**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| UNION OF AMERICAN PHYSICIANS & DENTISTS,<br><br>Charging Party,<br><br>v.<br><br>COUNTY OF SAN JOAQUIN (HEALTH CARE SERVICES),<br><br>Respondent. | Case No. SA-CE-19-M<br><br>PERB Decision No. 1524-M<br><br>May 14, 2003 |

Appearances: Gary Robinson, Executive Director, for Union of American Physicians & Dentists; Steven B. Bassoff, Attorney, for County of San Joaquin (Health Care Services).

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the County of San Joaquin (Health Care Services) (County) to a proposed decision (attached) of the administrative law judge (ALJ). The ALJ held that the County violated the Meyers-Milias-Brown Act (MMBA)[1] by retaliating against Dr. David Gran (Gran) for exercising protected rights. Specifically, the ALJ found that the County disciplined Gran for allegedly providing deficient patient care and discussing union matters during clinical hours in retaliation for Gran's organizational campaign on behalf of the Union of American Physicians & Dentists (UAPD). After reviewing the entire record in this case, including the proposed decision, the County's exceptions and UAPD's response, the Board

[1] The MMBA is codified at Government Code section 3500 et seq.

finds the ALJ's proposed decision to be free from prejudicial error and adopts it as the decision of the Board itself. The Board writes separately to address the County's exceptions to the proposed remedy.

## DISCUSSION

The ALJ ordered the County to rescind the plan of corrective action (PCA) imposed on Gran, destroy any copies of the PCA, and notify the National Practitioner's Data Bank that the PCA was improperly issued. The County asserts that the ALJ's remedial order was improper, because PERB does not have jurisdiction to review the quality of care provided by physicians. That duty, argues the County, is within the exclusive purview of the hospital's Medical Evaluation Committee (MEC) pursuant to the Business and Professions Code. The County's only support for this proposition is Business and Professions Code section 809.05 which provides that: "It is the policy of this state that peer review be performed by licentiates." Since PERB is not a "licentiate," the County contends that PERB is without jurisdiction to conduct peer reviews.

The County's argument is fundamentally flawed because the Board is not engaging in the "peer review" of physicians. Nothing in the ALJ's decision purports to adjudicate the charges brought against Gran before the MEC. Rather, the issue before the ALJ was the motivation behind the charges. The ALJ's focus on the County's motive was proper since PERB is charged with determining whether the County committed an unfair practice. (MMBA sec. 3509.) The ALJ concluded that the charges against Gran were motivated by Gran's efforts to unionize the County's physicians. More importantly, the ALJ concluded that but for Gran's protected activities, the charges would not have been brought before the MEC. The ALJ's decision thoroughly documents the overwhelming evidence in support of these conclusions.

Because the charges against Gran would not have been brought before the MEC but for Gran's protected activities, the ALJ properly ordered the County to rescind the PCA.

The ALJ also ordered the County to reimburse Gran for the attorneys' fees that he incurred defending himself before the MEC. The County argues that the MMBA does not provide for the award of attorneys fees. Even if the MMBA allowed for such an award, the County cites to Hacienda La Puente Unified School District (1998) PERB Decision No. 1280 (Hacienda) for the proposition that an award of attorneys' fees is only appropriate "where a case is without arguable merit, frivolous, vexatious, dilatory, pursued in bad faith or otherwise an abuse of process."

The County's reliance on Hacienda is misplaced. Hacienda involves attorneys' fees that are incurred by a litigant in proceedings before PERB. Gran is not being awarded attorneys' fees that he incurred while prosecuting this action before PERB. Rather, Gran is awarded attorneys' fees incurred as part of the MEC proceedings. The purpose of the award is to "make whole" Gran for the monetary losses that he suffered as a result of the County's unfair practices. Contrary to the County's assertions, the Board has broad powers to issue compensatory or "make whole" remedies in unfair practice proceedings. (MMBA sec. 3509(a) and 3541.3(i); Mt. San Antonio Community College District v. Public Employment Relations Board (1989) 210 Cal.App.3d 178 [258 Cal.Rptr. 302].) Here, the ALJ determined that Gran's attorneys' fees were reasonably incurred to defend against the charges before the MEC. Because the charges would not have been brought against Gran but for his protected activities, Gran should be compensated for his attorneys' fees in order to make him whole.

Finally, the County argues that the award of attorneys' fees is improper because there is no evidence as to how much in fees Gran actually incurred. This is an issue that can be discussed between the parties. To the extent the parties are unable to reach a resolution, the matter can be submitted to the Office of the General Counsel which is responsible for enforcing the Board's order.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the County of San Joaquin (Health Care Services) (County) violated the Meyers-Milias-Brown Act (MMBA) , Government Code sections 3503 and 3506 and Public Employment Relations Board (PERB) Regulations 32603(a) and (b)[2], by retaliating against Dr. David Gran (Gran), interfering with his right to participate in activities of employee organizations of his own choosing, and denying the Union of American Physicians & Dentists (UAPD) the right to represent employees in their employment relations with public agencies.

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

A. CEASE AND DESIST FROM:

1. Retaliating against Gran by issuing a plan of corrective action dated October 4, 2001, because of his participation in an employee organization of his own choosing;

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

2. Interfering with Gran's right to participate in the activities of an employee organization of his own choosing by issuing him the August 23, and September 17, 2001, letters of warning, and;

3. Denying UAPD its right to represent employees by:

a. Retaliating against Gran by imposing its plan of corrective action; and

b. Threatening Gran because of his participation in activities protected by the MMBA.

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

1. Rescind the October 4, 2001, action of the Medical Executive Committee (MEC) adopting a plan of corrective action for Gran, destroy all copies documenting such action, including those contained in Gran's personnel file, and notify the National Practitioners Data Bank that the referral it made in this regard should be expunged from Gran's record.

2. Make Gran whole for monetary losses he may have suffered as a result of the referral of the complaint to the MEC, including but not limited to the reimbursement of reasonable attorneys fees and litigation expenses incurred in defending against the charges of physician malfeasance. This award shall include interest at the rate of seven (7) percent per annum.

3. Rescind the letters of warning issued to Gran on or about August 23, and September 17, 2001, and destroy all copies thereof.

4. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations at San Joaquin General Hospital (Hospital) and other clinics at which Hospital physicians practice, where notices to employees customarily are

placed, copies of the Notice attached hereto as an Appendix, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, defaced, altered or covered by any other material.

5. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of PERB in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on UAPD.

Members Whitehead and Neima 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. SA-CE-19-M, Union of American Physicians & Dentists v. County of San Joaquin (Health Care Services), in which all parties had the right to participate, it has been found that the County of San Joaquin (Health Care Services) (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503 and 3506, and Public Employment Relations Board (PERB) Regulations 32603(a) and (b) (Cal. Code Regs., tit. 8, sec. 31001 et seq.), when it retaliated against Dr. David Gran (Gran) by issuing him a plan of corrective action dated October 4, 2001, and interfered with his right to participate in an employee organization of his own choosing by issuing him two letters of warning dated August 23, and September 17, 2001. This conduct also denied the Union of American Physicians & Dentists (UAPD) the right to represent employees in their employment relations with the County.

