STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN BREWINGTON, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	Case No. LA-CE-261-M PERB Decision No. 2336-M October 18, 2013

Appearances: The Leahy Law Firm by Alan J. Leahy, Attorney, for John Brewington; The Zappia Law Firm by Edward P. Zappia and Brett M. Ehman, Attorneys, for County of Riverside.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the County of Riverside (County) to the proposed decision (attached) of a PERB administrative law judge (ALJ 2) arising out of a compliance proceeding. The ALJ found that the County failed to comply with the Board's reinstatement order in *County of Riverside* (2009) PERB Decision No. 2090-M. In that case, the Board held that the County committed an unfair practice under the Meyers-Milias-Brown Act (MMBA)[1] by retaliating against John Brewington (Brewington) for engaging in protected activities. Thus, the Board ordered the County to, among other things, offer Brewington immediate reinstatement to his former position or, if that position no longer existed, then to a substantially similar position. The ALJ ordered that the County take several affirmative actions, including

[1] The MMBA is codified at Government Code section 3500 et seq. All further section references are to the Government Code.

paying Brewington his salary and benefits at the Associate Civil Engineer classification level from December 31, 2009, forward.

The County filed timely exceptions to the proposed decision, and Brewington filed a timely response. The Board has reviewed the entire record in this matter, including the hearing record, the ALJ 2's findings of fact, conclusions of law and proposed order, the County's exceptions and Brewington's response thereto. Based on this review, we conclude that the ALJ 2's findings of fact are supported by the record and therefore adopt them as the findings of the Board itself, as supplemented herein. We also conclude that the ALJ 2's conclusions of law are well-reasoned and in accordance with applicable law and therefore adopt them as the conclusions of law of the Board itself. Last, we adopt the ALJ 2's proposed order, except as modified to require that the County pay Brewington his salary and restore his benefits from May 20, 2008, forward rather than from December 31, 2009, forward. The latter date corresponds to the date of the Board's decision in *County of Riverside, supra,* PERB Decision No. 2090-M. The former corresponds to the date that the ALJ 1's April 25, 2008, proposed decision in *County of Riverside, supra,* PERB Decision No. 2090-M would have become final had the County not pursued an unsuccessful appeal.[2] For reasons explained below, we conclude that fixing the County's liability at this earlier date more effectively fulfills the Board's responsibility in enforcing the MMBA.

[2] As noted below, the proposed decision issued on April 25, 2008. Under PERB Regulation 32300, subdivision (a), a party may file with the Board itself a statement of exceptions to a proposed decision within 20 days following the date of service. Under PERB Regulation 32130, subdivision (c), a five day extension of time shall apply to any filing in response to documents served by mail. (PERB Regs. are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.)

PROCEDURAL BACKGROUND

Official notice is taken of the contents of the case file.[3] On December 31, 2009, the Board itself issued *County of Riverside, supra,* PERB Decision No. 2090-M. The case arose out of an unfair practice charge alleging a series of adverse actions taken by the County against Brewington because of his protected activities, the final adverse action being the termination of his employment on August 23, 2006, after approximately 22 years of continuous employment. After a five-day formal hearing and submission of post-hearing briefs, the ALJ 1 issued a proposed decision on April 25, 2008, which ordered the County to, among other things, make Brewington an offer of immediate reinstatement "to his former position of employment or, if that position no longer exists, then to a substantially similar position." The County filed exceptions challenging both the ALJ 1's proposed decision and order and PERB's authority to adjudicate the matter.

In *County of Riverside, supra,* PERB Decision No. 2090-M, the Board concluded that the County had taken four retaliatory adverse actions[4] against Brewington, including terminating his employment, in violation of MMBA section 3506, and thereby committed unfair practices under section 3509, subdivision (b).[5] In responding to the County's constitutional challenge to PERB's authority, the Board itself held:

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[3] The information contained in the Procedural Background section of the decision is for background purposes only. It is not evidence and was not considered as such in the resolution of the disputed legal issues on appeal.

[4] Other adverse actions alleged in the amended complaint were dismissed.

[5] MMBA section 3506 states: "Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502." Section 3509, subdivision (b), declares such conduct an unfair practice.

> No court has held that the MMBA's provisions vesting jurisdiction in PERB to decide and remedy unfair practices are unconstitutional. Indeed, the California Supreme Court has twice upheld the constitutionality of the MMBA in the face of challenges to its application to charter cities and counties. (*Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55 [requiring county to meet and confer with employee unions under MMBA before amending its civil service rules does not offend the home-rule provisions of Art. XI, §§ 3 and 4 of the California Constitution]; *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 [charter city council must comply with MMBA's meet and confer requirements before proposing amendment to the city charter affecting terms and conditions of public employment].) Accordingly, PERB has the authority *and duty* to issue decisions and orders to effectuate the purposes of the MMBA.

(*County of Riverside, supra,* at pp. 41-42, emphasis added.)

The Board included in its order against the County the following four affirmative actions, in addition to the standard posting and reporting provisions:

1. Rescind Brewington's termination.

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

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

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

On January 28, 2010, the County filed a petition for writ of extraordinary relief seeking review of the Board's decision, and a request for a stay, in the Court of Appeal, Fourth Appellate District. The County's petition urged the court to take review on the following grounds: (1) PERB's statutory authority to issue a back pay and reinstatement award conflicts with the County's authority to manage its affairs under the California Constitution; (2) PERB's award of back pay and reinstatement exceeds PERB's authority; (3) PERB's award of back pay and reinstatement conflicts with the County's management rights; and (4) the County determined that Brewington was not fit to be employed with the County.

On February 24, 2011, the Court issued an order summarily denying the County's petition. On March 29, 2011, the County filed a petition for rehearing, which the court denied on March 30, 2011.

Meanwhile, on March 9, 2011, PERB sent a letter requesting that the County file an initial statement of compliance outlining the steps the County had taken towards compliance with the Board's order in *County of Riverside, supra,* PERB Decision No. 2090-M. The County was given a deadline of March 25, 2011. The County failed to comply with PERB's request. On April 4, 2011, PERB sent a letter noting the County's failure to comply and giving the County a new deadline of April 11, 2011. On April 21, 2011, the County responded by letter informing PERB that "[t]his letter is to notify you of the County's intent to comply with PERB's decision" and outlining the steps the County intended to take. The County asserted that its obligations toward Brewington were cut off on February 13, 2008, "the date he would have been laid off with the other Civil Engineers, had he not been previously terminated."

On May 4, 2011, PERB sent a letter requesting information from both the County and Brewington. The County was asked to provide information concerning the County's layoff, the use of the civil engineer classification in the County and the existence of substantially similar positions for which Brewington was qualified. Brewington was asked to provide information concerning mitigation of his damages. Responses were received from both parties.

On May 4, 2011, PERB also served the parties with notice of a compliance status conference scheduled for June 3, 2011. At the status conference, the County maintained its position that compliance with the Board's back pay and reinstatement award only required that the County pay Brewington what he would have earned had he not been unlawfully terminated, i.e., from August 23, 2006, the date of termination, to February 13, 2008, the date of the layoff. PERB requested that the County provide information about engineers in the County's Building and Safety Department that continued to work for the County in some capacity after the layoff and other engineer positions that still existed in the County. The County was given a deadline of June 10, 2011. Brewington was given a deadline of July 1, 2011, by which to file objections to the steps taken by the County towards compliance.

The County did not comply with PERB's request for information. On June 13, 2011, PERB contacted the County. The County thereupon requested a new deadline of June 17, 2011, which was granted. Having received no response, PERB contacted the County again on June 22, 2011. The County confirmed that it had not undertaken any steps towards compliance with PERB's information request or towards compliance with the Board's order. The County stated that it was in the final preparations to doing so. On June 29, 2011, PERB contacted Brewington. Brewington informed PERB that he had not received a check from the County and was not aware that the County had complied with any other item included in the Board's order.

On June 29, 2011, based upon the above-description of events, PERB issued an order to show cause why PERB should not "proceed immediately to seek court enforcement of the Board's order, pursuant to its authority under PERB Regulation 32980(a)." Responses were received from both parties.

