks to fill a vacancy, the respective DSS program manager and Curiel approach Applegate with their recommendation for selection and give an explanation supporting their recommendation. Applegate then usually asks about the candidate's reference checks. If the candidate is a DSS employee, Applegate asks about the candidate's DSS job performance. Applegate will then either approve or disapprove the recommendation of selection.

DSS Eligibility Division

Curiel oversees all program managers of the various DSS divisions, including the DSS Eligibility Division, and is responsible for all personnel matters. The DSS Eligibility Division is managed by Program Manager Melody Finwick (Finwick) and consists of six units which include multiple Intake and Continuing Units, and a Medi-Cal Unit. The Intake Units process applications for benefits by interviewing applicants. Once the applicant is approved for benefits, that benefit recipient is handled by the Continuing Units.

Each of the six units has a supervisor and a leadworker—Eligibility Worker III. The Eligibility Worker III supports the supervisor as well as acts as a role model and trainer of the Eligibility Worker I's and II's. Eligibility Worker III's are also to handle difficult cases/situations.

Feger's Employment

In July 1998, Feger began her County employment as an Office Assistant II and was promoted to Office Assistant III. In 2000, Feger was appointed as an Eligibility Worker I and was the last person on the eligible list when she was appointed. She was assigned to one of the Intake Units. She was automatically elevated to Eligibility Worker II after she passed probation and continues to work in the Intake Unit.

March 2006 Eligible List and Termination of an Eligibility Worker II

On March 15, 2006, an Eligibility Worker III eligible list was established and issued by SPB as a result of an open examination. Twelve individuals were on the list and Feger received the lowest rating of the candidates and was on the bottom of the list. Also on that list was Eligibility Worker II Marilyn[6] who was rated as fifth on that list. Before this list issued, Feger had applied for an Eligibility Worker III position on one or two occasions, but was never selected.

On March 17, 2006, Finwick signed a "Notice of Proposed Disciplinary Action" suspending Eligibility Worker II Donna for 15 days effective April 5, 2006 for threatening her supervisor, Lorena Jones (Jones), on March 16, 2006. The remarks included "I hate that fucking bitch," when referring to Jones. Also, when being counseled by Jones, Donna said in Jones' presence, "did I tell you I have a shotgun, I haven't even taken it out of the box yet." When Jones asked Donna whether she intended to take the shotgun out of the box, Donna allegedly said, "you know those kids at a high school, the one with the trench coats that got pushed over the edge . . . things happened at school to push those kids over the edge and you never know, it could happen anywhere." The notice also accused Donna of laughing when Finwick explained that she was being placed on administrative leave pending an investigation

[6] The last name of Marilyn and other candidates for Eligibility Worker III are not used in order to protect their privacy as they are third-parties to the proceeding.

of the shotgun comment, not returning to her desk when Finwick instructed her, and throwing things about her desk. The Union filed a grievance on Donna's behalf and represented her throughout the grievance/arbitration process.

On August 9, 2006, the March 15, 2006 Eligibility Worker III eligible list was certified in order to make an Eligibility Worker III selection. The eligible list had ten eligibles on the list and Feger was the tenth on that list. Marilyn was third on the list. Laurie Nelson and Supervisor Linda Shell told Feger that she would be interviewed. However, Feger was not interviewed as two of the outside candidates on the certification list had not been properly notified of the vacancy. When the two candidates were notified and expressed their interest, Feger was too far down the list to be interviewed.

On December 16, 2006, and January 30 and 31, 2007, an arbitrator conducted a hearing on Donna's disciplinary grievance. Donna was represented by her union through a union attorney and DSS was represented by the County Counsel's office. The Union's labor representative, Robert Belgeri (Belgeri), was present throughout the proceedings. The County's witnesses included Applegate, Curiel, Finwick, and Jones. Finwick testified to being the investigator which led to the termination action. Curiel also testified as to her involvement in the investigation.

