STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RONALD S. QUINN, Charging Party, v. COUNTY OF SANTA BARBARA, Respondent.	Case No. LA-CE-686-M PERB Decision No. 2279-M August 9, 2012

Appearances: Ronald S. Quinn, on his own behalf; Victoria Parks Tuttle, Deputy County Counsel, for County of Santa Barbara.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Ronald S. Quinn (Quinn) of the Office of General Counsel's partial dismissal of his unfair practice charge. The charge, as amended, alleged that the County of Santa Barbara (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by retaliating against him based on his protected activity. The Office of the General Counsel partially dismissed the charge, having determined that the allegations concerning alleged retaliatory conduct that occurred prior to the limitations period were untimely, and that the remaining allegations failed to state a prima facie case. Quinn filed an appeal, challenging two of the conclusions reached by the Office of the General Counsel in the partial dismissal.

We have reviewed the entire record in this matter and given full consideration to the issues raised on appeal and the response thereto. Based on this review, the Board affirms the

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

Office of the General Counsel's conclusion that the alleged retaliatory acts added by the first amended charge are untimely. The Board reverses the Office of the General Counsel's conclusion regarding the allegation that the County retaliated against Quinn by changing his job duties and subjecting him to increased scrutiny. Regarding this allegation, the Board holds that the charge, as amended, is sufficient to state a prima facie case of retaliation, and remands the matter to the Office of the General Counsel for issuance of a complaint.

SUMMARY OF ALLEGATIONS

Events Leading to the Filing of Quinn's Unfair Practice Charge

Quinn is employed by the County as a senior child support officer in the Department of Child Support Services (DCSS), which is part of the Santa Barbara County General Bargaining Unit exclusively represented by SEIU Local 620 (SEIU). Quinn had been promoted to this position on December 19, 2005, and assigned the role of trainer on the DCSS Training Team. From December 19, 2005 through December 14, 2009, Quinn received above satisfactory performance reviews and awards. Quinn was the duly elected union shop steward at his work location for approximately eight years. At some point in the course of the events described below, Quinn temporarily relinquished his shop steward position.

On June 29, 2010, Quinn represented a co-worker in a grievance proceeding in his capacity as shop steward. The following day, on June 30, the Executive Director of DCSS Carrie Topliffe (Topliffe) called Quinn's former co-worker and friend Divina Johnston (Johnston) to seek her assistance in gaining access to any statements made by Quinn on his Facebook page about time spent at work on union activity. In the course of this conversation, Topliffe referred to Quinn's mental health. A day later, on July 1, Topliffe left a telephone message for Johnston, apologizing for contacting her, stating that the situation with Quinn had gotten worse, that a lot of people were concerned about Quinn's mental stability and that she

was looking for ideas how to encourage him to get the help he needed. Johnston informed Quinn of Topliffe's inquiries.[2] Quinn's first amended charge includes a declaration signed by Johnston under penalty of perjury attesting to these facts.

Quinn went on stress leave. On July 6, 2010, Quinn delivered to the County a disability letter from his doctor. On July 8, 2010, Quinn was released to return to work with accommodations. It appears that Quinn's doctor requested that Quinn be permitted to work from home, and the County granted the medical accommodation requested. Quinn alleges that the County did not permit him to return to work until July 14, 2010, at which time he began to work from home. At some point thereafter, the County relieved Quinn of his duties as lead worker and trainer. Quinn alleges that his prior role as lead worker and trainer was a respected role within DCSS and that his new role involved unfamiliar duties amounting to data entry and data correction, which were also being performed by clerical staff and temporary workers. Quinn alleges that he was capable of performing the duties of his former position and that there was no reason he could not continue to do so while working from home. Quinn requested that the County provide him with an explanation for changing his job duties, which he successfully had performed for four and one-half years, but none was given.

On July 14, 2010, his first day back at work, Quinn prepared a complaint against Topliffe regarding her telephone calls to Johnston on a grievance form (Topliffe Complaint).