On November 2, 2011, the parties were informed that the matter had been transferred from the Office of the General Counsel to the Division of Administrative Law for purposes of conducting a compliance hearing. A formal hearing was conducted on February 7, 2012, by the ALJ 2. The matter was submitted for proposed decision upon the receipt of reply briefs on April 20, 2012, and the ALJ 2's proposed decision issued on January 30, 2013.

PROPOSED DECISION

The ALJ 2 noted that, of the four items in the Board's order, those that remained at issue were items three and four of the Board's order: reinstatement and back pay. Regarding item 4, the back pay award, the ALJ 2 agreed with the County that its liability for back pay terminated with the layoff of February 13, 2008. Regarding item 3, the reinstatement award, the ALJ 2 determined that the County had failed to comply. In addition, the ALJ 2 determined that Brewington had satisfied his duty to mitigate damages by going into business for himself, and that the County could offset from its liability $20,400 earned by Brewington in the 2006 and 2007 tax years.

To remedy the County's failure to comply with the Board's reinstatement order, the ALJ 2 ordered the County to take following affirmative actions:

> 1. Pay Brewington his salary and restore his benefits at the Associate Civil Engineer classification level from December 31, 2009 forward until he is offered immediate reinstatement to his former position of employment or, if that position no longer exists, then to a substantially similar position. Such payment and restoration shall include an augmentation at the rate of 7 percent per annum.

2. Such payment of salary and restoration of benefits set forth in paragraph 1 may be offset by $20,400.00 as the amounts of income earned by Brewington in calendar years 2006 and 2007.

3. Offer Brewington immediate reinstatement to his former position of employment, or if that position no longer exists, then to a substantially similar position.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Mr. Brewington or his representative.

DISCUSSION

As the ALJ 2 appropriately noted, the purpose of the compliance proceeding was to determine whether, or to what extent, the County had complied with the Board's order. The purpose was not to provide the County with yet another opportunity to challenge that order or the Board's remedial authority. The County availed itself of that opportunity in *County of Riverside, supra,* PERB Decision No. 2090-M, but failed to persuade the Board, or the Court of Appeal, of its position.

In the Board's decision of December 31, 2009, the Board adopted the ALJ 1's proposed order of April 25, 2008, which required the County to offer Brewington immediate reinstatement to his former position of employment, or, if that position no longer existed, then to a substantially similar position. Over five years since the ALJ 1's proposed order and after all possible avenues for appeal have been exhausted, the County remains locked into the same unlawful position it has maintained all along. The County has had the option to relieve itself

of any further liability by making Brewington a valid offer of reinstatement.[6] Instead, the County has chosen to allow its liability to grow with each passing day. (See *Davis v. Los Angeles Unified School Dist. Personnel Com.* (2007) 152 Cal.App.4th 1122, 1132 ["The intended effect of reinstatement is to reduce or eliminate an employer's liability for monetary damages by returning the employee to the workplace and compensating him or her for actual work."].)

The County's Arguments

The County argued in the compliance hearing that it complied with the Board's order by retroactively reinstating Brewington in the County's human resources computer system, PeopleSoft, in order to calculate the initial back pay award. County Human Resources employee, Jennifer Moquin (Moquin), was called as a witness at the compliance hearing to support the County's argument that the County had complied with the Board's reinstatement order. She testified that Brewington had in fact been reinstated when he was reinstated "in the system." Another Human Resources employee, Tiffany Bates, testified in the same vein:

> Q For purposes of complying with this order, in your interactions with Ms. Moquin and employee relations, was Mr. Brewington immediately reinstated to his former position as of August 23, 2006?
>
> A He was, yes. For the purposes of back pay, he was placed back into the PeopleSoft system and reinstated into that position, yes.

The County's argument is absurd on its face. To reinstate is to return an employee to the workforce, not to restore an employee's employment status in a computer system for purely administrative or fiscal purposes. The former promotes the policies of the MMBA. The latter

[6] An employer's liability for back pay is terminated by an employee's rejection of a valid offer of reinstatement. (*Otay Water District* (2004) PERB Decision No. 1634-M.)

is a fictional event, the masquerading of which as "reinstatement" offends the policies of the MMBA.

The County's exceptions can be distilled down to one main argument. The County argues that Brewington would have been laid off on February 13, 2008, and that the County's liability for both back pay and reinstatement under the Board's order was effectively cut off as of that date.

At the outset, we distinguish between the initial back pay award under item four of the Board's order requiring the County to "[m]ake Brewington whole for financial losses which he suffered as a direct result of his termination" and the additional back pay award under item one of the ALJ 2's order. The ALJ 2 deemed the County's back pay obligation under item four of the Board's order was satisfied by a payment made by the County to Brewington covering August 23, 2006, the date of Brewington's unlawful termination, through February 13, 2008, the date of the layoff. We do not take issue with that determination. The County's back pay obligation under item one of the ALJ 2's order, however, is a separate issue. Even if the County's initial back pay liability terminated at the time of layoff, additional back pay liability began to accrue with, and flows directly from, the County's failure to comply with the Board's reinstatement order.

The County's argument, that its liability under the Board's reinstatement order terminated with the layoff, is undermined by a single indisputable fact. The Board's reinstatement order was not limited to Brewington's former position, a position that was subject to the layoff and subsequently abolished in a departmental reorganization. The Board's order recognized that Brewington's position might no longer exist. The Board addressed that

contingency by allowing the County to reinstate Brewington, in the alternative, "to a substantially similar position." This clause alone defeats the County's argument.[7]

None of the witnesses called by the County at the compliance hearing testified that the County made any attempt to comply with the Board's reinstatement order other than to reinstate him "on the books" in order to calculate the initial back pay award. Most of the testimony demonstrated that the County functioned under a misunderstanding of its obligations. It was the County's responsibility to actively search for a position and make Brewington a valid job offer. Brewington was under no obligation to reapply for employment with the County and go through a competitive hiring process as though he were seeking employment with the County for the first time. SEIU worksite organizer, Nick Martinez, should not have had to file, on behalf of Brewington, multiple requests under the California Public Records Act, section 6250 et seq., attempting to elicit from the County information about open positions. Brewington had been unlawfully terminated and it was the County's

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[7] From the beginning, the County has been operating as though there is no difference between "former position" and "substantially similar position" in the Board's reinstatement order.

> Q So, at the time you reviewed PERB's decision ordering immediate reinstatement to Mr. Brewington, it's fair to say you didn't review whether or not the classification of associate civil engineer existed at the County?
>
> A That's correct. I didn't review to see if there was any other incumbents filling that classification elsewhere.

(Testimony of Moquin at the compliance hearing.)

responsibility to rectify the wrong, not Brewington's.[8] As important, the burden of proving compliance with the Board's reinstatement order rested with the County. On this point, we find the following unrebutted testimony of Brewington to be relevant and inherently credible given the County's recalcitrance on the reinstatement issue:

> Q . . . My first question to you is, has anybody at the County, following PERB's decision, ever offered immediate reinstatement to your former position of employment?
>
> A No, they have not.

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[8] The court in *NLRB v. Cowell Portland Cement Co.* (9th Cir. 1945) 148 F.2d 237 rejected the same argument in a case challenging a reinstatement order. The court stated:

> Another objection is that some of the employees mentioned in these paragraphs – employees whom respondent discriminatorily discharged – have not applied for reinstatement. This is not a valid objection.
>
> [¶ . . . ¶]
>
> Another objection is that the former positions of some of the employees mentioned in these paragraphs have been abolished. This is not a valid objection. Employees whose former positions have been abolished can be offered 'substantially equivalent positions,' as provided in paragraph 2(a).

(*Id.* at p. 245, fns. omitted.)

See also *Idaho Potato Growers, Inc. v. NLRB* (9th Cir. 1944) 144 F.2d 295. The court stated:

> Where there has been a discriminating discharge, we do not understand that the 'order to make whole' is dependent upon the discharged employee's application for re-employment. There is nothing in the record which indicates in the slightest that either Moore or Rash would not at any time have accepted reinstatement.