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

A. CEASE AND DESIST FROM:

1. Retaliating against Gran by issuing a plan of corrective action dated October 4, 2001, because of his participation in an employee organization of his own choosing;

2. Interfering with Gran's right to participate in the activities of an employee organization of his own choosing by issuing him the August 23, and September 17, 2001, letters of warning, and;

3. Denying UAPD its right to represent employees by:

a. Retaliating against Gran by imposing its plan of corrective action; and

b. Threatening Gran because of his participation in activities protected by the MMBA.

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

1. Rescind the October 4, 2001, action of the Medical Executive Committee (MEC) adopting a plan of corrective action for Gran, destroy all copies documenting such action, including those contained in Gran's personnel file, and notify the National Practitioners Data Bank that the referral it made in this regard should be expunged from Gran's record.

2. Make Gran whole for monetary losses he may have suffered as a result of the referral of the complaint to the MEC, including but not limited to the reimbursement of reasonable attorneys fees and litigation expenses incurred in defending against the charges of physician malfeasance. This award shall include interest at the rate of seven (7) percent per annum.

3. Rescind the letters of warning issued to Gran on or about August 23, and September 17, 2001, and destroy all copies thereof.

Dated: _____

COUNTY OF SAN JOAQUIN (HEALTH CARE SERVICES)

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**

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| UNION OF AMERICAN PHYSICIANS & DENTISTS,<br><br>Charging Party,<br><br>v.<br><br>COUNTY OF SAN JOAQUIN (HEALTH CARE SERVICES),<br><br>Respondent. | UNFAIR PRACTICE<br>CASE NO. SA-CE-19-M<br><br>PROPOSED DECISION<br>(5/16/02) |

Appearances: Gary Robinson, Executive Director, for Union of American Physicians and Dentists; Steven B. Bassoff, Attorney, for County of San Joaquin (Health Care Services).

Before Donn Ginoza, Administrative Law Judge.

## PROCEDURAL HISTORY

In this case, a union representing physicians alleges that a county hospital retaliated against the physician who led its successful organizational campaign by disciplining him for allegedly deficient care of patients and discussing union matters during clinical hours.

The unfair practice charge initiating the action was filed on October 9, 2001, by the Union of American Physicians and Dentists (UAPD) against the County of San Joaquin (Health Care Services) (County). Following an investigation, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on October 26, 2001. The complaint alleges that by issuing Dr. David Gran disciplinary letters on August 23, and September 17, 2001, and by issuing him a plan of corrective action on October 4, 2001, the County retaliated against Dr. Gran because he exercised rights guaranteed

by the Meyers-Milias-Brown Act (MMBA).[1] This conduct is alleged to violate sections 3503[2] and 3506[3] of the MMBA and PERB Regulations 32603(a)[4] and 32603(b).[5] The County answered the complaint on November 14, 2001, admitting certain jurisdictional allegations, but

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

[2] Section 3503 reads as follows:

> Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the public agency.

[3] Section 3506 reads as follows:

> 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.

[4] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Regulation 32603(a) reads as follows:

> It shall be an unfair practice for a public agency to do any of the following:
>
> (a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

[5] Regulation 32603(b) reads as follows:

> It shall be an unfair practice for a public agency to do any of the following:
>
> (b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3508(c) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

denying the other allegations and denying that it had violated the MMBA. An informal settlement conference held before PERB on November 14, 2001, failed to resolve the matter.

The formal hearing was conducted in Stockton on February 13, and 14, 2002. The matter was submitted for decision on April 9, 2002, following submission of the parties' post-hearing briefs.

## FINDINGS OF FACT

The County is a "public agency" within the meaning of section 3501(c). At all times relevant, Dr. Gran was a "public employee" of the County within the meaning of section 3501(d). Dr. Gran has been employed since 1994 as a physician in the obstetrics/gynecology (OB/GYN) department of the County's San Joaquin Community Hospital (Hospital), located in Stockton. The Hospital provides acute care and fulfills the County's obligations as a health care provider of last resort. The Hospital is part of the County's wider health care system that includes primary care and out-patient clinics. The Hospital also serves as a teaching hospital for residents and interns. Its OB/GYN department provides for the delivery of babies through twelve labor and delivery rooms. The OB/GYN department also has an emergency room and an out-patient clinic.

The County's Director of Health Care Services is Roger Speed, who is its chief administrative officer. At times relevant to this dispute, he was the interim chief. The medical provider staff of the Hospital is governed by the Medical Executive Committee (MEC). The MEC is composed of the president and vice-president of the medical staff as well as the chairs of the Hospital's various departments. The officers are elected by vote of the medical staff. The MEC is procedurally governed by a set of bylaws.

The physicians at the Hospital are part of a bargaining unit that was defined in 1998 by the County's labor relations office.

Dr. Gran's Protected Activities

Sometime around 1999, Dr. Gran was approached by other physicians and asked to be a candidate for the president of the medical staff. He accepted and was elected, serving from July 1999 through early 2001. Dr. Gran has also served as the chair of the Independent Practices Committee, which oversees the activities of mid-level practitioners.

In June 2000, Dr. Gran sought nomination for the position of chair of the OB/GYN department. As president of the medical staff, he complained to Mr. Smith, the former County medical director, about the installation of Dr. Gregory Lee as the chair of the department. Dr. Gran believed that he had been forced to withdraw his name from competition for the position as a result of the administration's erroneous interpretation of the bylaws. Dr. Gran threatened legal action or a complaint to the County's board of supervisors. Smith told Dr. Gran that as president of the medical staff he was part of administration and should abide by its decisions.

Beginning in late 2000, Hospital physicians approached Dr. Gran in his capacity as president of the medical staff and asked him to facilitate an effort to unionize the workforce. Dr. Gran spearheaded the effort by investigating the merits of collective bargaining and facilitating an ongoing debate. To this end, he contacted both UAPD and the Service Employees International Union (SEIU). During this time, Dr. Gran communicated with employees concerning the benefits of union representation and distributed written communications to the staff. His efforts culminated with invitations of UAPD and SEIU to make presentations to the medical staff in May 2001.

SEIU made the first presentation on May 23. UAPD followed on May 30. Both meetings were attended by the medical staff, including Dr. Lee Adams. Dr. Adams was identified by Dr. Gran at the hearing as the "Associate Medical Director" and chair of the

anesthesia department. At the meetings, Dr. Gran identified Dr. Adams as a representative of management and asked him privately to leave the meeting. Gary Robinson, executive director of UAPD, also asked Dr. Adams to leave the UAPD meeting. Dr. Adams refused on both occasions. The parties disputed whether Dr. Adams was a member of the bargaining unit eligible to vote in the certification election. UAPD provided a County list of unit employees that did not contain Dr. Adams's name. The County presented evidence that the bargaining unit was defined on the basis of a specified level of yearly compensation, suggesting that employees not on the list could have been omitted due to not having met the compensation requirement, as opposed to their management status. However, the County did not provide the list of voters eligible in the election that was held in July 2001 pursuant to UAPD's petition for recognition. Such a list would have been dispositive on the issue as it pertains to this dispute. Nor was there any evidence of Dr. Adams's level of compensation. I find that Dr. Adams was a member of management based on his title as associate medical director and the absence of clear proof that he was included in the bargaining unit.