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[2] Johnston was interviewed in the course of the County's investigation into Topliffe's conduct. When asked for the substance of her conversation with Quinn, she responded:

> My intention when I contacted him because after the conversation with Carrie [Topliffe] I knew that they were looking for dirt on him you know and I just wanted to let him know that he was to keep his nose clean at work because they're gunning for his job.

Johnston was then asked if she was specifically told that the County was gunning for Quinn's job, and she responded, "No I was reading between the lines." (Transcript, Johnston, September 15, 2010.)

Unlike the other copies of grievances attached to the initial charge and first amended charge, the copy of this grievance form referred to herein as the Topliffe Complaint is unsigned and undated. Quinn states that he "reported the incident to Human Resources" on July 15, 2010. A meeting was scheduled with Chief of Employee Relations Robert MacLeod (MacLeod) for July 20, 2010. MacLeod promised that a disciplinary investigation into Topliffe's conduct would be launched. McLeod requested that Quinn's grievance be held in abeyance until the investigation concluded. Quinn asserts that MacLeod extended the deadline to file the grievance until 10 days following notification by the County of the conclusion of the disciplinary investigation. Quinn asserts that MacLeod's extension is in writing, but Quinn did not provide a copy to PERB.[3]

Beginning on August 16, 2010, Quinn alleges that he started to come under increased scrutiny by his supervisor, Helen Martin (Martin). Martin required Quinn to notify her by e-mail each time he started work, ended work and broke for mealtime. Martin also required Quinn to keep a log of every task performed and checked to see at what time each task was completed. Quinn alleges that he had worked from home on multiple prior occasions and never before been held to these requirements. Quinn also alleges that several other employees also telecommute and are not being held to these requirements.

[3] On September 15, 2010, Quinn, accompanied by his attorney, Gregory Ramirez, was interviewed in connection with the County's investigation into Topliffe's conduct. The interviewer stated at the outset of the interview that he was conducting an investigation at the request of the County into Quinn's complaint that DCSS invaded his right to privacy, invaded the privacy of his medical records and retaliated against him for his union activities. As mentioned in footnote 2, *ante*, Johnston was also interviewed in connection with this investigation. Both interviews were taped and transcripts of the interviews were provided to PERB as attachments to the first amended charge. Quinn asserts that, almost a year later, on August 22, 2011, he received notification by the County of the conclusion of County's disciplinary investigation into Topliffe's conduct. The County denied any wrongdoing.

Quinn filed a grievance dated September 13, 2010 (Grievance No. 1). In Grievance No. 1, Quinn asserted that he was locked out of the office and denied access to the workplace without a security escort, citing no particular rule or regulation alleged to have been violated. Quinn alleges that Topliffe denied Grievance No. 1 on September 21, 2010, and that he appealed to step 2 of the grievance procedure. Quinn alleges that MacLeod gave Quinn an extension to re-write the grievance. Quinn filed a grievance dated October 22, 2010, claiming that the lock out and imposition of a security escort were acts of retaliation and discrimination for exercising his rights (Revised Grievance No. 1). Revised Grievance No. 1 refers to various provisions of the memorandum of understanding (MOU) between SEIU and the County, including a section of the MOU providing that union stewards shall not be discriminated against in their employment relationship because of their activity in the investigation and processing of grievances on behalf of other employees. Quinn also refers to a departmental practice against barring employees from the work site or requiring them to have a security escort regardless of whether they are telecommuting.

Quinn filed a grievance dated November 1, 2010, regarding his removal from the DCSS-wide e-mail distribution group (Grievance No. 2). In Grievance No. 2, Quinn refers to a section of the MOU protecting the right of employees to file a grievance without fear of restraint, interference, coercion, discrimination or reprisal. Quinn also refers to a departmental practice in favor of including all staff in DCSS-wide e-mail notifications. Quinn alleges that Topliffe denied the grievance on November 29, 2010, and that he appealed to step 2 of the grievance procedure.