The Union subpoenaed Feger who testified on behalf of Donna on January 30, 2007, although Feger did not witness any of the events set forth in the disciplinary notice. Feger gave her subpoena to Finwick before she testified to ensure that she would be released to attend the hearing. Curiel was also aware that Feger was subpoenaed. At the disciplinary arbitration hearing, Feger testified that Donna had a strong personality, was loud in her use of profanity, had a "potty mouth," and would rant and vent when she got passed over for promotion, but Feger never heard Donna threaten others. Feger admitted that she had been

passed over for promotion before and was still "pissed off" about it. At that time, Feger believed she had been "targeted" by Finwick.

Belgeri, a union representative for a number of years, testified that the County expended more resources to prosecute Donna's disciplinary arbitration than he had seen in any other disciplinary action proceeding and included the County seeking a restraining order against Donna on behalf of some of its employees, including Jones. Criminal contempt proceedings for violating the restraining order were also initiated against Donna.

January 2007 Certification List

On January 8, 2007, the March 15, 2006 Eligibility Worker III eligible list was certified again for appointment(s). The certification list had nine eligibles on the list and Feger was ninth on that list. Marilyn was third on the list. Marilyn was the most senior candidate and Feger was the next senior candidate.

Finwick approached Curiel and expressed concern over the existing Eligibility Worker III certification list as she did not think five candidates would express interest in the two vacancies as several candidates on the list had already been appointed to other DSS positions. Curiel instructed Finwick to send out Contact and Waiver forms[7] to see who was interested in the position. Curiel wanted to wait until she determined how many candidates expressed interest in the positions until she made a decision as to the viability of the list.

On or about January 30, 2007,[8] DSS sent out Contact and Waiver forms to the candidates on the eligible list requesting them to complete the forms and return it by

[7] Contact and Waiver forms allow the candidate to express interest in the vacancy, decline interest in the vacancy or request removal from the list.

[8] Curiel testified that the Contact and Waiver forms were sent out before January 30, 2007 as Finwick and her were too busy with the arbitration on January 30, 2007 to discuss the selection process of two Eligibility Worker III vacancies.

February 8, 2007. Feger received the form in the mail, completed it on January 31, 2007, and indicated on it that she was interested in the vacancy.

As of February 8, 2007, only four candidates on the certification list responded that they were interested in the two vacancies: Marilyn - third on the list; Kami - fifth on the list; Luan - seventh on the list; and Feger - ninth on the list. Curiel asked Kami if she was truly interested in the vacancy as she had already received an appointment to a Social Worker position. Kami replied that she was not interested, but was asked by Marilyn to express her interest so the certification list would have at least five candidates who expressed interest. Curiel then decided that Kami was not interested in the vacancy. After discovering that only three candidates expressed interest, Curiel instructed Finwick to request SPB to abolish the existing eligible list and conduct another examination so that DSS could have a candidate pool of at least six candidates to fill the two Eligibility Worker III vacancies.[9] Curiel testified that neither Curiel or Finwick discussed Feger's arbitration testimony when discussing whether to abolish the eligible list.

On February 8, 2007, Finwick completed the SPB form requesting a new examination for the Eligibility Worker III classification. SPB granted Finwick's request and a new examination was conducted by SPB.[10] After a new examination for Eligibility Worker III was conducted, the new eligible list was issued on April 16, 2007 and had nine eligibles on the list. Eligibility Worker II's Brinda, Sarah and Kelly scored in the top four positions on the list. Marilyn and Feger scored in the sixth and seventh position. Eventually Brinda and Kelly were

[9] Curiel understood that it was not mandatory to abolish a list if less than five candidates expressed interest.

[10] Examinations are usually conducted by three-person interview panels consisting of one DSS representative, one SPB representative, and one community representative. Curiel admitted that sometimes the panels consisted of one SPB representative and two DSS representatives.

selected to fill the Eligibility Worker III vacancies. Feger had no knowledge of whether she had been inappropriately ranked on the new eligible list.