Dr. Rebecca Stanley was a staff physician in the OB/GYN department. She would later become chair of the department in November 2001. Sometime in May 2001, she had a discussion with Dr. Adams in which Dr. Adams told her, "Dr. Gran has got to go." Dr. Stanley was intimidated. She considered Dr. Adams's statement to be a threat and reported it to Dr. Gran.

On June 1, 2001, Dr. Gran distributed a memorandum to the medical staff regarding the union presentations. Dr. Gran identified himself as the president of the employee organization within the Hospital.

Departmental Investigation of Quality of Care Issues

Within days of the June 1 memorandum, Dr. Gregory Lee, then-chair of the OB/GYN department, notified Dr. Gran that he would be investigating Dr. Gran's patient files to determine if there were quality of care issues. Dr. Gran replied by asking Dr. Lee if this wasn't a "scare tactic."

Dr. Gran then went on an out-of-town vacation from June 7 through June 16. On June 8, without prior notice to Dr. Gran, Dr. Lee called a meeting of the OB/GYN staff to discuss quality of care concerns he had with several of Dr. Gran's patients. Dr. Lee did not bring any of the patient charts to the meeting. Dr. Lee reported that Dr. Gran had refused to provide a response to him. Dr. Stanley informed Dr. Gran of the meeting by telephone.

Shortly thereafter, Dr. Lee called a second meeting of the staff for June 17. Dr. Lee called Dr. Gran on the Sunday evening preceding his return to work and notified him of the meeting. He did not offer to tell Dr. Gran the reason for the meeting. This meeting also included an administrator with risk management, Donna Haight, Dr. Adams, and other department members, including Dr. Sebastian (Dr. Lee's wife). The atmosphere of this meeting was tense. Dr. Lee had prepared a list of the cases he was investigating. The list contained the patient identifying numbers, but the charts did not accompany them. Dr. Lee stated to Dr. Gran on behalf of unspecified attendees, "We find there is a problem with these cases." The list was pushed across the table to Dr. Gran. Haight told Dr. Gran, "You might as well talk now." Dr. Adams and Dr. Sebastian also pressured Dr. Gran to respond. Dr. Gran refused and stated his belief that it was all a "witch hunt" in reprisal for his union activities.

Dr. Lee had conducted quality improvement meetings within the department on a regular schedule, but these meetings were not part of that process. Quality of care issues were typically addressed through a peer review process that starts with the measurement of charts by

certain predetermined criteria. If the chart fails the criteria it is sent to a review by the departmental peers of the physician under inquiry. The physician who is the subject of the inquiry would have one month's prior notice and an opportunity to review the charts. At the meeting to discuss the case, no administrative personnel would be present; it would be both collegial and independent. The result of the meeting could be to treat the subject case as an opportunity for education or, if more serious, to refer it for further investigation. Dr. Stanley concluded that the manner in which Dr. Lee had raised these quality of care issues was highly irregular.

During one of the two meetings, Dr. Lee indicated that he would be referring the matter to the MEC for formal investigation. At this point, Dr. Stanley considered looking for employment elsewhere. Dr. Stanley testified:

> . . . I felt that basically that this was inappropriate to accuse a physician, a staff, without bringing the records to a departmental review, and I felt that this was very underhanded and I didn't – I did not want to work for a chairman like Dr. Lee at that time.

Dr. Phillip Ross, another member of the OB/GYN department who attended the second meeting, could not recall any other formal referral during his seven years at the Hospital. Dr. Gran testified that during his years as president of the medical staff only one case was ever referred to the MEC, and that was done informally. In that case, Dr. Gran alone was asked by the administration to evaluate a case in which a patient died. No disciplinary action resulted against the attending physician. Dr. Gran conceded hypothetically that a case of physician negligence involving serious harm or death to a patient could be referred directly to the MEC, rather than being processed through the departmental peer review process.

Immediately after the second meeting, on June 17, Dr. Lee referred his charges to the MEC in writing. The letter was addressed to Dr. Rod Felber, the president of the medical

staff.[6] Dr. Lee would tell Dr. Stanley that he referred the charges because Dr. Gran refused to answer his questions. Dr. Felber accepted the charges for review because in his opinion the matter could not be resolved at the departmental level. He solicited no input from Dr. Gran as to this point.

By letter dated June 18, Dr. Lee instructed Dr. Gran to respond to the charges in writing within 14 days. Dr. Lee identified five patients by their patient number. As to Patient #1, he asked why Dr. Gran did not perform an examination of the patient or assess whether she was in labor, and why he prescribed Demerol. As to Patient #2, Dr. Lee questioned why Dr. Gran did not treat the patient more aggressively for issues of fetal lung maturity given the patient's elevated liver functions and borderline low platelet count. Failing to post complete notices of patient conditions or posting inaccurate information on the sign-out board were the issues raised as to Patients #3 and #4. Failing to perform a pre-operative pelvic examination on a patient on whom he performed a hysterectomy was the issue as to Patient #5.

Dr. Gran responded by memorandum dated July 2, 2001, claming that 14 days was an insufficient amount of time in which to review all the charts and provide written responses.[7] At this point, Dr. Gran, sensing a legitimate threat to his licensure, retained private counsel.

The MEC Referral and Reprimands for Discussing the Union

Dr. Felber wrote to Dr. Gran on July 12, 2001, stating that the MEC had met in response to Dr. Lee's letter of complaint and Dr. Gran's failure to respond in a timely fashion.[8]

[6] There was a lack of interest on the part of Hospital physicians to succeed Dr. Gran as president of the medical staff until after he floated the idea of union representation. Dr. Felber then expressed interest. He was elected and his term began July 1, 2001.

[7] OB/GYN physicians typically work 50 to 60 hour weeks.

[8] Dr. Felber indicates that Dr. Lee's letter to him cited "multiple clinical practice issues that have occurred over the period of several months to a year," as reported by Dr. Gran's

Dr. Felber indicated that the MEC decided that it would seek an outside entity to conduct an investigation. Dr. Felber proposed to use an independent medical examiner from the Institute of Medical Quality. However, under advice of counsel, Dr. Gran declined this proposal. After failing to obtain Dr. Gran's agreement on an outside investigator, Dr. Felber chose to refer the matter to consultants from the University of California (U. C.) at Davis Medical Center. Instead of just the five patients identified in Dr. Lee's June 18 letter to Dr. Gran, Dr. Felber's list of referred patients included two additional patients. The scope of the inquiry was also expanded to include review of certain other confidential complaints by coworkers and an assessment of Dr. Gran's "professional behavior."