(*Id.* at pp. 304-305.)

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.)

Q Okay. Has anybody at the County ever contacted you or communicated to you that your former position of employment no longer existed?

A No, they have not.

Q Has anybody at the County ever communicated with you as to whether or not he or she felt a substantially similar position at the County existed?

A No, they have not.

And, when asked whether he was able to return to work with the County, Brewington testified: "I would certainly hope so. I'm ready."

The evidence produced by the County at the compliance hearing fails to establish that there were no "substantially similar positions" anywhere in the County for which Brewington was qualified. Because the associate civil engineer classification was abolished in the Department of Building and Safety where Brewington last worked, the County argues that this further supports the County's position that it has fully complied with the Board's order. The Board's reinstatement order, however, is not limited to the Department of Building and Safety. Greg Neal, a deputy director in the County's planning department, testified at the compliance hearing as follows:

Q Okay. But you do know that other departments employ civil engineers, correct?

A Yes.

Q And isn't it true, in fact, that the transportation department for the County of Riverside employs engineers?

A Yes.

Q Okay, and isn't it true, in fact, that the facilities management department for the County of Riverside employs civil engineers?

A I believe they do.

Q Okay, and isn't it true, in fact, that the waste management department for the County of Riverside employs civil engineers?

A I believe they do.

As the ALJ 2 points out, the County has had open associate civil engineer positions in the Flood Control Department where Brewington had prior experience. Moreover, although the civil engineer classification series was eliminated in the Department of Building and Safety, a new plans examiner classification series had been created for that department. As the ALJ 2 also notes, the salary range for the associate civil engineer classification was equivalent to a plans examiner V. Brewington remained in the associate civil engineer classification at the time of his termination, but his last assignment was as a grading plans examiner. The County had assigned him a business card that identified his title as grading plans examiner. Brewington's performance evaluation of December 22, 2003, showed that he had been cross-trained to perform a wide variety of work. As the ALJ 2 concluded:

> Clearly, Brewington should have been able to qualify for one of the five levels in the Plans Examiner series, especially since one of the levels was a trainee/entry level.

Even had the County been able to prove at the compliance hearing that it had no positions available when the County first came under the reinstatement order, the County would still have been required to comply with the reinstatement order with the next available substantially equivalent opening, such as the newly created plans examiner classification series. (*Santa Clara Unified School District* (1985) PERB Decision No. 500, proposed decision, p. 44.) The problem, however, is not that the County has lacked the opportunity to comply with the Board's order to reinstate Brewington. Instead, the County decided from the start that the layoff of February 13, 2008, relieved the County of its legal obligation to do so.

In sum, the County has shown insufficient understanding of the seriousness of its unfair practice violation and the consequences of its failure to comply with the Board's reinstatement order. Termination of employment is the most severe form of adverse action an employer can take against an employee. When a termination is found to have been unlawfully motivated, as it was here, a reinstatement order serves an important public policy purpose. As the court stated in *NLRB v. Mall Tool Co.* (7th Cir. 1941) 119 F.2d 700:

> We recognize that a reinstatement order is not merely a means of vindication or of restitution of private rights and that the policy of the act, in behalf of the public welfare, requires that coercive effects of discrimination upon all employees be dissipated by means of reinstatement, where the act so authorizes.

(*Id.* at p. 703.)

Not once did the County contact Brewington to discuss the reinstatement order, to assist him in determining his options or to negotiate a fair resolution of the issue, let alone to make him a valid offer of reinstatement. The County could have offered Brewington a substantially equivalent job anywhere in the many departments and agencies within County government. Instead, the County did nothing. In conclusion, we agree with the ALJ 2 that the County has failed to comply with the Board's reinstatement order and none of the County's arguments are of any avail.

The County's Legal Authorities

None of the cases cited by the County stands for the proposition that the County's layoff of February 13, 2008, cancels out the reinstatement order.[9] The County quotes the following passage from *Ackerman v. Western Electric Company, Inc.* (N.D. Cal. 1986) 643 F.Supp. 836: "A wrongfully terminated employee is not entitled to back pay for a period

[9] The County's cases on the issue of speculative damages in breach of contract matters are inapposite to the issue before us and will not be discussed.

when he or she would not have been on the job in any event for a reason unrelated to the unlawful conduct of the employer." (*Id.* at p. 854.) That quote is taken from a section of the court's opinion on back pay. Reinstatement and front pay were addressed by the court in a different section of the opinion. According to the court in *Ackerman*, where reinstatement is not "feasible," front pay may be awarded. The court awarded plaintiff front pay for a period of three years, computed at the rate of net back pay payable under the back pay order, in lieu of reinstatement. As the *Ackerman* case demonstrates, back pay and reinstatement are two separate remedies. While the ALJ 2 found that the County complied with its initial back pay obligation under item four of the Board's order by paying Brewington through the date of the layoff, he properly recognized reinstatement under item three of the Board's order as a distinct and separate issue with its own additional back pay consequences for failure to comply. Also, *Ackerman* serves to remind us of the proper focus in these proceedings, the County's unlawful conduct. As the court held:

> Finally, since the Company's unlawful conduct has created the necessity for this back pay judgment, any uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating party.

(*Ibid.*, internal citations and quotation marks omitted.)

The County's reliance on *Blackburn v. Martin* (4th Cir. 1992) 982 F.2d 125 is equally misplaced. The court's statement that the plaintiff "should not recover damages for the time after which his employment would have ended for a nondiscriminatory reason" was made in the context of back pay liability, not reinstatement. The issue in *NLRB v. Master Slack and/or Master Trousers Corp* (6th Cir. 1985) 773 F.2d 77, also concerned back pay awards, not reinstatement, and therefore the County's reliance on this case is similarly misplaced. Again, the problem here is not the initial back pay award, which the County has satisfied; it is the

additional back pay award arising out of the County's failure to comply with the Board's reinstatement order. In discussing the remedial authority of the National Labor Relations Board, the equivalent of PERB for the private sector, the court stated:

> The Board's discretion to fashion appropriate remedies for violations of the Act is quite broad and its choice of remedies should be set aside only if "it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act."

(*Id.* at p. 83.)

The County relies on the following statement in *Rivcom Corporation v. Agricultural Labor Relations Bd.* (1983) 34 Cal.3d 743: "Under the circumstances, we construe the order as self-limited to losses *directly* arising *from the unlawful conduct*. That interpretation excludes those former employees who would not have been rehired even under a legitimate hiring policy." (*Id.* at p. 773, italics in the original.) The Agricultural Labor Relations Board's (ALRB) order, however, specifically recognized that the company's needs might not accommodate all the former workers. The ALRB's order therefore "directed that those who could not be reinstated immediately be placed on a nondiscriminatory preferential-hiring list approved by the regional director."[10] Similarly here, too, the Board in *County of Riverside, supra,* PERB Decision No. 2090-M recognized that Brewington's former position might no longer exist, and planned for that contingency by allowing the County to comply with its order by offering Brewington a "substantially similar position."

[10] See also *Quick Shop Markets, Inc.* (1967) 168 NLRB 180, a case involving a store reorganization resulting in the elimination of positions. The NLRB found that although immediate reinstatement was not possible, the affected employees "shall be offered employment before any new employees are hired." (*Id.* at p. 190.)

The County also relies on *Davis v. Los Angeles Unified School Dist. Personnel Com., supra,* 152 Cal.App.4th 1122. In *Davis*, plaintiff was demoted, but before learning of his demotion, commenced disability leave and remained unavailable for work. The Personnel Commission found the demotion to be wrongful and ordered reinstatement to plaintiff's prior position effective as of the date of the demotion. The issue was whether plaintiff was entitled to full back pay for a period when he was not available for work due to a nonindustrial illness. The court concluded that an employee is not entitled to earnings he or she would not have received in any event and that the plaintiff was not entitled to immediate reinstatement given that he was medically unable to return to work. The facts in *Davis* are distinguishable from the facts here.