Arbitrator's Opinion and Award

On April 20, 2007, the Arbitrator's Opinion and Award regarding Donna's grievance of her termination was issued to the Union's attorney and the County Counsel's office. The penalty of termination was modified to a thirty working day suspension with a directive that the grievant attend anger-management counseling. The entire Arbitration Opinion and Award was not offered into the evidentiary record so it is difficult to determine whether the arbitrator believed that Feger's testimony was helpful to Donna's defense or not.

Curiel testified that she believed Feger's testimony did not play a large role in the outcome of the arbitrator's opinion. Curiel admitted that she was surprised and not happy with the arbitrator's opinion reinstating Donna. Applegate did not become aware of Feger's involvement in the arbitration until she read the arbitrator's opinion. Applegate was not upset that Feger testified, but only wanted to know what DSS had to do to comply with the arbitrator's award.

October 2007 Selection[11]

By September 2007, Jones replaced Finwick as the Program Manager on an interim basis when Finwick received a temporary assignment. In October 2007, candidates on the eligible list competed again for an Eligibility Worker III vacancy. The position was not initially advertised as bilingual, but one of the Eligibility Worker III positions was being upgraded to a bilingual position. Laura was eventually selected. Feger testified that Jones told

[11] The selection processes subsequent to the February 8, 2007 request to abolish the March 15, 2006 eligible list is examined for the purposes of determining an improper motive of the February 8, 2007 request and determining the accuracy of the testimony of Applegate and Curiel as to DSS' past practice of the selection process. The complaint was not amended to allege that each selection after February 8, 2007 was also a retaliatory event.

her she finished a close second and further stated, "You understand that admin has issues with you." Feger asked Jones what issues she was referencing and Jones responded that she did not know. Feger asked Jones what she ever did against them except testify at Donna's arbitration. Jones denied having any discussion with Feger about why she wasn't selected until the December 2007 interviews occurred.

December 2007 Selection

In December 2007, a temporary vacancy for Eligibility Worker III in the Continuing Unit was advertised to cover behind the absence of Eligibility Worker III Rachel Martinez. Around December 20, 2007, Jones informed Feger that Sarah was selected. Jones testified that Sarah and Feger were "neck and neck" with Sarah doing a "little bit" better. When she called Feger to notify her that she had not been selected and that Sarah was selected, Jones informed Feger that Sarah was bilingual, had the most experience working in the Continuing Unit regarding Medi-Cal issues, and was a "better fit." Specifically, Jones was looking for an employee who had experience in the Continuing Unit processing Medi-Cal food stamps. Jones also told Feger to work on her interviewing skills.

Feger told Jones that she felt "picked on," that she was never going to promote, that "admin had a problem with her," and that Finwick told her that if the scores were close that the most senior person would get the appointment. Jones responded that she did not work that way, but hired the best candidate for the job. Feger brought up the arbitration, but Jones did not want to discuss it. Jones denies ever stating that "admin had a problem" with Feger.

Later, the same day of Jones' discussion with Feger, Jones sent an e-mail to John Buckley, Feger's supervisor, which stated in part:

> ". . . however when I started to talk to her about improving on her interviewing skills she pretty much lost it. She says she knows that she needs to improve, but it shouldn't matter because her seniority should count. I tried to explain to her the way things

> work (or at least for me) but she feels she has been wronged by Admin. I felt so bad for her. She was really upset and crying when she stormed out of my office. Luckily it was late in the day and I don't think anyone was here that heard her. I know she feels like I am lying to her when I tell her I want to help her, I wish she would give me a chance, but I know she feels I am part of the enemy. At least she has the next week off. Just wanted you to know so you can be prepared if she talks to you about this. (Emphasis added.)