On July 23, 2001, the ballots for the election whether to certify UAPD as the exclusive representative were mailed out to the voters. On July 24, Roger Speed placed Dr. Gran on administrative leave based on his conduct toward other OB/GYN staff. Dr. Gran was alleged to have created a climate of fear by telling staff a "war" was about to begin, telling employees they were about to be terminated, lying about who chose the date for the election, and attempting to initiate a second election process for the medical staff president. He also allegedly cancelled clinic appointments to attend meetings to advocate for physician unionization. Speed ordered Dr. Gran "not to talk to hospital staff or come to the workplace." This action prompted the filing of a separate unfair practice charge with PERB (Case No. SA-CE-6-M) by UAPD on Dr. Gran's behalf and a request for injunctive relief. PERB granted the request, and the general counsel's office sought and obtained a temporary restraining order from San Joaquin County Superior Court Judge Peter K. Saiers on August 8, 2001. The restraining order expired on August 23.

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"peers," "the nursing staff and consulting attendings from U.C. Davis." These issues exceeded the scope of Dr. Lee's June 18 letter to Dr. Gran.

The votes for the representation election were counted on August 10, and UAPD prevailed by a vote of 24 to 17. An August 17, 2001, settlement agreement was arranged as to the related unfair practice charge, whereby the County agreed, among other things, to withdraw the notice of administrative leave in exchange for UAPD's withdrawal of the underlying charge.

On August 23, 2001, Speed issued Dr. Gran a memorandum, whose subject line read: "Union Activities During Working Hours." Speed wrote:

> I have received a letter from Community Medical Centers regarding your activities. Please see Attachment #1.
>
> I draw your attention to the restraining order issued by Judge Peter K. Saiers regarding union activities during working hours. I expect you to comply with this order. Please see Attachment #2.

Attachment #1 was a letter from Michael H. Kirkpatrick, the chief operating officer of Community Medical Centers, Inc., stating that on August 20 Dr. Gran was observed conversing with clinic staff on the medical floor regarding his "current employment situation and his activity with the physician's [sic] union." Kirkpatrick asserted that as a result of these discussions, the clinic fell behind in its patient schedule. Attachment #2 contained that portion of the judge's restraining order requiring that Dr. Gran have access to employees so long as he did not discuss union matters during working hours.

On September 12, 2001, the Davis consultants, Drs. Dena Towner and Gary Leiserowitz, returned their report to Dr. Felber. The one case where the consultants concluded that Dr. Gran had been negligent was Patient #1. According to their review, this patient had been admitted to the Hospital two weeks prior to the birth of her child for examination of a cervical device, called a cerlage,[9] that had been implanted. It was recommended that she have

[9] A cerclage is a nonabsorbable suture place around an incompetent cervix.

it removed, but she refused. Two weeks later, while still hospitalized, she complained of pain. Dr. Gran did not perform a speculum or vaginal examination. He made a diagnosis and prescribed Demerol. The patient delivered prematurely but successfully. A rupture of the cervix caused blood loss and required surgical repair, a complication the consultants deemed preventable. However, the consultants noted that Dr. Gran's plan had been to perform a Caesarian birth "due to the cerclage being in place." They wrote in conclusion that the management of the patient was negligent and substandard: "[t]he preterm delivery was not avoidable, but the patient injury was."

The consultants declined to find substandard treatment as to Patients #2, #3 and #4. They noted that all four of these cases related to the night shift undertaken by Dr. Gran from May 31, to June 1, 2001. They noted:

> There is some indication that Labor and Delivery was particularly busy on that evening. Although the medical care provided by Dr. Gran was clearly less than ideal in these four cases, a mitigating consideration could be the extraordinary volume of clinical work that night.

Dr. Gran had been working a 24-hour shift on this evening. Dr. Gran was the only physician on duty that night, and he had worked 20 hours straight before these incidents. Responsibility for 30 patients during that shift is common. There are typically as many as seven to eight deliveries per night and as many as four to six happening at any one time. Under these conditions, the department is forced to rely on a team approach where interns have responsibility for seeing the patients, taking the medical history, and evaluating. Nurses also are responsible for reporting significant conditions to the attending physician. There is a nursing shortage and the interns on duty are not well trained.

The Davis consultants also did not find substandard care for Patients #5, #6, and #7. The consultants did find areas where Dr. Gran could improve his practice.

On September 17, 2001, Speed again wrote to Dr. Gran concerning a complaint he received about talking to physicians during work hours. The letter concluded that "[a]nother incident of this nature may result in dismissal." Dr. Gran admitted he discussed the union effort, for about "one minute." Dr. Gran testified that while on break during a 24-hour shift, he approached two physicians who did not appear to be with patients. Dr. Marc Krueger, who had a medical condition of his own, was chatting with Dr. Greg Rossellini. Dr. Gran sought out Dr. Krueger to check on his condition. Dr. Rossellini asked Dr. Gran how the union campaign was going, to which Dr. Gran recalls saying, "slow but sure." Dr. Gran left after their brief conversation. A complaint by a third physician, Dr. Richard Buys, the medical staff president preceding Dr. Gran, was made to Speed regarding this incident.

Dr. Buys's letter to Speed states that Dr. Gran approached the two physicians while they were on duty seeing patients, made statements critical of the administration, urged Dr. Rossellini to join the union, and made the two feel uncomfortable based on the content of the conversation. The statements in Dr. Buys's letter are hearsay. Since I have no basis to assess the credibility of the witnesses cited in the letter and find Dr. Gran to be a credible witness, I credit Dr. Gran's version of the incident, particularly as to the claim that the conversation interfered with the physicians' performance of clinical duties.

Dr. Gran's Leave to Prepare a Written Response to the MEC

On September 18, 2001, Dr. Felber ordered Dr. Gran to review the patient charts and respond to him regarding the concerns raised by the Davis report. By letter dated September 19, Dr. Felber notified Dr. Gran that he had been placed on an immediate 14-day leave with pay for the purpose of allowing him time to respond to the concerns raised in the Davis report. Dr. Felber noted Dr. Gran's previous refusals to respond to the clinical concerns, "initially by Dr. Lee, then by the Department of Obstetrics CQI functions, and then by Medical

Executive Officers and then by the [Davis] Consultant, Dr. Dena Towner."[10] Upon advice of counsel, Dr. Gran requested the charts.

On September 22, 2001, Dr. Felipe Dominguez, chair of the pediatrics department, contacted Dr. Gran proposing a meeting with two other Hospital physicians, Drs. Dee Pak Shrivastava and James Pucelik, at Dr. Gran's house. The purpose of the meeting was to speak with Dr. Gran about the MEC inquiry. It occurred on a Sunday late in September, either the 23rd or the 30th. Dr. Gran testified that Dr. Dominguez stated he would "guide [Dr. Gran] through the process and save his job." However, Dr. Dominguez told Dr. Gran that he essentially would have to "grovel" before the committee if they were to help him. Dr. Dominguez also told Dr. Gran that he "would be okay if he would keep quiet for a year." Dr. Gran's wife, Patrice, who sat in on the meeting, testified that the physicians told Dr. Gran that some on the MEC were "out to get him." She heard them advise her husband to "lay low," "wear a tie," and "not talk about the union." Both Dr. Gran and his wife testified that the three other physicians considered the quality of care issues not to be significant.