Given the court's definition of reinstatement as "synonymous with returning to work," *Davis v. Los Angeles Unified School Dist. Personnel Com., supra,* 152 Cal.App.4th 1122, 1131, it is unclear why the County cites this case in support of its position. The court in *Davis* would not agree with the County here that "reinstating" Brewington in the County's computer system for purposes of calculating its initial back pay liability qualifies as reinstatement in the true sense of the word. The County's reinstatement obligation under item three of the Board's order, as distinct from its back pay obligation under item four of the Board's order, will be satisfied only when the County returns Brewington to the workplace and compensates him for his actual work or Brewington rejects a valid offer of reinstatement. This is the meaning the *Davis* court ascribed to the word "reinstatement."

Finally, the County relies on *Beverly Hills Unified School District* (1990) PERB Decision No. 789 (*Beverly Hills*) because the Board found reinstatement to be an inappropriate remedy in that case. As Brewington points out in his response to the exceptions, *Beverly Hills* involved a temporary employee on an emergency credential who was lawfully terminated prior to any unlawful act on the part of the school district. In contrast, Brewington's termination itself was the unlawful act. As the Board stated in *Beverly Hills*:

> The District relies primarily on San Diego Community College District (1988) PERB Decision No. 662 (appeal pending, Civ. No. D009278), in which the Board declined to order reinstatement or back pay where the illegal contracting out had been preceded by an independent and lawful decision to lay off. . . .
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> We believe that the District's arguments with regard to San Diego have merit. As in San Diego, in the present case, *there was a lawful decision to eliminate* . . . the affected teachers. The later decision to review the OP by unilaterally contracting out . . . is much like the contracting out of certain foreign language courses in San Diego that occurred after an earlier decision to stop offering those courses. . . .

(*Id.* at p. 18, emphasis added.)

The County cites another series of cases for the proposition that the Board's reinstatement order violates "basic requirements of the civil service process." A compliance proceeding may not be used as an opportunity to re-litigate the underlying decision and order. The sole question presented is whether the County complied with the Board's reinstatement order. Whether the County agrees with the order is no longer of moment. The County availed itself of the opportunity to challenge the Board's decision, and lost. The Board's decision and,

specifically as relevant to this discussion, the Board's reinstatement order in *County of Riverside, supra,* PERB Decision No. 2090-M is final and subject to enforcement.[11]

Modification of the ALJ's Proposed Order

To remedy the County's failure to comply with the Board's reinstatement order, the ALJ 2 proposed that the County be ordered to pay Brewington additional back pay from December 31, 2009 forward, take as an offset $20,400, offer Brewington immediate reinstatement to his former position or to a substantially similar position, and provide written notification of the actions taken to comply with the ALJ 2's order to the PERB General Counsel. We adopt the ALJ 2's order with one exception. The County's liability for additional back pay shall be fixed as of the date the proposed decision in *County of Riverside* (2009) PERB Decision No. 2090-M would have become final in the absence of the County's unsuccessful appeal, which is May 20, 2008.

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[11] If there was ever a doubt as to PERB's power to remedy an unfair practice with a reinstatement order, it was resolved in *McFarland Unified School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166. Similar to the County's civil service argument in this case, the school district in *McFarland* argued that PERB's reinstatement order impermissibly interfered with the school district's authority to decide whether to grant tenure to a probationary teacher. The court held that PERB, pursuant to its statutory authority to order reinstatement as a remedy for an unfair practice, may order a probationary teacher's reinstatement to a tenured position upon its determination that an unfair practice resulted in nonreelection. As the court held:

> The initial determination regarding whether there has been an unfair labor practice and what shall be the remedy is within the exclusive jurisdiction of the PERB. (Gov. Code, § 3541.5.) In fashioning a remedy, the PERB has the express authority to order reinstatement. (*Ibid.*) The fact that Stephens-Weaver will automatically obtain tenure as a result of reinstatement does not mean that the PERB is interfering with the District's authority to establish and regulate tenure. It merely gives effect to the determination that Stephens-Weaver would not have been denied tenure but for her exercise of protected rights. The reinstatement order was not in excess of the PERB's authority.

(*Id.* at p. 169.)

The Board in *County of Riverside, supra,* PERB Decision No. 2090-M adopted *verbatim* the ALJ 1's proposed order of April 25, 2008. The ALJ 1's proposed order included "immediate reinstatement." In adopting that same language in its decision of December 31, 2009, the Board could only have meant for the word "immediate" to refer to that point in time in which the ALJ 1 intended for it to apply, i.e., the date of issuance of the ALJ 1's proposed decision.

The Board has held that where a respondent elects to go to hearing and file exceptions to a proposed decision, the respondent runs the risk that exhaustion of the Board's administrative procedures will increase its liability for back pay in the event its appeal is unsuccessful. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221.) Such is the case here. The County has been on notice of the potential consequences of its conduct since receipt of the ALJ 1's proposed decision of April 25, 2008. By choosing to appeal rather than offer Brewington "immediate reinstatement," the County ran the risk that its liability would grow.

It is the Board's responsibility to enforce the labor laws of the State of California and to protect employees in the exercise of rights guaranteed to them under these laws. If we were to fix liability based on the Board's decision of December 31, 2009, rather than the ALJ 1's proposed decision, we would in effect be requiring Brewington to bear the consequences of the County's unsuccessful appeal. These consequences are the County's, and the County's alone.

CONCLUSION

In sum, we agree with the ALJ 2 that the County failed to comply with the Board's reinstatement order in *County of Riverside, supra,* PERB Decision No. 2090-M. To comply with the Board's order, the County is required to reinstate Brewington to his former position of employment or, if that position no longer exists, then to a substantially similar position. An

immediate, full and unconditional offer of reinstatement by the County will cap its liability for the additional back pay award, a back pay award that we emphasize was not inevitable but only made necessary by the County's ongoing failure to comply in full with the Board's order.[12]

ORDER

Upon the findings of fact and conclusions of law in this case, and the entire record, it is found that the County of Riverside (County) failed to comply with the order in *County of Riverside* (2009) PERB Decision No. 2090-M, by failing to offer John Brewington (Brewington) immediate reinstatement to his former position of employment or, if that position no longer existed, then to a substantially similar position. Additionally, it is found that Brewington satisfied his duty to mitigate damages, but that the County may offset $20,400 from the amount owed to Brewington.

Pursuant to the Meyers-Milias-Brown Act (MMBA), section 3509(a) and section 3541.3(i) and (n) of the Government Code, it hereby is ORDERED that the County, its governing board and its representatives shall:

A. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA AND THE BOARD'S PRIOR ORDER IN *COUNTY OF RIVERSIDE* (2009) PERB DECISION NO. 2090-M:

1. Pay Brewington his salary and restore his benefits at the Associate Civil Engineer classification level from May 20, 2008, forward until he is offered immediate reinstatement to his former position of employment or, if that position no longer exists, then to

[12] The County's request for oral argument is denied. The Board historically denies requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. *(Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Monterey County Office of Education* (1991) PERB Decision No. 913.)

a substantially similar position. Pay interest on such payments at the rate of 7 percent per annum.

2. Such payment of salary and restoration of benefits set forth in paragraph 1 may be offset by $20,400 as the amount of income earned by Brewington in calendar years 2006 and 2007.

3. Offer Brewington immediate reinstatement to his former position of employment or, if that position no longer exists, then to a substantially similar position.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or her designee. All reports regarding compliance with this Order shall be concurrently served on Mr. Brewington or his representative.

Members Winslow and Banks joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-261-M, *John Brewington v. County of Riverside*, in which all parties had the right to participate, it has been found that the County of Riverside (County) failed to comply with the order in *County of Riverside* (2009) PERB Decision No. 2090-M, by failing to offer John Brewington (Brewington) immediate reinstatement to his former position of employment or, if that position no longer existed, then to a substantially similar position. Additionally, it is found that Brewington satisfied his duty to mitigate damages, but that the County may offset $20,400 from the amount owed to Brewington.