March 2008 Interviews

In March 2008, another Eligibility Worker III position was advertised to be filled. After the Contact and Waiver forms were received, only Marilyn and Feger expressed interest in the position. Applegate decided to make an exception to her usual practice of requesting a new eligible list and allowed Marilyn and Feger to be interviewed as Applegate was sensitive to Feger's unfair practice charge regarding the February 8, 2007 request to abolish the list.[12]

After the interviews of both Marilyn and Feger, Jones did not think either candidate had the skills needed to perform as an Eligibility Worker III. Both Curiel and Jones went to Applegate and suggested abolishing the eligible list. Applegate was told that both candidates did "okay" in their interviews, but their job performance was not exceptional and their abilities did not merit selection. Applegate agreed and DSS requested that the April 16, 2007 list be abolished.

Feger testified that she believed that Donna prevailed on her arbitration because of all the witnesses who testified on Donna's behalf, including herself. Other DSS rank and file employees who testified on behalf of Donna were Sarah, Sue, Sherry, and Chris. However, since January 30, 2007, Sherry was promoted to DSS Adult Protective Services Supervisor and Sarah was appointed as an acting Eligibility Worker III (bilingual).

[12] Jones testified that, other than in March 2008, she always interviewed at least five candidates for a position that was filled.

Requests for Information for Preparation of the PERB Hearing

On April 4, 2008, Belgeri sent a letter to Linda Durrer, Personnel Consultant to the County's Chief Administrator, entitled, "Request for Information In the Matter of Carmen Feger—Unfair Labor Practice Charge" which requested copies of Interagency Merit System certification lists for Eligibility Worker III from 2003 to 2008; Contact and Waiver forms received from prospective candidates for Eligibility Worker III from 2003 to 2008; and, any and all documentation and/or correspondence from SPB in which a determination had been made about an existing list being exhausted and a new list being generated. Belgeri admitted that the requested information was to be used to support Feger's contentions at the PERB hearing.

On April 8, 2008, Belgeri sent another letter to Durrer entitled "Second Request for Information In the Matter of Carmen Feger—Unfair Labor Practice Charge" requesting information regarding those candidates who were interviewed for an Eligibility Worker III position on March 14, 2008, including the certification list, the interview/test scores of the interviewees, the factor as to why no candidates from the certification list would be chosen and the names, titles and contact telephone numbers of any officials of DSS who decided to dissolve the certification list. Belgeri requested that information be provided by April 14, 2008. Belgeri admitted that he requested the documents in order to prepare for the PERB hearing.

On April 14, 2008, the County's attorney responded to both the April 4 and 8, 2008 requests stating that PERB did not allow a right for discovery, but decided to provide responses to the requests. The County provided some of the documents requested in the April 4, 2008 request, but denied providing any of the documents in the April 8, 2008 request as being irrelevant to the complaint.

ISSUES

1. Was the County's February 8, 2007 request to abolish the eligible list taken in retaliation for Feger's exercise of protected activities?

2. Are requests for information a proper discovery tool in a PERB formal hearing?

CONCLUSIONS OF LAW

Feger alleges that the County requested to abolish an eligible list because of her exercise of protected activities under the MMBA, in violation of MMBA section 3506 and PERB Regulation 32603(a). To establish a prima facie case of retaliation, Feger must show that: (1) she exercised rights under MMBA; (2) the County had knowledge of the exercise of those rights; and (3) the County 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; San Leandro Police Officers Association v. City of San Leandro (1976) 55 Cal.App.3d 553.) Once protected activity is established to be a motivating factor, the burden shifts to the County to demonstrate that it would have taken the same action even in the absence of protected conduct. (County of San Joaquin (Health Care Services) (2003) PERB Decision No. 1524-M, adopting proposed ALJ decision at p. 23.)