Quinn filed a grievance dated November 9, 2010, asserting that he was a victim of retaliation and harassment, citing the following acts by the County: ordering him to remove his personal belongings from his office; increasing his productivity standard leading to

issuance of a letter of concern; refusing to provide him a hands-free device for his cell phone; and providing him less than 24-hour notice before a home inspection in violation of the telecommute policy (Grievance No. 3). In Grievance No. 3, Quinn refers to various provisions of the MOU, departmental practices regarding production quotas and the provision of hands-free devices, and the telecommute policy.

Quinn alleges that his grievances were denied by MacLeod at step 2 and that he appealed to step 3, which is mediation. On December 20, 2010, Quinn, MacLeod and Deputy County Counsel Victoria Parks Tuttle participated in a mediation conducted by the State Mediation and Conciliation Service. The County's response to the initial charge confirms that "Charging party's grievances were mediated on December 20, 2010."

Quinn's Unfair Practice Charge

Quinn filed the initial charge on May 23, 2011. The statement of the charge in its entirety is as follows:

> I was denied a promotion 12/16/10, given a poor performance evaluation 01/05/11, denied a lateral transfer in 02/11, my job duties have been changed and I have been subjected to increased scrutiny following my filing of the attached grievances.

Attached to the initial charge are copies of the Topliffe Complaint, the first page of Grievance No. 1, Grievance No. 2, Grievance No. 3 and a performance evaluation dated January 5, 2011.

Quinn filed the first amended charge on September 2, 2011 at the earliest.[4] The first amended charge states:

> At the time of the original filing, I did not include violations of law that occurred prior to 6 months before the date of filing of the charge. I subsequently became aware that the filing deadlines are tolled when there is a pending grievance in process. Accordingly, I am adding those violations to the charge by this amendment.

[4] The partial dismissal refers to a filing date for the first amended charge of September 6, 2011.

The first amended charge enumerates the acts of retaliation in the following way, incorporating the four allegations included in the initial charge as allegations 4, 8, 9 and 10:

1. This allegation corresponds to the conduct described in the Topliffe Complaint;

2. On July 14, 2010, McLeod failed to properly investigate the Topliffe Complaint;

3. On July 15, 2010, Quinn was locked-out, following revocation of his access privileges on July 7, 2010, corresponding to the conduct described in Grievance No. 1 and Revised Grievance No. 1;

4. On August 16, 2010, Quinn began being subjected to increased scrutiny;

5. On September 22, 2010, in retaliation for filing a grievance based on being locked out, Quinn was removed from the DCSS-wide e-mail distribution group, which he discovered on October 18, 2010, corresponding to the conduct described in Grievance No. 2;

6. From August 31, 2010 through November 1, 2010, Quinn was harassed at home while telecommuting, including being ordered to use unpaid time off to come to the office to remove personal belongings and being required to have a security escort while at the workplace, corresponding to conduct described in Grievance No. 1, Revised Grievance No. 1 and Grievance No. 3;

7. From November 1, 2010 through November 4, 2010, Supervisor Martin raised Quinn's performance standard and issued a letter of concern, corresponding to conduct described in Grievance No. 3;

8. On December 16, 2010, Quinn was denied a promotion to a supervisory position;

9. On January 5, 2011, Quinn was issued a poor performance evaluation;

10. In February 2011, Quinn was denied a lateral transfer; and

11. On May 26, 2011, Quinn was denied overtime opportunities because of the poor performance evaluation.

Attached to the first amended charge are copies of Quinn's performance evaluations dating back to March 6, 2006, two letters of concern dated November 4 and December 7, 2010, the Topliffe Complaint, a complete set of the grievances, the affidavit of Johnston and transcripts of the Johnston and Quinn interviews.

The Processing of Quinn's Unfair Practice Charge

On December 1, 2011, the Office of the General Counsel issued a complaint and a partial dismissal.

By issuance of the complaint, the Office of the General Counsel had determined that Quinn set forth a prima facie case of retaliation under MMBA section 3506 as to certain retaliatory acts, corresponding to allegations 9 (poor performance evaluation) and 11 (denial of overtime opportunity) of the first amended charge. Regarding the element of protected activity, the Office of the General Counsel alleged:

> During the period of time including from on or about October 2009 through December 2010, Charging Party exercised rights guaranteed by the Meyers-Milias-Brown Act by serving as a shop steward for his exclusive representative, filing grievances on behalf of bargaining unit members, representing employees in other forums, and filing grievances in his own behalf that sought to enforce protections afforded by the memorandum of understanding negotiated by the exclusive representative and the Respondent.