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

A. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MEYERS-MILIAS-BROWN ACT AND THE BOARD'S PRIOR ORDER IN *COUNTY OF RIVERSIDE* (2009) PERB DECISION NO. 2090-M:

1. Pay Brewington his salary and restore his benefits at the Associate Civil Engineer classification level from May 20, 2008 forward until he is offered immediate reinstatement to his former position of employment or, if that position no longer exists, then to a substantially similar position. Pay interest on such payments at the rate of 7 percent per annum.

2. Such payment of salary and restoration of benefits set forth in paragraph 1 may be offset by $20,400 as the amount of income earned by Brewington in calendar years 2006 and 2007.

3. Offer Brewington immediate reinstatement to his former position of employment or, if that position no longer exists, then to a substantially similar position.

Dated: _____ COUNTY OF RIVERSIDE

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN BREWINGTON, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-261-M PROPOSED DECISION (January 30, 2013) COMPLIANCE

Appearances: The Leahy Law Firm, by Alan J. Leahy and Brent L. Valdez, Attorneys, for John Brewington; The Zappia Law Firm, by Edward P. Zappia, Attorney, for County of Riverside.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

PROCEDURAL HISTORY

On December 31, 2009, the Public Employment Relations Board (PERB or Board) issued *County of Riverside* (2009) PERB Decision No. 2090-M (*Riverside*). The County appealed the matter. The case had a lengthy appellate history, but on March 30, 2011, PERB's decision became final.

In *Riverside*, the Board held that the County of Riverside (County) unlawfully terminated John Brewington (Brewington) for alleged dishonesty and threats of workplace violence, as well as taking other actions against him, because of his exercise of protected activities and thereby violated the Meyers-Milias-Brown Act (MMBA).[1] In part, the Board's decision ordered the County to take the following affirmative actions to effectuate the policies of the MMBA:

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

1. Rescind Brewington's termination;

2. Expunge from its records, . . .

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

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

In short, the parties contest whether the County owed any obligation (or further obligation) of reinstatement to Brewington pursuant to the December 31, 2009 *Riverside* Order after the February 13, 2008 layoffs of all Associate Civil Engineers in the County's Transportation and Land Management Agency (TLMA), Division of Building and Safety (DBS),[2] and whether Brewington satisfied his duty to mitigate damages.

Complaint and Proposed Decision

On August 21, 2006 and November 28, 2006, the Acting General Counsel issued a complaint/amended complaint, alleging, inter alia, that Brewington was terminated for his exercise of protected activities. Formal hearings were held between October 22 and December 6, 2007 and briefs were filed by February 22, 2008. The administrative law judge (ALJ) assigned to the case issued her proposed decision on April 25, 2008. The proposed order directed the County to perform the same affirmative acts as later set forth in *Riverside*.

[2] The ALJ agrees with the County that its backpay (versus reinstatement) obligation pursuant to paragraphs 1 and 4 were cut off by the February 13, 2008 layoffs. The backpay obligation does not have the same or similar contingency language as the reinstatement order of "[o]ffer Brewington immediate reinstatement to his former position of employment or, if that position no longer exists, then to a substantially similar position . . ." (Emphasis added.)

Board Decision and Appellate History

A Statement of Exceptions was filed on June 11, 2008.[3] The Board issued its decision on December 31, 2009. On January 28, 2010, the County filed a Verified Petition for Writ of Extraordinary Relief and Request for Immediate Stay with the California Court of Appeal, Fourth Appellate District, seeking review of PERB's decision.[4] The court assigned the matter case number E050056. On February 24, 2011, the Court of Appeal issued an order summarily denying the petition. A petition for rehearing was filed and later denied on March 30, 2011.

Compliance History

On March 9, 2011, the PERB Office of the General Counsel requested that the County file an initial statement of compliance. On April 27, 2011, the County responded stating it would comply with the *Riverside* Order and noted some issues were still outstanding. A Compliance Status Conference was set for June 3, 2011. After this conference, the parties disputed whether paragraphs 3 and 4 of the *Riverside* Order had been satisfied. On November 2, 2011, the PERB Office of the General Counsel transferred the compliance matter to the PERB Division of Administrative Law in order that a hearing be conducted on the outstanding compliance issues.

A formal hearing was conducted on February 7, 2012. At the hearing, both parties agreed that the remaining issues centered on whether the County complied with paragraphs 3

[3] One of the exceptions, Exception 15, challenges the ALJ's order for reinstatement as Brewington stated that he was going to voluntarily leave his County job and had no interest in returning to the County. The ALJ takes official notice of the County's Statement of Exceptions filed in this matter. By the time the exceptions were filed, the February 13, 2008 layoffs had occurred.

[4] The appellate court docket did not reflect that the Request for Immediate Stay was ever granted.

and 4 of the *Riverside* Order. The matter was submitted for proposed decision upon the receipt of reply briefs on April 20, 2012.

FINDINGS OF FACT

Brewington's Employment History

Brewington was hired by the County on June 7, 1984, as a Junior Civil Engineer working for the Flood Control Department. On November 21, 1985, Brewington was appointed as an Assistant Civil Engineer with the DBS.[5] Since January 1986, Brewington performed the duties of a soil grading engineer in the DBS. On April 23, 1998, Brewington promoted to an Associate Civil Engineer position. Brewington transferred to the DBS Indio office on October 13, 2005. Although his civil service classification remained as an Associate Civil Engineer, his functional assignment was a soil grading plans examiner. Brewington was terminated from his position as an Associate Civil Engineer on August 23, 2006.

The County offered Brewington's evaluations from May 5, 1987 to December 22, 2003 to establish that Brewington would not have been hired if he applied and competed for vacancies as they came open with the County after the February 13, 2008 layoffs of Associate Civil Engineers within DBS.[6] These evaluations were kept by the County in Brewington's personnel file.

On May 5, 1987, Brewington received a performance report criticizing how he belittled and berated other staff, verbalized constantly, and created problems instead of solving them. On October 10, 1987, Brewington received a performance review informing him that he had

[5] The TLMA is an umbrella agency over five departments: DBS, Transportation, Environmental Programs, and Code Enforcement and Planning.

[6] The County also submitted documents which supported the termination action against Brewington. As those charges were deemed to be retaliatory under the MMBA and were supposed to be expunged, they will not be considered for purposes of the County's argument that he would be less competitive, if he applied for other positions with the County.

improved his ability to get along with others. On October 26, 1995, Brewington received a performance appraisal that he could be harsh when explaining what was required of staff and the public. On July 2, 1996, Brewington received a performance review which criticized him about the amount of work produced, not being a team player, being insensitive to his subordinate staff's needs and not accepting his supervisor's decisions. On July 18, 1996, Brewington received a performance evaluation which was critical of his criticisms of his supervisor. On October 30, 2000, Brewington received a performance review which was critical of his ability to be sensitive of other staff's point of view.

On December 22, 2003, Brewington received an annual performance review with ratings from meeting expectations to exceeding expectations. The Senior Civil Engineer evaluations included the following comments:

> John has a friendly disposition with most staff as well as the public. He is also familiar with many staff members at Flood Control, Transportation, Planning and Survey. This familiarity is often helpful in the determination of certain aspects of project status. His relationship with the private sector professionals, developers and other owners seem to vary with the degree of insistence on proper documentation and the completion of technical analysis and stated corrections pertaining to the development proposals. Nonetheless, some consulting engineers actually appreciate his ability to focus on the major plan check issues and other evaluation situations and his willingness to discuss.
>
> [¶ . . . ¶]
>
> With his cross training background in Flood Control, Transportation, Building & Safety and knowledge of Planning (Land Use) requirements, he is well qualified and has proved to be excellent at training other staff – most recently: engineering technicians, junior engineer[s] and engineering interns.

(Emphasis added.)