To constitute an adverse action for purposes of determining a reprisal, the action must involve "actual and not merely speculative harm" and the "inquiry is whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (City & County of San Francisco (2004) PERB Decision No. 1664-M, p. 12, citing to Regents of the University of California (1998) PERB Decision No. 1263-H, Palo Verde Unified School District (1988) PERB Decision No. 689, and Newark Unified School District (1991) PERB Decision No. 864.)

It is uncontested that on January 30, 2007, Feger testified in a coworker's disciplinary arbitration which was represented by the Union. By testifying on behalf of a union-represented grievance/arbitration, Feger participated in the activities of her exclusive representative in their representation of a coworker on all "matters of employer-employee relations." (MMBA section 3502.) Curiel admitted that she was aware that Feger was subpoenaed to testify for the Union and Finwick received Feger's subpoena so she could be released to testify. Feger has met the first two elements of establishing a prima facie case of retaliation that Feger exercised protected activity by testifying on behalf of a coworker in a union-represented grievance/arbitration and that Curiel and Finwick were aware of her protected conduct.

The next element is whether the February 8, 2007 request to abolish the eligible list constituted an adverse action. Being prevented from competing in a selection interview which could result in the increase of an employee's salary actually harms Feger as it deprives her of an opportunity to advance, especially when Feger would have been one of three candidates competing for two vacancies. A reasonable person would conclude that under these specific circumstances and this particular candidate to vacancy ratio, such a deprivation of an opportunity would have an actual adverse impact on an employee's employment. Therefore, the February 8, 2007 request to abolish the eligible list constitutes an adverse action.

Feger must next demonstrate that Curiel's decision to request SPB to abolish the eligible list was motivated by Feger's testimony at the arbitration. Feger contends that Curiel's February 8, 2007 decision was based upon her testimony which occurred only eight days earlier. However, February 8, 2007 was also the date that the Contact and Waiver forms were due back and the date that Curiel discovered that only three candidates were interested in filling two vacancies. While it is not clear whether Curiel and Finwick were aware of the content of Feger's testimony on February 8, 2007, her testimony would not be viewed as

particularly helpful to Donna and in some ways appeared helpful to the County. While she testified that she never heard Donna threaten others, she painted Donna as someone who was not afraid to rant and vent and say something that was offensive. Feger also admitted at the arbitration that she was still angry for being passed over for an Eligibility Worker III promotion. Additionally, there were many employees who testified on behalf of Donna, some had been promoted and Feger did not demonstrate that anything negative happened to the other witnesses.

It is clear that on a singular occasion after one of the Eligibility Worker III interviews, either Jones or Feger stated something about "admin" having problems with or wronging Feger. Feger testified to this occurring after the October 2007 selection of Laura and Jones testified it occurred after the December 2007 selection of Sarah. Because Jones' testimony is corroborated by an unsolicited e-mail to Feger's supervisor which reflected only compassion towards Feger, Jones' testimony is credited over that of Feger's and it is found that Jones never told Feger that "admin had issues" with her.

Lastly, the record does not show that Applegate/Curiel substantially deviated from the past practice that they usually requested a new eligible list be established when less than five candidates expressed interest in a vacancy. While Feger was appointed as the last candidate on an Eligibility Worker I list, that occurred before Applegate became the Director. Applegate's exception of allowing both Marilyn and Feger to interview in March 2008 was a concession to Feger because of the unfair practice charge. Applegate should not be penalized for giving Feger a break. Curiel's request that SPB establish a new eligible list on February 8, 2007, given the lack of a competitive selection process, fell within Applegate's established past practice.

Even assuming that Feger had proven a prima facie case of discrimination, the County produced non-discriminatory reasons that it would have taken the same actions in the absence of such protected activities. While the LAPS regulations do not require the local agency to request a new eligible list as a result of the interest shown for the selection process, it cannot also be said that the County violated the rules by making such a request. The overall guiding requirement for the selection process is that the process be competitive. Having three candidates for two vacancies can hardly be considered competitive for a critical leadworker position when the regulation allows the local agency to request a new list when fewer than five of the candidates on the eligible list are "available" to DSS. (LAPS Regulation 17468.) Lastly, the legitimacy of Curiel's request was further demonstrated by SPB's approval of it.