As to each of the two retaliatory acts, the Office of the General Counsel alleged:

> Respondent took the [adverse] actions . . . because of the employee's [protected] activities . . . and thus violated Government Code section 3506 and committed an unfair practice under Government Code section 3509(b) and PERB Regulation 32603(a).

By issuance of the partial dismissal, the Office of the General Counsel had determined that Quinn failed to set forth a prima facie case as to the remainder of the alleged retaliatory

acts contained in Quinn's charge, as amended. The Office of the General Counsel concluded that: allegations 1 through 7 as enumerated in the first amended charge were untimely and the statute of limitations was not tolled under the doctrine of equitable tolling; allegations 8 (denial of promotion) and 10 (denial of lateral transfer) failed to state a prima facie case; and the allegation contained in the initial charge regarding change in job duties and increased scrutiny was either deemed withdrawn for failure by Quinn to incorporate it into the first amended charge or, if not withdrawn, then dismissed for the reasons provided in the warning letter of August 23, 2011.

DISCUSSION

On appeal, Quinn takes issue with two conclusions reached by the Office of the General Counsel.[5] He argues that the Board agent erred in not applying the doctrine of equitable tolling. He also argues that the Board agent erred in concluding that Quinn failed to incorporate into the first amended charge his original allegation in the initial charge that his job duties had changed and that he was being subjected to increased scrutiny.

The Statute of Limitations and Equitable Tolling

The Office of the General Counsel, relying on selected provisions of the MOU taken from the County's official website and on representations made by the County and by SEIU that Quinn's allegations of retaliation were not subject to the grievance procedures, concluded that the doctrine of equitable tolling did not apply. Quinn argues on appeal that "a grievance proceeding was pending" concerning the Topliffe Complaint at the time the initial charge was

[5] PERB Regulation 32635, subdivision (a), requires an appeal to specify the contested issue(s), identify the relevant page or part of the dismissal appealed from and state the ground(s) for each issue. (PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.) An appeal is subject to dismissal for failure to comply with these requirements. (*City of Brea* (2009) PERB Decision No. 2083-M.) In Quinn's appeal, he does not raise any issues with that part of the partial dismissal dismissing allegations 8 (denial of promotion) and 10 (denial of lateral transfer), as enumerated in the first amended charge. These allegations are hereby dismissed and require no further analysis.

filed; and that the other grievances regarding retaliatory acts as enumerated in the first amended charge were "accepted" by the County and "advanced through the grievance procedure to mediation;" Quinn argues that the County cannot now claim that these grievances were not grievable.

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)[6]

A charging party bears the burden of demonstrating that the charge is timely filed. (*County of Sonoma* (2012) PERB Decision No. 2242-M.) The statute of limitations is an element of the charging party's prima facie case. (Long Beach Community College District (2009) PERB Decision No. 2002.) The statute of limitations for new allegations contained in an amended charge begins to run based upon the filing date of the amended charge (*Sacramento City Teachers Association (Marsh)* (2001) PERB Decision No. 1458) unless the new allegations in the amended charge relate back to the original allegations in the initial charge. (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959.) An amended charge relates back to the initial charge only when it clarifies facts originally alleged in the initial charge or adds a new legal theory based on facts originally alleged in the initial charge. (*Ibid.*)

[6] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

Here, the first amended charge was not filed until September 2, 2011, at the earliest. The limitations period for new allegations contained in the first amended charge extends back six months from the date of filing to March 2, 2011. The new allegations concern conduct that allegedly occurred between June 30, 2010 and November 4, 2010, and therefore these allegations fall outside the limitations period.