Pertinent Memorandum of Understanding Sections

The Memorandum of Understanding (MOU) between the Service Employees International Union (SEIU) Local 1997 and the County for the Professional Unit between 2006 and 2009, Article XVI "Layoff and Reinstatement," provides in pertinent part:

Section 2. Reduction in Force

A. When it becomes necessary to reduce the work force in a department, the department head shall designate the job classification(s) to be affected, and the number of employees to be eliminated within the department. . . .

[¶ . . . ¶]

B. Layoffs of employees within each classification shall be based primarily on date of hire with the least senior employees being laid off first. . . .

[¶ . . . ¶]

Section 5. Departmental Reinstatement List

A. The name of every regular employee who is laid off for longer than one (1) pay period due to a reduction in force, . . . shall be placed on Departmental Reinstatement Lists for all classifications of a currently equal or lower salary range in which the employee ever held regular status, provided the department is allocated any positions of such classification.

B. Any vacancy to be filled within a department shall be offered first, in order of greatest seniority, to individuals on the Departmental Reinstatement List for the classification of the position to be filled.

C. An employee's name shall be removed from Departmental Reinstatement Lists, for specific classifications for any of the following reasons:

1. The expiration of two (2) years from the date of placement on the list.

Departmental Layoffs and Reorganization

On January 23, 2008, DBS sent a "Notification of Layoff" to lay off two Subdivision Engineers,[7] two Senior Engineers, seven Associate Civil Engineers, one Assistant Engineer, and two Junior Engineers due to decreased workloads and departmental revenues. The layoffs were supposed to be effective the close of business on February 13, 2008. The notification listing the names of the least senior employees stated they would be placed on a departmental reinstatement list and that any position vacancies within the department would be offered first to persons on this list in order of seniority. All seven Associate Civil Engineers scheduled for

[7] The Subdivision Engineer is the supervisorial series for the Associate Civil Engineer.

layoffs were laid off. Brewington was more senior than all seven Associate Civil Engineers laid off. The only engineer in DBS not placed on the layoff list was Subdivision Engineer Kack Sung (Sung) who was hired with the County on November 1, 1983 and was more senior than Brewington. After the layoffs, the Associate Civil Engineer position was eliminated from DBS.

Based upon a reorganization within DBS, the DBS decided to create a new classification series: the Plans Examiner series. On January 29, 2009, the County established the series specification of Plans Examiner (I through V), which provided in pertinent part:

> PLANS EXAMINER I
>
> CLASS CONCEPT
>
> Under close supervision, to perform the most routine phases of technical and analytical plans examiner work in the receipt and review of plans for buildings and structures, to assist the public counter in issuing permits, to check plans for conformity to uniform building codes, ordinances, and administrative orders, to participate in training in order to learn more responsible work; and to do other work as required.
>
> This class is the trainee/entry level in the Plans Examiner series.
>
> PLANS EXAMINER II
>
> CLASS CONCEPT
>
> Under general supervision of a licensed engineer, to continue learning plans examiner practices, procedures, and methodologies in the plans examiner series. To assist the public counter in issuing permits, to inspect the more complex projects, review water quality plans and permit requirements, and to participate in training in order to continue to learn more responsible work; and to do other work as required.
>
> This is the intermediate working level class of the Plan[s] Check Engineering series. . . .
>
> PLANS EXAMINER III
>
> CLASS CONCEPT
>
> Under direction, to perform difficult and complex plans examiner practices, procedures and methodologies in the plans examiner series. To examine residential, commercial, industrial building and grading plans, to assist the

public counter with code questions, review water quality plans, and permit requirements, and to do other work as required.

The Plans Examiner III class is the fully-qualified working level in the professional Plans Check Engineering series and is characterized by a variety of regular and unusual assignments, following standard staff procedures without instruction. . . .

PLANS EXAMINER IV

CLASS CONCEPT

Under direction, to perform the most difficult and complex plans examiner practices, procedures and methodologies in the plans examiner series. To examine professional structural or grading engineering work; makes structural engineering analysis of proposed commercial, industrial, and a variety of buildings and structures. This work is characterized by the requirement for independently performing the full scope of building code and engineering review, with full responsibility for any combination of building code review, planning, specification writing, engineering plan review, or inspection necessary for the completion of projects.

This is the advanced working and lead level in the Plans Examiner series. . . .

PLANS EXAMINER V

CLASS CONCEPT

Under direction, to assist in planning, organizing and managing a group of professional and support plans examiner personnel or perform difficult and varied professional civil engineering work in the review of building or grading plans; and to do other work as required.

Positions in this class are characterized by their responsibility for managing and coordinating the activities of a major section within the plans examiner division, or a district office or performing at the fully qualified professional and civil engineering review work.

(Emphasis added.)

DBS Director Mike Lara (Lara) stated that the new classification series was created so that the Plans Examiner's duties included soil grading plan review, as well as building code and structural review. The Plans Examiners would replace the Associate Civil Engineers who exclusively reviewed soil grading plans or exclusively reviewed building codes and structural plans. In a sense, two assignments were combined into one to better cross-train those

employees. The salary range for an Associate Civil Engineer was equivalent to a Plans Examiner V.

The 2009-2010 County Budget report reflected that DBS had authorization to hire three Plans Examiner IV's and two Plans Examiner V's. Of the seven Associate Civil Engineers who were laid off only two were rehired/hired back by DBS: Chandras Desai (Desai) was hired as a Plans Examiner V on May 7, 2009 and Hua-Hsing Wu (Wu) was rehired in the County's Temporary Assignment Program (TAP)[8] as an Associate Civil Engineer on February 28, 2008, and then hired as a Plans Examiner V on March 26, 2009. When Desai and Wu were hired, they were not hired as a part of the layoff reemployment process because the Plans Examiner series were new positions for which employees had to apply and compete.[9] When Lara evaluated candidates during the competitive hiring process, he reviewed the résumés of the candidates. Lara did not believe that Brewington possessed the needed experience of building code and structural plan review for the Plans Examiner position.

Fiscal State of the County

The County's budget reports from the midyear 2008-2009 through 2010-2011 all reflect that the County was facing cost overruns and declining revenues. Planned cuts in the County's budget included staff reductions and possible layoffs, if staff attrition had not already reduced personnel costs. Additionally, individual departments experienced across the board cuts of 5 percent and 10 percent. By the 2010-2011 fiscal year, the County's long-term outlook for

[8] The TAP is a personnel staffing agency operated by the County where the County can hire a temporary employee through the TAP program for a period of up to six months.

[9] The merit system competitive hiring process begins when the County Human Resources Department performs a recruitment based upon current résumés in the County's Resumix system, of which the most qualified applicants are placed on a certified list which are then referred to the hiring department for interviews. The résumés are screened to determine whether the candidate meets the qualifications of the position. To comply with the County's Civil Service System, all appointments must be based on merit and ability.

discretionary revenue improved from the prior two fiscal years, but the structural deficit was expected to top $130 million and further layoffs were anticipated.

As of August 8, 2011, there were 30 filled Associate Civil Engineer positions with the County. Nine of those positions were vacant, but the County was not recruiting and hiring for those positions at the time. The decision whether to fill a vacant position or leave it unfunded was a budgetary decision made at the departmental level as each department determined its own budget. The TLMA's Transportation Department, and the Facilities Management Department and the Waste Management Department all employed civil engineers.

Mitigation and Offset

The County contracts with a vendor, "The Work Number," to provide a service to potential employers so they may obtain the dates of employment of former or current County employees seeking employment from them. The Work Number does not provide information as to how a County employee was separated or performed while at work.

Since Brewington's termination in August 2006, he did not send out any résumés to other public or private sector employers. Brewington explained that he did not do so as private sector employers were aware of his termination and told him not to apply as they would not hire him and jeopardize their relationship with the County. Brewington contemplated applying with the federal government, but did not think he could pass the backgrounds check. In 2005 and 2006, residential and commercial development in Riverside County was active.

On September 8, 2006, Brewington started Brewington Group Incorporated, an engineering company, and rented an office in Corona. He believed engineering firms would not hire him and it was best that he obtain his own contracts for work. He tried to get work by procuring contracts with firms that had projects with different counties. During tax year 2006, Brewington received a W-2 reporting $6,970.00 in income and during tax year 2007,

Brewington received a W-2 reporting $13,430.00 in income. He always worked more than 40 hours a week.