Feger failed to demonstrate by a preponderance of the evidence that her protected activities were motivating factors to Curiel's decision to request that the eligible list be abolished on February 8, 2007. Even assuming Feger had met her burden, the County established that it would have taken the same actions even in the absence of such protected conduct. No violation of MMBA sections 3506 and 3509(b) and PERB Regulation 32603(a) is therefore found.

Refusal to Provide Information for a PERB Hearing

At the hearing, Feger's representative moved to exclude any documents or strike any testimony based upon documents which it requested in its April 4 and 8, 2008 letters, as the Union requested the County to provide these documents and, for the most part, the County did not provide them. Respondent contended that the Union's information request circumvented the PERB formal hearing process set forth in the PERB regulations as it was made in order to obtain documents for the hearing whereas the Union should have requested the issuance of a

subpoena duces tecum pursuant to PERB Regulation 32150 instead. In the alternative, Respondent contended that it properly responded to the request for information.

It is well established under PERB and National Labor Relations Board (NLRB) case law, an exclusive representative is entitled to information sufficient to enable it to understand and intelligently discharge its duty to represent bargaining unit members. "Necessary and relevant" information must be furnished for representing employees in contract negotiations and for policing the administration of an existing agreement/grievance processing. (Stockton Unified School District (1980) PERB Decision No. 143 (Stockton); Chula Vista City School District (1990) PERB Decision No. 834; NLRB v. Acme Industrial Co. (1967) 385 U.S. 432; and Procter & Gamble Mfg. Co. v. NLRB (8th Cir. 1979) 603 F.2d 1310.)

Certain information requested by an exclusive representative is presumed to be relevant. The Board has found various types of information relevant when requested for collective bargaining or contract administration. (Stockton, supra, - health insurance data; Trustees of the California State University (1987) PERB Decision No. 613-H - wage survey data and Newark Unified School District (1991) PERB Decision No. 864 - staffing and enrollment projections.) Information pertaining to mandatory subjects of bargaining is also presumptively relevant. (State of California (Departments of Personnel Administration and Transportation) (1997) PERB Decision No. 1227-S.)

Whether an exclusive representative is entitled to employer information in an extra-contractual forum, such as PERB,[13] under current PERB case law is not easy to resolve. In Los Angeles Unified School District (1994) PERB Decision No. 1061 (Los Angeles USD), three Board members wrote three separate opinions regarding a district which refused to provide sexually-explicit magazines to the exclusive representative to review in preparation of a

[13] SEIU Local 1000, CSEA (Burnett) (2007) PERB Decision No. 1914-S.

Personnel Commission disciplinary appeal hearing in which it was representing its member. The district instructed the exclusive representative to subpoena the magazines pursuant to the Personnel Commission's procedures. The exclusive representative did not, but filed an unfair practice charge. The Board by a 2-1 vote concluded that the unfair practice charge should be dismissed.

The majority opinion held that the district rebutted the relevance of the disclosure of this information by contending that it was being used solely in an extra-contractual forum and that SEIU failed to overcome the burden of the relevance of the request to it's statutory responsibilities. The concurring opinion held that the duty to provide information extended to extra-contractual forums, but the district satisfied its obligation when it allowed the exclusive representative to review the magazines at an earlier time and at the first day of the disciplinary hearing. The dissenting opinion held that the exclusive representative had the right to obtain employer information needed to represent an employee before an extra-contractual forum and found that the district did not turn over the information when it was needed and therefore violated the Educational Employment Relations Act (EERA). While the unfair practice charge was dismissed, two Board members found a right to employer information existed when it was necessary to represent an employee in an extra-contractual forum.