The relation back doctrine does not alter this conclusion. By Quinn's own admission, in the initial charge he did not "include violations of the law that occurred prior to 6 months before the date of filing of the charge" because he was unaware that filing deadlines are tolled "when there is a pending grievance in process."[7] These allegations do not relate back to the original allegations in the initial charge because they cannot be viewed as merely clarifying the original allegations in the initial charge or adding a new legal theory based on facts originally alleged in the initial charge.[8] These allegations were expressly *added* to Quinn's charge.[9]

Based on the above analysis, the retaliatory acts enumerated in the first amended charge that are over and above the original four listed in the initial charge are subject to a limitations

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[7] The statute of limitations begins to run when a charging party discovers the conduct that constitutes the alleged unfair practice, not when a charging party discovers the legal significance of that conduct. (*Trustees of the California State University* (2009) PERB Decision No. 2038-H; *Compton Unified School District* (2009) PERB Decision No. 2016.)

[8] By contrast, the first amended charge also contains allegations that expand on the original allegations in the initial charge. These allegations relate back to the initial charge because they merely serve to clarify the original allegations. These allegations are therefore timely to the extent the original allegations are timely.

[9] While the grievance documents attached to the initial charge allude to the retaliatory acts in the new allegations, Quinn included these attachments only for the purpose of demonstrating that Quinn was engaged in protected activity. As is evident from the initial charge, Quinn originally complained of four specific retaliatory acts that allegedly occurred within the six-month limitations period preceding the filing of the initial charge on May 23, 2011, i.e., the denial of the promotion, the denial of the lateral transfer, the poor performance evaluation, and the changed job duties and increased scrutiny.

period that is calculated based on the filing date of the first amended charge. Based on calculation of the proper limitations period alone, these new allegations are untimely.

The question next presented is whether the doctrine of equitable tolling applies. The doctrine of equitable tolling applies to cases under the MMBA. (*Solano County Fair Association* (2009) PERB Decision No. 2035-M.) Under the doctrine of equitable tolling, the statute of limitations is tolled during the period of time the parties are utilizing a non-binding dispute resolution procedure if the following elements are met: (1) the procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitations period by causing surprise or prejudice to the respondent. (*Long Beach Community College District* (2009) PERB Decision No. 2002.) The charging party has the burden of establishing that the statute of limitations was equitably tolled. (*Ibid.*)

Quinn did not provide PERB with a copy of the grievance procedures. Nor did Quinn provide PERB with documentation, other than the grievances, demonstrating what occurred during the grievance procedures. In a typical case, if a grievance is denied, it is usually done in a writing that provides both the reasons for the denial and the deadline for appeal. Without a copy of the grievance procedures and the usual paper trail, it is difficult to determine whether Quinn's grievances were processed utilizing a dispute resolution procedure contained in a written agreement negotiated by the parties, as the Office of the General Counsel concluded.

PERB Regulation 32615, subdivision (a)(5), requires that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party has the burden to allege sufficient facts supporting an unfair practice charge, and mere legal conclusions are not sufficient to state a prima facie case. (*State*

of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944; *Charter Oak Unified School District* (1991) PERB Decision No. 873.) It is reasonable to conclude that Quinn did not satisfy his affirmative burden to demonstrate with sufficient factual support the applicability of the equitable tolling doctrine as he did not provide PERB with the basic documents necessary to determine this issue with any real certainty. On this basis alone, we may affirm the conclusion reached by the Office of the General Counsel, but there are additional bases for affirmance.

Allegations 1 and 2

Allegations 1 and 2, as enumerated in the first amended charge, concern the Topliffe Complaint. Although Quinn's appeal states that "a grievance procedure was pending" when the initial charge was filed on May 23, 2011, the first amended charge states that MacLeod extended the deadline for filing a grievance to 10 days from the conclusion of the disciplinary investigation, which did not occur until August 22, 2011.