Brewington received no taxable wages in 2008 and 2009. By 2009, Brewington was trying to salvage the contracts that he had and the business ran into serious debt. By February 2010, he could not afford to continue to accumulate debt. Brewington continued to try to find work with other firms through his personal contacts, but the firms would not hire him.

Order for Reinstatement and Current Engineer Openings

When the County processed Brewington's backpay check pursuant to the December 31, 2009 *Riverside* Order, the human resources office "reinstated" Brewington to his former position, Associate Civil Engineer, back to August 23, 2006 and paid him back salary and back benefits from that date until February 13, 2008, as the County had laid off all Associate Civil Engineers within DBS on that day. This "reinstatement" was not offering Brewington employment/reemployment, but a personnel transaction made in the County's human resource management system, PeopleSoft, which allowed the County to process a back salary and back benefit award.

Since the issuance of the December 31, 2009 *Riverside* Decision, Brewington has never been contacted by the County and offered to return to employment to his former position or a substantially similar position.

As of the date of the hearing, February 7, 2012, no civil engineering positions were available in TLMA and DBS, but there were civil engineer openings in the Flood Control Department. County Human Resources Manager Tiffany Bates (Bates) stated there were not any comparable positions open or funded in TLMA also. Bates explained that there were three Associate Civil Engineer or similar openings in the Flood Control Department in 2011. Of the

three employment offers that were made for these positions, two candidates declined the offers and the Flood Control Department offered them to others on the certified list. Interviews were being conducted with candidates on the certified list for the current civil engineering position opening in Flood Control Department.

ISSUES

1. Did the County comply with the December 31, 2009 *Riverside* Order to offer Brewington immediate reinstatement to his former position of employment or, if that position no longer existed, to a substantially similar position?

2. Did Brewington satisfy his duty to mitigate damages?

CONCLUSIONS OF LAW

Statutory Authority

Pursuant to MMBA section 3509(a) and Government Code section 3541.3(i) and (n), PERB is given the authority to:

> (i) To investigate unfair practice charges or alleged violations of this chapter, and take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter, . . .
>
> [¶ . . . ¶]
>
> (n) To take any other actions as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter.

(Emphasis added.)

Additionally, Government Code section 3541.5(c) provides:

> The board shall have the power to issue a decision and order directing the offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without backpay, as will effectuate the policies of this chapter.

(Emphasis added.)

Challenges to the Board's Authority to Order Reinstatement

The County raised numerous challenges to the appropriateness of the *Riverside* Order that it be compelled to reinstate (make a valid offer of employment/reemployment to) Brewington after December 31, 2009. Those challenges center on the reinstatement order being inappropriate as the County's obligation to make an offer of employment/reemployment was cut off after the February 13, 2008 layoff as it was violative of the County's Civil Service system to hire employees based upon merit and ability;[10] as violative of the MOU's management rights clause in which the County maintains the right to determine the methods, means and personnel by which County government operations are to be conducted and administer the Local Merit System;[11] as violative of California Constitution Article XI sections

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[10] According to the County, the Riverside County Code 440, section 6(a), which was relevant to the time in question, provided in pertinent part:

> Section 6. Employment Procedures
>
> a. The personnel administration under this ordinance is designated a merit system. Appointments and promotions shall be made on the basis of merit and ability. Each officer shall appoint all necessary employees allowed for his or her department by this ordinance only from among persons certified to him by the Human Resources Director as eligible for the respective positions. . . .
>
> [¶ . . . ¶]
>
> c. Officers shall appoint only persons certified to them by the Human Resources Director as eligible for the particular position. . . .

[11] MOU Article III, section E provides in pertinent part:

> The County retains, among other management rights, the exclusive right to determine the methods, means, and personnel by which County government operations are to be conducted, . . .
>
> It also retains the sole right to administer the Local Merit System, to classify or reclassify positions, add or delete positions or classes; to establish standards for employment, promotion, and transfer of employees; . . . to establish work schedules and work assignments, . . . and to relieve its employees from duty for lack of work or other legitimate reasons.

1(b) and 11(a);[12] as violative of Riverside County Code 5.A.;[13] and, as violative of Riverside County Code Section 6.[14] All of these arguments were either raised in the appellate court

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[12] California Constitution Article XI, sections 1(b) and 11(a) provided in pertinent part:

> 1(b) . . . The governing body shall provide for the number, compensation, tenure, and appointment of employees.
>
> 11(a) The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions.

[13] According to the County, the RCC section 440, Section 5.A., which was relevant to the time in question, provided in pertinent part:

> Section 5. POSITIONS ALLOWED
>
> 5.A. AUTHORIZED POSITIONS
>
> (1) Position Control. No person shall be appointed to a position in any department until the position has been allowed. The number of positions allowed to be filled in each department shall be allocated by job class and employment type (e.g., regular, seasonal, temporary, or Per Diem) in the approved department budget. . . .
>
> (2) Change in Allocated Positions. The Human Resources Director, with the approval of the County Executive Officer, may adjust the number of positions allocated to a department, without Board of Supervisors action, when no additional funding is required. . . . Other changes in the number of positions, those requiring additional funding, may be requested by department heads via Form 11 submitted to the Board of Supervisors. . . .

[14] According to the County, the County's Employee Relations Resolution relevant to the time in question, provided in part:

> Section 6. COUNTY RIGHTS
>
> a. The following rights and functions are vested exclusively in the County:
>
> [¶ . . . ¶]
>
> 3. To exercise control and discretion over its own organization and operations.
>
> [¶ . . . ¶]

proceedings or should have been raised in the appellate court proceedings[15] challenging the December 31, 2009 *Riverside* Decision.[16] Additionally, the County challenged the ALJ's reinstatement order in its Statement of Exceptions, but the Board did not change the order.

When the petition for rehearing was denied on March 30, 2011, the *Riverside* Order became final and the County will not therefore be allowed to bring these arguments forward to collaterally attack the *Riverside* Order again. The purpose of the compliance procedures is to determine whether the County has complied with the final orders of the Board (PERB Regulation 32980), not whether the Board had the authority to issue the order in the first place. For these reasons, these collateral attacks on the *Riverside* Order are rejected and will not be considered.

Reinstatement to Former or Substantially Similar Position

The standard remedy for a discriminatory discharge is reinstatement as it best effectuates the purposes and policies of the Act because it restores the status quo prior to the

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5. To relieve its employees from duty because of lack of work or for other legitimate reasons.

6. To determine the methods, means and personnel by which its operations are to be conducted, including the performance thereof by contract, and to determine workloads and staffing patterns.

7. To prescribe the qualifications for employment and determine whether they are met.

8. To take all other action except as clearly and expressly otherwise provided for by or pursuant to this Resolution.

[15] In its Verified Petition for Writ of Extraordinary Relief, the County alleged that PERB's award of reinstatement conflicted with the County's authority to manage its financial and management affairs granted by the California Constitution and conflicted with the County's management rights as set forth in its MOU and Employee Relations Resolution. The County had every opportunity to challenge PERB's reinstatement order on other grounds, but did not do so.

[16] Official notice was taken of PERB's hearing file and appellate litigation file.

unlawful action. (*Los Angeles Unified School District* (2001) PERB Decision No. 1469.) As a logical extension to PERB's authority to order reinstatement pursuant to Government Code section 3541.5(c) and its authority to "take any other actions as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter," pursuant to Government Code 3541.3(i) and (n), the Board has express authority to tailor a reinstatement order to best fit or remedy the violation. In the instant case, the final Board order directed the County to:

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

(Emphasis added.)