However, four years later in San Bernardino City Unified School District (1998) PERB Decision No. 1270 (San Bernardino), PERB held that the employer's failure to provide a witness list requested for a Personnel Commission disciplinary appeal hearing did not violate EERA. The Board found the witness list did not relate to a mandatory subject of bargaining or grievance processing, but only to an extra-contractual forum. The burden was on the exclusive representative to show that the witness list was relevant and necessary to its representational

duties, but the union did not meet that burden.[14] PERB's decision in San Bernardino contradicted the opinions of two of the Board members in Los Angeles USD.

The NLRB applies a dual purpose rule when the information requested can both be used outside the bargaining relationship, such as before an extra-contractual forum, and within the collective bargaining relationship. (Westinghouse Electric Corp. (1978) 239 NLRB 106 (Westinghouse).) As long as one of the purposes for which the information is to be used is within the collective bargaining relationship, the information must be considered to be provided if it is presumptively relevant. If the exclusive representative has not demonstrated how the information is relevant to its representation role, but is only to be used in anticipation of litigation, then the NLRB will not enforce the information request. (Sahara Las Vegas Corp. (1987) 284 NLRB, 337, 344, information requested solely for filing an unfair practice charge and Southern California Gas Co. (2004) 342 NLRB 613, information requested solely for filing a safety complaint with the California Public Utilities Commission.)

Based upon the face of the April 4 and 8, 2008 letters from Belgeri to Durrer, Belgeri requested the information in preparation of the PERB hearing, as both letters specifically referred to "In the Matter of Carmen Feger—Unfair Labor Practice Charge" and the contents requested pertained to the subject matter of what Feger contended at the hearing. The requested production date set was to be the day before the scheduled PERB hearing. Clearly, the purpose of the request for information was to aid Feger in her litigation against the County. No other purpose was set forth at the hearing or in the post-hearing briefs.

Once a complaint is sent to formal hearing before a PERB Board agent, a party's ability to obtain documentation to support its case is set forth in PERB regulations. (PERB Regulations 32150 and 32170(c).) Feger did not follow these procedures to obtain specific

[14] San Bernardino did not mention or distinguish Los Angeles USD.

documents helpful in prosecuting her complaint. To allow Feger to use the request for information process to obtain documents helpful in prosecuting her case also causes the Board Agent to have to determine whether the non-producing party committed an unfair practice, thereby conducting an unfair practice hearing within an unfair practice hearing.[15]

In other areas of law where a party to a civil action requests documents of an opposing governmental party outside the process set forth in the civil discovery statute, such as the California Public Records Act (CPRA) (Gov. Code, section 6250 et seq.), a party is prohibited from using the CPRA to make such request while those parties are engaged in pending litigation. (Government Code section 6254(b).) This prohibition exists to prevent a litigant who had taken an action against a public entity from using the CPRA to "accomplish earlier or greater access to records pertaining to pending litigation or tort claims than would otherwise be allowed under the rules of discovery . . . ." (Poway Unified School District v. Superior Court (1998) 62 Cal.App.4th 1496, 1504.) Clearly, the same analysis applies in this case where Feger sought to get pre-hearing discovery when the PERB regulations only provide for documents to be brought on the day of hearing. (PERB Regulation 32150(a).)

For all of the these reasons, Feger's motion to exclude documentation, and motion to strike testimony is therefore denied.

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[15] If an unfair practice charge was filed after the previous hearing was conducted alleging that a request for employer information was requested in preparation of the hearing and denied by the employer, a second hearing would be conducted which could impact factual findings of the previous hearing due to a requested remedy similar to that requested in this case. Judicial economy, efficiency and order dictate that documents be obtained pursuant to PERB Regulations 32150 and 32170 where a subpoena duces tecum would be served and an appropriate motion to quash the subpoena be brought before the same Board Agent conducting the initial hearing.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SA-CE-500-M, Carmen Feger v. County of Tehama, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4174
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

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

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served

on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Shawn P. Cloughesy
Administrative Law Judge