Dr. Dominguez denied that anyone downplayed the seriousness of the quality of care issues, and to the contrary, that they advised Dr. Gran to address them in a professional way. Dr. Dominguez's intent was to convey the idea that the issues might be resolved in a "quality improvement" manner. Dr. Gran was receptive at first, but became resistant over the course of the meeting. Dr. Dominguez could not recall if anyone made a reference to union activity.

Dr. Shrivastava, is a pulmonologist and internist, who was also vice-president of the medical staff and chair of the Quality Improvement Committee at the time of the inquiry. He accepted Dr. Dominguez's invitation to the meeting out of concern that the issues had escalated, at least in part because of Dr. Gran's failure to respond to the allegations. He

[10] Dr. Gran was interviewed by the Davis consultants.

conceded that he may have believed the charges were exaggerated and he personally believed that Dr. Gran was a qualified physician. Dr. Shrivastava agreed that someone advised Dr. Gran to wear a tie. He could not recall if anyone told him not to discuss the union.

Dr. Pucelik is an orthopedic surgeon. According to his testimony, the main point Dr. Pucelik tried to convey to Dr. Gran was that he should respond to the allegations even if he believed the investigation to be a witch hunt.

In resolving the conflicts, I note that all the witnesses appeared for the most part credible and that some of the conflicts can be attributed simply to differences in how certain statements were interpreted or recollected. Dr. Dominguez was guarded and nervous while testifying, and I find his testimony the weakest. Dr. Gran and his wife appeared to have a much firmer recollection and ability to relate the details of what was said during the meeting than any of three County witnesses. Significant for purposes of this case, I find that Dr. Gran was advised to be compliant in the process and not discuss the union. I believe there were some statements that the medical issues were not significant, but were probably offered in the "assuming-for-purposes-of-argument" vein. I also believe Dr. Gran was warned there were members of the MEC who were not sympathetic to him.

Dr. Gran prepared a written response to Dr. Felber dated October 3, 2001. As to Patient #1 he noted that due to the busy schedule he was not able to see her until 2:00 p.m. after arrival on the shift at 7:30 a.m. He was called to evaluate the patient again at 1:00 a.m. Dr. Gran noted pain for a couple of hours, and ordered fetal heart monitoring to indicate the onset of labor. He denied that either the attending nurse or first-year intern advised him of any complications. As to the Patient #6, Dr. Gran asserted that the treating physician was not himself but Dr. Lee. While acknowledging his full legal responsibility as the team leader, he

noted the nursing shortage and issues related to training. He admitted that improvements in the flow of information were needed and vowed he would endeavor to correct that situation.

The October 4, 2001, MEC Meeting and Adoption of the Plan of Corrective Action

On the day after Dr. Gran submitted his response, the MEC met to make its findings regarding the quality of care issues. The meeting began with Dr. Gran being given an opportunity to address the full committee. He was queried by the committee regarding the cases reviewed by the Davis consultants. Dr. Gran provided further explanations of his actions with regard to each of the cases. Dr. Gran was then excused and the committee deliberated before resolving to take action.[11]

At the outset of the meeting it was revealed that Dr. Lee was the attending physician who came on duty the morning following Dr. Gran's 24-hour shift ending on June 1, 2001, and that several of the patients involved in the investigation were patients during that shift.

It would also be revealed that Dr. Lee was unable to speak to Dr. Gran following the end of Dr. Gran's shift and that this led to confusion about the status of several of the patients remaining in the ward. As to Patient #1, Dr. Gran provided further testimony in defense of the accusation by the Davis report that surgery to repair the cervical rupture was avoidable.

[11] Proceedings of the MEC are confidential under the terms of Evidence Code section 1157. This statute protects the peer review process from inquiry for litigation purposes so that the salutary purposes of such activities are not inhibited or thwarted. However, this privilege has been construed as applying essentially only to private suits against physicians and discovery of the material is not beyond the reach of governmental agencies pursuing inquiries on behalf of the public. (See People v. Superior Court (Memorial Medical Center) (1991) 234 Cal.App.3d 363 [286 Cal.Rptr. 478].) Therefore, I have ruled that the proceedings of the MEC are admissible in this case, but will be sealed from public view. In addition, anonymity for the participating physicians (with the exception of Dr. Gran), will be preserved by identifying each with a letter of the alphabet from A to L. The letters shall be assigned by reference to the roster of attendees noted on the minutes of the October 4, 2001, meeting, beginning at the top of the first column of names (A-D), proceeding next to the top of the middle column (E-H), and finishing with the right column (I-L).

Dr. Gran noted that he had discussed with the patient at length the risks of not removing the cerclage prior to birth, that she had been so advised previously, but had repeatedly refused to have it removed. Dr. Gran also indicated that the chart revealed that Dr. Lee was informed about the patient's condition by another member of the staff.

As to Patient #2, Dr. A guided the discussion by suggesting that the issue concerned the failure to diagnose a possible "HELP" syndrome, which might have benefited from the administration of steroids. The HELP syndrome is identified by blood tests indicating a drop in platelet count. Dr. Gran noted that the patient had been transferred from Tracy, where she had been under a physician's care. Thus, she arrived with a two-day medical history. Dr. Gran reviewed the second of three blood tests and acknowledged the dropping platelet count. He did not order medication, but instead ordered a third lab test halfway through his shift. He contacted U. C. Davis at 6:00 p.m. on June 1, at which time he received confirmation of the HELP condition. Dr. Gran noted that Dr. Lee contacted U. C. Davis earlier in the afternoon, at which time Dr. Lee was advised to begin steroids. In response to the charge that he delayed seeing the patient for more than 12 hours, Dr. Gran indicated that an intern saw the patient following her admission and reported to him. Dr. Gran believed he saw the patient himself, but acknowledges he failed to document that in the chart.

As to Patient #3, the committee agreed that the issue concerned the failure to diagnose elevated blood pressure and proteinuria. Dr. Gran asserted that this failure resulted from the department's practice of relying on nurses to report the condition and the fact that his shift was extremely busy – a fact confirmed by the Davis report. He also noted that in many cases the attending physician does not see a patient who delivers. In this case, the nurse did not report the symptoms, the internist missed the diagnosis, and physician who followed Dr. Gran also missed the diagnosis despite the patient's elevated blood pressure throughout that shift.

Finally, the third attending physician made the diagnosis. The patient delivered successfully, with no complications noted. Dr. Gran also challenged the Davis opinion by citing the nursing shortage at the Hospital and the County's failure to address that situation, as well as the comparatively lower number of deliveries and higher number of interns available to monitor patients at Davis.

Dr. A introduced the next three cases as involving a pattern of failing to give pelvic exams. Dr. Gran admitted the situation may have involved his failure to document. In mitigation he explained that he has performed hundreds of surgeries and that it was his custom to give pelvic exams in all cases. As to the first patient, Dr. Gran claimed that he did perform the exam; as to the second, one was performed by the surgical resident; and as to the third, the physician performing the surgery examined the patient.