To order a violating employer to offer employment/reemployment or reinstatement to one's former position or to a substantially similar position if the former position no longer exists (or the use of comparable language), has been ordered previously in *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 19 (*Fairfield-Suisun*) and *Rainbow Municipal Water District* (2004) PERB Decision No. 1676-M, p. 2 (*Rainbow*).[17] This type of reinstatement order is also not unusual in cases before the National Labor Relations Board (NLRB), where it is expected that a period of time will pass between the date of termination and the date of the adjudication of the allegations of retaliatory termination (*Starr Group Home, Inc.* (2011) 357 NLRB No. 100, p. 2; *Camaco Lorain Mfg. Plant* (2011) 356 NLRB No. 143, pp. 4-5; *L.B.&B: Associates, Inc.,* (2006) 346 NLRB No. 92, pp. 1027 and 1032). In this case, as Brewington was terminated and it took time to adjudicate his complaint, it is

[17] In *Rainbow*, PERB used the language "offering him reinstatement to the position of Value Maintenance Technician, or if that position no longer exists to an equivalent position . . ." (*Rainbow*, *supra*, PERB Decision No. 1676-M, p. 2.)

understandable why PERB crafted the reinstatement order in the manner which it did, as it had done so previously in *Fairfield-Suisun* and *Rainbow*.

The County argued that it satisfied the reinstatement order when it "reinstated" Brewington by performing a personnel transaction rescinding its termination of Brewington on August 23, 2006. Such an interpretation of the term "reinstatement" cannot be the meaning of reinstatement in the *Riverside* Order. If this were the case, there would be no need to place in the order that Brewington be offered reinstatement "to his former position of employment or, if that position no longer exists, then to a substantially similar position." (Emphasis added.) Under the County's interpretation of reinstatement, a discriminatee could always be reinstated to his former position as they would only need to make a personnel transaction in the payroll database and the "substantially similar position" phrase would be rendered surplusage.

Contrary to the County's assertions, reinstatement means to make a valid offer of employment/reemployment which occurred after the date of termination. (*Fairfield-Suisun Unified School District*, *supra*, PERB Decision No. 2262, p. 19;[18] *Los Angeles Unified School District*, *supra*, PERB Decision No. 1469, pp. 3-5.) It is undisputed that the County never made a valid offer of employment/reemployment to Brewington and after December 31, 2009, the County had open Associate Civil Engineer positions. While these open positions were in departments other than DBS such as the Flood Control Department, Brewington had prior experience in Flood Control. Additionally, while Lara did not believe Brewington to have the experience on building code and structural review, his December 22, 2003 evaluation

[18] Specifically, in *Fairfield-Suisun,* p. 19, PERB described in the remedy section of the decision to "offer Campbell immediate unconditional reinstatement to a position of equivalent rank and stature as that held by Campbell prior to his termination . . ." and to pay him interest "from the date of his termination on March 25, 2010, until the date the offer of reinstatement is made to him." (Emphasis added.) Based on this language in *Fairfield-Suisun*, reinstatement is not a personnel transaction back to the date of termination, but an offer of employment/reemployment after the termination date.

mentioned his cross-training in those areas. Clearly, Brewington should have been able to qualify for one of the five levels in the Plans Examiner series, especially since one of the levels was a trainee/entry level.

The County also argued that offering Brewington employment/reemployment after the February 13, 2008 layoff was contrary to PERB precedent in *Beverly Hills Unified School District* (1990) PERB Decision No. 789 (*Beverly Hills USD*) and *San Diego Community College District* (1988) PERB Decision No. 662 (*San Diego CCD*). In *Beverly Hills USD* and *San Diego CCD*, the Board found a reinstatement remedy of the ALJ to be inappropriate and modified the remedy to eliminate the reinstatement order due to an intervening event of subcontracting job duties and a layoff. However, in this case the *Riverside* Order specifically used the language to "[o]ffer Brewington immediate reinstatement to his former position of employment or, if that position no longer exists, then to a substantially similar position" which accounts for an intervening event in which a discriminatee's former position no longer exists. To cutoff Brewington's reinstatement rights as set forth in the *Riverside* Order by the February 13, 2008 layoff, would strip the contingency language in the Order. A literal reading of the Order allows someone who suffered retaliation of termination to maintain some type of County employment which was at least substantially similar to his former position. Such a remedy clearly effectuates the policies of the MMBA by making whole the public employee who was wronged.

It is found that the County failed to comply with its duty to reinstate Brewington or offer him employment/reemployment to his former position of employment or, if that position no longer existed, then to a substantially similar position.

Duty to Mitigate Damages and Offset

Discriminatees have a duty to mitigate losses resulting from an adverse employment action, but the burden of establishing that a discriminatee failed in this duty rests on the employer who committed the wrongful act. (*Fresno County Office of Education* (1996) PERB Decision No. 1171 (*Fresno*).) As stated in *Fresno*:

> In establishing a failure to mitigate, the employer must demonstrate that the claimant failed to make efforts "consistent with the inclination to work and to be self-supporting." [Citations omitted.] Claimants are not expected to seek a job more onerous than the one from which they were removed but rather are expected to seek a substantially equivalent job. [Citations omitted.]

(*Ibid*, adopted ALJ's proposed decision, p. 4.)

Attempting to go into business for oneself can also satisfy the discriminatee's duty to mitigate damages. As summarized in *Lorge School* (2010) 355 NLRB No. 94, p. 5:

> It is well settled under Board precedent that self-employment is an adequate and proper way for a discriminatee to attempt to mitigate loss of wages. [Citations omitted.] There is no requirement that the self-employment be a financial success. "The fact that a self-employed discriminatee is not successful in his business does not demonstrate that he was not engaged in full-time self-employment because 'the principle of mitigation of damages does not require success; it only requires an honest good-faith effort.'" [Citations omitted.]

It is understandable why Brewington decided to go into business for himself based upon what was told him by engineering firms and the serious charges leveled against him by the County. He worked more than 40 hours a week and made progress in the beginning. Unfortunately, as time went on he accumulated more debt than profit and the business failed. The County was not able to demonstrate that Brewington did not exert honest good-faith efforts to mitigate his damages and it is found that he met his duty to mitigate damages.

However, while the County was unable to demonstrate that Brewington failed to meet his duty to mitigate damages, the County may offset from its backpay liability any amounts the discriminatee received in mitigation, typically "interim earnings" from other employment

between the time of layoff and the time of the offer of reinstatement. (*Fresno County Office of Education* (1996) PERB Decision No. 1171; *California School Employees Association v. Personnel Commission* (1973) 30 Cal.App.3d 241; *NLRB v. Brown & Root, Inc.* (8th Cir. 1963) 311 F.2d 447.) It is undisputed that Brewington earned $20,400.00 during the 2006 and 2007 tax years which were reported to the Internal Revenue Service. The County is entitled to set that amount off against monies it owes to Brewington.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the County of Riverside (County) failed to comply with the order in *County of Riverside* (2009) PERB Decision No. 2090-M, by failing to offer John Brewington (Brewington) immediate reinstatement to his former position of employment or, if that position no longer existed, then to a substantially similar position. Additionally, it is found that Brewington satisfied his duty to mitigate damages, but that the County may offset $20,400.00 from the amount owed to Brewington.

Pursuant to MMBA section 3509(a) and Government Code section 3541.3(i) and (n), it hereby is ORDERED that the County, its governing board and its representatives shall:

A. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT AND THE BOARD'S PRIOR ORDER IN *COUNTY OF RIVERSIDE* (2009) PERB DECISION NO. 2090-M:

1. Pay Brewington his salary and restore his benefits at the Associate Civil Engineer classification level from December 31, 2009 forward until he is offered immediate reinstatement to his former position of employment or, if that position no longer exists, then to a substantially similar position. Such payment and restoration shall include an augmentation at the rate of 7 percent per annum.

2. Such payment of salary and restoration of benefits set forth in paragraph 1 may be offset by $20,400.00 as the amounts of income earned by Brewington in calendar years 2006 and 2007.

3. Offer Brewington immediate reinstatement to his former position of employment or, if that position no longer exists, then to a substantially similar position.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Mr. Brewington or his representative.

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 95811-4124
(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, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (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, subdivision (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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 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, §§ 32300, 32305, 32140, and 32135, subd. (c).)