The circumstances presented here do not support the application of the doctrine of equitable tolling as to allegations 1 and 2 for several reasons. There is no factual support for the proposition upon which Quinn has based his argument, i.e., that the County's disciplinary investigation into Topliffe's conduct in contacting Johnston about Quinn was part of a negotiated grievance procedure. Moreover, a disciplinary investigation by its nature cannot be categorized as involving the same dispute as an unfair practice charge alleging retaliation. The two may overlap to some degree in substance but not in purpose, scope or consequence. Finally, there is no indication that Quinn filed a grievance within the extended timeframe agreed to by MacLeod. The copy of the Topliffe Complaint provided to PERB is undated and unsigned, unlike the other grievances that were also provided to PERB. This supports a

conclusion that Quinn did not pursue a grievance concerning the subject matter of allegations 1 and 2, i.e., Topliffe's conduct in contacting Johnston about Quinn, and the County's failure to properly investigate Quinn's complaint. Accordingly, we conclude that the doctrine of equitable tolling does not apply to toll the statute of limitations as to these allegations.

Allegations 3, 5, 6 and 7

Unlike Quinn's equitable tolling argument with respect to allegations 1 and 2, Quinn's charge at least arguably suggests that Grievances 1 through 3 and allegations 3, 5, 6 and 7, as enumerated in the first amended charge, concern the same disputes; that the grievances were accepted by the County and advanced through a negotiated grievance procedure that includes mediation; that Quinn pursued the procedure reasonably and in good faith; and that the County was placed on notice of allegations 3, 5, 6 and 7 by the grievances, thereby eliminating any claim of prejudice or element of surprise. Therefore at least with regard to these four allegations, there is an arguable case for applying the doctrine of equitable tolling were we to ignore the pleading deficiencies in Quinn's charge, and give him the benefit of the doubt.

These allegations would still be untimely even if the doctrine of equitable tolling applied, however. Utilization of the grievance procedure ended with mediation on December 20, 2010. That date was the last possible date upon which the statute of limitations would have been tolled. Assuming Quinn had filed the grievances on the day the conduct giving rise to the grievances occurred,[10] Quinn would have had six months from December 20, 2010, or until June 20, 2011, within which to file the new allegations in the first amended charge. Quinn did not file the first amended charge until September 2, 2011, at the earliest.

[10] This did not occur. For example, the unrevised version of Grievance No. 1 concerning the lock-out and revocation of access privileges was filed on September 13, 2010, but the conduct giving rise to that grievance is alleged to have occurred on July 15, 2010, two months earlier. The statute of limitations would not have been tolled during this gap in time.

Therefore, even giving Quinn the benefit of the doubt regarding the applicability of the equitable tolling doctrine, allegations 3, 5, 6 and 7 would still be untimely.

Changed Job Duties and Increased Scrutiny

We agree with Quinn that he did not fail to incorporate into the first amended charge his original allegation regarding changed job duties and increased scrutiny. We conclude that this allegation should have been included in the complaint in addition to the retaliatory acts that were included in the complaint relating to the poor performance evaluation and the denial of overtime opportunity.

Footnote 2 of the partial dismissal states that the original allegation in the initial charge regarding changed job duties and increased scrutiny was considered either withdrawn for failure by Quinn to incorporate it into the first amended charge or, if not withdrawn, then dismissed for the reasons provided in the warning letter of August 23, 2011. The problem, however, is that allegation 4, as enumerated in the first amended charge, specifically refers to Quinn's "increased scrutiny" claim and provides further factual detail about this claim, presumably in response to deficiencies cited in the warning letter. Furthermore, although the 11 violations enumerated in the first amended charge do not specifically refer to the changed job duties claim, further factual detail about this claim is provided in a different section of the first amended charge, presumably also in response to deficiencies cited in the warning letter. We therefore do not agree that Quinn meant to withdraw this allegation or that the warning letter provided an adequate basis for dismissal.

To demonstrate that an employer discriminated or retaliated against an employee in violation of MMBA section 3506 and PERB Regulation 32603, subdivision (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, i.e., nexus.[11] (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato).*) 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.) 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; fn. omitted.)

Quinn has adequately alleged that he was engaged in protected activities. He also has adequately alleged that Martin, his supervisor, had knowledge that he was engaged in protected activities. These first two elements of the prima facie case were found to exist by the Office of General Counsel for purposes of issuing a complaint based on the retaliatory acts of issuing

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[11] 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), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following 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; (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); (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); (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 (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (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 School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

Quinn a poor performance evaluation and denying him overtime. There is no basis to conclude otherwise with respect to Quinn's allegation of changed job duties and increased scrutiny. Regarding the other two elements of the prima facie case, adverse action and nexus, further factual detail provided by Quinn in the first amended charge cures the weaknesses in Quinn's initial charge as explained below.