Dr. A then opened the floor to discussion of more general concerns. Dr. H volunteered that in his department no one checks out personally to the new physician coming on. The new physician has to "figure it out" himself. Dr. E questioned why Dr. Gran's case was even brought before the MEC. Dr. H believed it was because Dr. Gran refused to respond to Dr. Lee by reviewing the charts. Dr. H offered that in his department, the chair would approach a physician individually with a serious quality of care issue. To this, Dr. Gran responded that Dr. Lee approached him at a stressful time. He had just completed an exhausting shift and was just one day away from his scheduled out-of-town vacation. And Dr. Lee had also threatened Dr. Gran with formal administrative action if he did not respond.

Dr. Gran went on to explain that his initial reaction to Dr. Lee was to believe a witch hunt was occurring. In support of this claim, Dr. Gran noted that there were no medical issues of an acute or long-term nature and there were no sentinel events (i.e., malfeasance leading to severe or potentially severe patient outcomes, including disability or death). He noted the

compressed time frame of the meetings Dr. Lee scheduled, the demand for an immediate chart review (contrary to the normal departmental quality improvement activities), and the inquisitorial nature of the demand for answers at the meeting the day he returned from vacation. Dr. Gran invited the committee to interview other members of his department for their opinions. He indicated that Dr. Stanley became very upset during the meeting at which answers were demanded of him and that she and Dr. Ross told him they were glad he refused to answer the questions. Dr. Gran also asserted that Dr. Lee's investigation came "specifically at the time the union was coming together."

The committee was skeptical. Dr. H opined that the other department members were intimidated and would be reluctant to speak. Dr. K asserted that Dr. Lee did talk with physicians on an individual basis about quality of care issues, and that Dr. Lee had told him that Dr. Gran promised Dr. Lee he would address the issues following his return from vacation. Dr. Gran disputed this, claiming he proposed that Dr. Lee have a departmental meeting where global issues could be discussed. Dr. K claimed that Dr. Lee would have addressed the MEC regarding Dr. Gran but was out of town on this date.

Dr. J asked if there was some event that triggered the witch hunt, and if so, was the inquiry purely vengeful and without any substance whatsoever. Dr. A suggested that these relatively minor issues could have been resolved if Dr. Gran had just met with Dr. Lee earlier. Dr. B demanded proof that Dr. Gran was targeted. In response to these questions, Dr. Gran offered the fact that he had lodged the written complaint to the former medical director concerning the election of Dr. Lee as chair of the department in June 2000. Within two or

three days of that complaint, Dr. Lee demanded that Dr. Gran address certain "behavioral" issues in writing.[12] He stated others told him he had reason to be fearful and he believed them.

At this point, Dr. B took a particularly aggressive tack with Dr. Gran. She asserted that Dr. Gran was paranoid and that his paranoia extended well beyond the department, implying to the MEC as well. She accused Dr. Gran of continually "putting up hurdles" and asked him if he would admit he had contributed to the problem in this instance. Later, Dr. B accused Dr. Gran of being "intimidating" and "not interacting well with others." She told him that she had heard that people do not want to work on his shift and suggested that he "look in the mirror." She asked if Dr. Gran would be willing to change his attitude, seek out some remedy for his problem, and be more "cooperative," "compliant" and "professional." Dr. H was somewhat in agreement, suggesting that Dr. Gran appeared to have been dismissive of the quality improvement process, citing Dr. Gran's July 2 memorandum to Dr. Lee, a leading point made by the Davis report under the heading addressing "professional behavior." To this, Dr. Gran stated that the memorandum was simply a follow-up request for more than the two weeks he had been granted to respond in writing, without the benefit of any time off from his duties. In a more general vein, Dr. Gran requested for the third time that the committee interview his fellow physicians.

Dr. D then spoke in a more conciliatory tone. Dr. D stated that Dr. Gran's responses to the committee were good and that there was no breach of the duty of care. He believed the extremely heavy caseload excused Dr. Gran's less than adequate chart documentation. However, Dr. D believed that the committee's inquiry could have been avoided if Dr. Gran had

[12] The Davis report rejected Dr. Gran's claim that the investigation was in retaliation for his union activities, claiming that his "behavioral" issues were first documented on June 8, 2000, at a time predating any union activity.

been more forthcoming earlier. Following Dr. D's statements, the committee excused Dr. Gran.

The chair of the committee began the discussion by offering the committee a chance to take time to consider the wealth of information presented. But there was no interest in postponing a decision. Dr. J began the discussion, agreeing with Dr. D that there were no sustainable medical issues contained in the Davis report. Dr. J suggested that despite the lack of medical issues, the committee needed to convince Dr. Gran that no one was vindictive toward him. Dr. B asserted that the issue with Dr. Gran concerned his professional attitude; that Dr. Gran was always going to "butt heads and be angry." Dr. X[13] agreed there were no medical issues and wished there was something more substantive. Dr. B insisted that the behavioral issue needed to be addressed and that Dr. Gran needed professional help to address his paranoia. Dr. K again spoke on behalf of Dr. Lee and stated that if you spoke with Dr. Gran about "some of his language with nurses" he would improve for awhile but then revert.

The committee developed a consensus that no one was not out to get Dr. Gran but that the committee could not ignore the problems with his professional attitude. The chair then suggested the committee look at possible corrective actions listed in the bylaws. Dr. I suggested that Dr. Gran met the California Medical Association's profile of a "disruptive" physician. Others concurred. Consensus was developed that an appropriate corrective action would involve monitoring regarding pelvic examinations for some duration along with behavioral counseling and sexual harassment training. Near the end of the meeting, Dr. H asked if there was some action the committee could take that would not be reportable to the

[13] There is one doctor whose name does not appear on the roster heading the minutes, but does appear in the body of the text.

National Practitioner's Data Bank, which maintains a public record of disciplinary actions taken against physicians. Voicing again her strong opinion that Dr. Gran be dealt with seriously, Dr. B revealed that an intern complained about Dr. Gran's sexual jokes and asked that no women ever be assigned to work with Dr. Gran. The committee then voted and unanimously approved a plan of corrective action for Dr. Gran. This included a 90-day period for monitoring Dr. Gran's clinical performance. By taking such action, the Hospital considered it a legal duty to report the matter to the National Practitioner's Data Bank. Dr. Gran appealed the MEC's decision, as was his right under the MEC bylaws. A due process hearing was scheduled but not held at the time of the formal hearing in this matter.

The MEC reported its disciplinary action to the National Practitioner Data Bank. Phylis Barenchi, the medical staff coordinator for the Hospital with responsibility for ensuring compliance with the medical staff bylaws, contacted the Bank and was advised to report the action notwithstanding that it was not yet final. However, the bylaws (sec. 7.7-1) state in pertinent part:

> The authorized representative shall report an adverse action to the National Practitioner Data Bank only upon its adoption as final action and only using the description set forth in the final action as adopted by the Governing Board.

"Governing Board" is defined as the Board of Supervisors of San Joaquin County. (Sec. 1.3-4.)

## ISSUES

1. Did the County retaliate against Dr. Gran for his protected activities when the MEC imposed its plan of corrective action?

2. Did the County retaliate against Dr. Gran or otherwise interfere with his right to engage in activities on behalf of UAPD by issuing him the two memoranda dated August 23, and September 17, 2001, regarding his discussion of the union with other employees?

## CONCLUSIONS OF LAW

### The Plan of Corrective Action

The complaint in this case alleges that the County imposed a plan of corrective action on Dr. Gran "because of" his exercise of activities that were protected under the MMBA. Section 3506 of the MMBA and PERB Regulation 32603(a) prohibit such conduct. To establish a prima facie case of discrimination under these provisions, the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employee because of the exercise of those rights. (Campbell Municipal Employees Association v. City of Campbell (1982) 131 Cal.App.3d 416 [182 Cal.Rptr. 461] (Campbell); San Leandro Police Officers Association v. City of San Leandro (1976) 55 Cal.App.3d 553 [127 Cal.Rptr. 856] (San Leandro).)

To prove this violation, UAPD bears the initial burden of showing evidence that Dr. Gran engaged in protected activity, that the County knew of the activity, and that the protected activity was a "motivating factor" in the County's decision to impose the plan of corrective action. (California State University, Hayward (1991) PERB Decision No. 869-H; Novato Unified School District (1982) PERB Decision No. 210.)[14] Motivation may be proven

[14] Since the language of the MMBA defining employee rights and the unfair practice of discrimination is substantially similar to that found in the National Labor Relations Act (NLRA) (29 U.S.C., sec. 141 et seq.) and the other statutes administered by the PERB, it is proper to rely on cases construing the other acts in analyzing these terms. (Fire Fighters v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].) In addition to the MMBA, PERB administers the Educational Employment Relations Act (Gov. Code, sec. 3540 et seq.), Ralph C. Dills Act (Gov. Code, sec. 3512 et seq.), and the Higher Education Employee-Employer Relations Act (Gov. Code, sec. 3560 et seq.).

by either direct or circumstantial evidence, or a combination of both. (Carlsbad Unified School District (1979) PERB Decision No. 89.) To establish that the employer was motivated to impose reprisals because of the exercise of protected rights, the charging party may rely on circumstantial evidence, such as a departure from standard procedures (Campbell, supra, 131 Cal.App.3d at p. 424), disparate treatment (San Leandro, supra, 55 Cal.App.3d at pp. 557-558; Los Angeles County Employees Assn. v. County of Los Angeles (1985) 168 Cal.App.3d 683, 688 [214 Cal.Rptr. 350]), inadequate justification (Campbell, supra, 131 Cal.App.3d at p. 424), the closeness in time of the retaliatory act to the protected activity (Santa Clara Unified School District (1985) PERB Decision No. 500), inadequate investigation prior to the imposition of discipline (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S), and employer animosity towards union activists (Marin Community College District (1980) PERB Decision No. 145).

Once protected activity is established to be a motivating factor, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. (Novato Unified School District, supra, PERB Decision No. 210; Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 730 [175 Cal.Rptr. 626].)

The evidence of unlawful motive most notable in this case is the close timing between Dr. Gran's protected activity and the commencement of disciplinary action against him. The pattern began approximately one year prior to Dr. Lee's June 2001 investigation. In June 2000, within days of Dr. Gran's complaint to the former medical director protesting Dr. Lee's installation as department chair, Dr. Lee documented "behavioral" problems on Dr. Gran's part. Dr. Gran's complaint on this occasion constituted self-representation within the meaning of section 3502 and was therefore protected. (Pleasant Valley School District (1988) PERB

Decision No. 708.) One year later, within days after the June 1 memorandum from Dr. Gran to the staff regarding the UAPD presentation, Dr. Lee identified quality of care issues involving Dr. Gran. Dr. Gran's campaign organizing was protected activity. (Regents of the University of California (1983) PERB Decision No. 329-H; Marin Community College District, supra, PERB Decision No. 145.)

There was also compelling evidence of disparate treatment and departure from standard procedures in regard to the initial investigation of the quality of care issues. This evidence was essentially unrebutted. No evidence was offered by the County illustrating other charges referred to the MEC or the types of issues leading to such referrals, if indeed there were any. From this record, I find that the formal referral of Dr. Gran to the full committee was unprecedented. Most of the issues first raised by Dr. Lee, including Dr. Gran's poor record keeping, noncompliance with check-out procedures, failure to perform pelvic examinations, and failure to closely monitor the condition of patients resulted in no significant harm to patients. The Davis report conceded that, apart from the cervical rupture, the issues could have been departmental ones owing to the stressed resources of the OB/GYN department and the heavy responsibilities of the attending physicians. Dr. Gran justifiably asserted that these issues should have been brought up in the normal internal quality improvement process. Dr. Lee was also the physician who came on duty immediately after Dr. Gran's exhausting 24-hour shift. At no time did he reveal this to other department members. Indeed, even in his own June 18 letter to Dr. Gran, he did not identify by name the physician who allegedly suffered due to Dr. Gran's inadequate check-out information. Dr. Lee did not bring any of the charts to the either of the departmental meetings. OB/GYN department physicians believed these meetings were irregular and threatening.

Dr. Lee quickly determined that he would refer the case to the MEC, no later than the time of the second departmental meeting. After this "rush to judgment," he made the June 18 demand for a written response from Dr. Gran, the response to which both he and the MEC would later deem to be "dismissive" of the process. Dr. Lee's referral to Dr. Felber expanded the scope of the inquiry without notice to Dr. Gran. Two additional patients were added (one of whom was not his patient), other confidential complaints were identified, and Dr. Gran's professional behavior became a subject of inquiry. There ultimately proved to be little basis in fact for the allegations against Dr. Gran, as the MEC concluded that there were no material deficiencies with respect to Dr. Gran's medical performance. (See Hall v. NLRB (8th Cir. 1991) 941 F.2d 684, 688 [138 LRRM 2266] [pretextual discipline where reasons have no basis in fact, are implausible, false or shifting].)

There is also evidence of anti-union animus in the threat by Dr. Adams issued very shortly before the investigation of Dr. Gran commenced. Dr. Adams, a close ally of Dr. Lee who attempted to interrogate Dr. Gran in the second departmental meeting and who, as associate medical director, would have had reason to be upset with Dr. Gran for attempting to exclude him from the union presentations, expressed his desire to have Dr. Gran removed from the department.

The County contends that the referral of Dr. Lee's concerns to the MEC was justified by Dr. Gran's refusal to respond at the departmental level in a timely manner, that the U. C. Davis report independently identified quality of care issues, and that based on the finding of substandard care in the Davis report, the MEC was required to take some punitive action against Dr. Gran pursuant to its peer review responsibilities and the County's responsibility to provide quality care to its patients.