Changed Job Duties

Quinn alleges in the first amended charge that he was "stripped of all my prior assignments as a lead worker and trainer (a respected role in the department) and assigned unfamiliar duties that amounted to data entry and data correction that were also being performed by clerical staff and temporary workers."

In *Fresno County Office of Education* (2004) PERB Decision No. 1674, the Board held that an involuntary reassignment 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. The Board has found an 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.) Here, Quinn formerly occupied a respected position involving leadership and training. We conclude that a reasonable person would consider the duties of Quinn's new position to be a step down. As the Board stated in *Trustees of the California State University* (2009) PERB Decision No. 2038-H,

> [A] reasonable person would conclude that a change from a position requiring the incumbent to work independently and exercise his or her own judgment to a position that essentially involves basic clerical work would have an adverse impact on the employee's employment.

Regarding nexus, the timing of events is particularly important. Quinn represented a co-worker in a grievance proceeding on June 29, 2010. The next day, Topliffe contacted Johnston to seek Johnston's assistance in gaining access to statements Quinn may have made on his Facebook page concerning his union activities. Their conversation left Johnston with the impression that the County was "looking for dirt" on Quinn and "gunning for his job." Soon thereafter, Quinn's job duties were changed, with no explanation as to why. Quinn alleges that he has on prior occasions telecommuted while successfully performing the duties of his prior position. Arguably, statements made by Topliffe to Johnston qualify as direct evidence of unlawful motive. At the very least, the close proximity in timing between the protected activity and the change in job duties, the failure by the County to provide Quinn with an explanation for the change, and Quinn's prior successful ability to work from home all coalesce to create a sufficient inference of unlawful motive, at least to satisfy Quinn's prima facie pleading burden.

Increased Scrutiny

Quinn alleges in the first amended charge that starting on August 16, 2010, his supervisor required him "to contact her whenever [he] started or ended work or meal breaks, . . . while telecommuting" and also required him to keep a log of every task performed, which she checked to ensure completion of assignments. Under the standard for adverse action set forth above, we also conclude that Quinn has alleged with sufficiency for prima facie purposes that the increased scrutiny constitutes an adverse action. After having been entrusted with a respected leadership role for over four years, Quinn began being held to punitive reporting requirements, which an objective person would find to constitute an adverse action.

Regarding nexus, as explained above, there is direct evidence of unlawful motive in statements made by Topliffe about Quinn to Johnston. Also, the increased scrutiny began to

occur within two months of the protected activity, thus the close proximity in timing between the two events supports an inference of unlawful motive. In addition, Quinn alleges that no one else was held to such requirements whether telecommuting or not. Accordingly, we conclude that Quinn has alleged sufficient facts to create an inference of unlawful motive, at least to satisfy Quinn's prima facie pleading burden.

The County asserts that the changed job duties and increased scrutiny was not a retaliatory act, but rather occasioned by Quinn's telecommute arrangement. Under the burden-shifting framework in a retaliation case under *Novato*, the County's affirmative defense cannot be decided at this juncture. At a formal hearing, Quinn will be required to prove up his allegations with competent evidence, and the County will be entitled to put on its case. For purposes of determining whether Quinn has alleged a prima facie case at this stage of the proceedings, however, facts as alleged by Quinn are assumed to be true. (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74.)

In sum, we conclude that Quinn has set forth a prima facie case of retaliation with respect to his allegation concerning changed job duties and increased scrutiny.

ORDER

The Public Employment Relations Board AFFIRMS in part and REVERSES in part the Office of the General Counsel's partial dismissal in Case No. LA-CE-686-M and REMANDS the case to the Office of the General Counsel for issuance of a complaint consistent with this Decision.

Members Dowdin Calvillo and Huguenin joined in this Decision.