PERB has held that an employer may avoid liability for an adverse action where unlawful motive is established as to an agent who recommends disciplinary action but where the discipline itself is imposed by another agent who has conducted an independent and impartial investigation. (Konocti Unified School District (1982) PERB Decision No. 217 (Konocti).) That rule does not apply in this case. Konocti is distinguishable because in this case, the MEC's investigation fell short of a full and impartial inquiry. For example, as to the key issue of whether Dr. Gran in essence precipitated the referral to the MEC by his refusal to respond to Dr. Lee's inquiry in a timely manner, the MEC refused despite three requests on Dr. Gran's part to have his department colleagues canvassed as to their opinion of whether Dr. Lee's inquiry was tainted. The committee relied on the hearsay assertions of one of its more biased members who in effect testified on behalf of Dr. Lee. Its aggressive questioning of Dr. Gran stands in stark contrast with its unquestioning acceptance of what Dr. Lee would reputedly have claimed regarding his treatment of quality improvement issues within the department had he been present at the October 4 meeting to testify. In addition, after rendering its decision, the MEC failed to accord Dr. Gran the protections of the bylaws when it relied on advice from its medical staff coordinator in referring the matter to the National Practitioners Data Bank.

It is also clear from the record that the MEC was not required to act on the Davis report because it rejected the report's only explicit adverse finding as to Patient #1. After several members of the committee concluded, based on Dr. Gran's written submission and verbal responses to the committee, that there were no quality of care issues, the committee agreed to impose the plan of corrective action based on perceived behavioral or attitudinal problems on Dr. Gran's part. The basis for these problems came largely from the committee members' knowledge of uncorroborated complaints against Dr. Gran. Indeed, the transcending theme

developed during the committee's deliberation was that Dr. Gran's belief that he was the target of Dr. Lee's witch hunt[15] resulted from his unjustified paranoia and general belligerence. The committee ultimately concluded that Dr. Gran had been disruptive by failing to respond to Dr. Lee in a more professional or collegial manner. Even assuming that the MEC itself did not harbor animus toward Dr. Gran for his protected activities and based its decision primarily on Dr. Gran's alleged hostility toward the peer review process, the MEC's adoption of this view without fair consideration of Dr. Gran's contention that Dr. Lee was engaged in a witch hunt amounted to a ratification or adoption of Dr. Lee's initial unlawfully motivated referral. (See Antelope Valley Community College District (1979) PERB Decision No. 97; Compton Community College District (1987) PERB Decision No. 649.)

Moreover, further assuming Dr. Gran was disciplined solely for his disruptive behavior and defiance of Dr. Lee, Dr. Gran's response to Dr. Lee was provoked by the circumstances under which Dr. Lee initiated his investigation. A well established line precedent under the NLRA justifies this conclusion. In these cases, the National Labor Relations Board (NLRB) and the courts begin by recognizing the need to balance the employer's right to run its office as it pleases against the employees' right to engage in protected activities without fear of retaliation. (Trustees of Boston University v. NLRB (1977) 548 F.2d 391, 393 [94 LRRM 2500].) In Trustees of Boston University, a clerical employee employed at a student health center was found to have been terminated as a result of her participation in concerted activity. The employee's personality clash with her supervisor and offensive conduct in dealings with supervisors and fellow employees, including the brandishing of a pair of scissors, was cited by the employer in justification for the dismissal. But the NLRB found that the employee's

[15] The American Heritage Dictionary defines "witch hunt" as "a political campaign launched on the pretext of investigating activities subversive to the state."

misconduct was triggered by the employer's own wrongful conduct. (Id. at pp. 392-393.) In balancing the competing interests of employee and employer, the appellate court, in affirming the NLRB's decision, noted that:

> if an employee's conduct is not egregious there is "some leeway for impulsive behavior", NLRB v. Thor Power Tool Co., 351 F.2d 584, 586-87 (7th Cir. 1965). Crown Cent. Petroleum Corp. v. NLRB, 430 F.2d 724, 730 (5th Cir. 1970); see Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1356 (3rd Cir. 1969), cert. denied, 397 U.S. 935, 90 S.Ct. 943, 25 L.Ed 2d 115 (1970). And the leeway is greater when the employee's behavior takes place in response to the employer's wrongful provocation.
>
> > "An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment. (Citation omitted.) The more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression."
>
> NLRB v. M & B. Headwear Co., 349 F.2d 170, 174 (4th Cir. 1965). Further, at least so long as the employee's indiscretions are not major, it is immaterial that the employee's misconduct would constitute a sufficient reason for discharge if the actual reason for discharge is the employee's participation in concerted activity. Hugh H. Wilson Corp. v. NLRB, supra, 414 F.2d at 1352. [Fn. omitted.]

(See also Rio Hondo Community College District (1982) PERB Decision No. 260, quoting NLRB v. Thor Power Tool Company (7th Cir. 1965) 351 F.2d 584 [60 LRRM 2237].)

Similarly, in NLRB v. Florida Medical Center, Inc. (5th Cir. 1978) 576 F.2d 666 [98 LRRM 3144], the NLRB found that a union activist was threatened and then discharged during an organizational campaign. The employer claimed that the employee's work suffered during the campaign, specifically by her displaying a "poor attitude." In discharging her, the employer relied heavily on the employee's statement that the chief administrative officer was a "Mafia director." That statement was spurred by her belief that the employer was downgrading her work because of her union activity. The court of appeals enforced the

NLRB's order, stating "[t]he hospital may not rely upon allegations of poor work attitude in the face of a record that demonstrates that poor attitude and union participation were, in its view, synonymous." (Id. at p. 672.) The court also noted that the disciplinary referral happened extremely quickly, and that no reasonable person would have taken the charge seriously. (Ibid.)

The same principle was also applied in Wilson Trophy Co. v. NLRB (8th Cir. 1993) 989 F.2d 1502 [143 LRRM 2008]. There the employee who engaged in protected activity was interrogated and reprimanded one day following her contacting a union. The employee took offense and the relationship between her and her supervisor deteriorated immediately thereafter. The supervisor then began documenting the employee's bad attitude and disruptive behavior. The employee was fired because of her poor attitude despite there having never been any complaints about her behavior prior to the protected activity. (Id. at pp. 1505-1506, 1509.)[16]

Under these authorities, I conclude that even if the MEC was not motivated by Dr. Gran's protected activity, its decision to discipline him for his bad attitude rested on responses from Dr. Gran that were provoked by Dr. Lee's retaliatory investigation of him. Dr. Gran's passive-aggressive behavior in responding to Dr. Lee's investigation was justified under the circumstances. His response was even less defiant than those actions illustrated by the cases cited above.

The County also contends that Dr. Gran's exclusive remedy for challenging the plan of corrective action is through the appeal procedure in the medical staff bylaws and the court review process thereafter. The discipline, it claims, was imposed pursuant to the peer review

[16] See also ABF Freight System, Inc. v. NLRB (1994) 510 U.S. 317, 319-322 [145 LRRM 2257] [firing of union activist for lying about tardiness was a pretext, as indicated by the fact that supervisors had warned him that management as "gunning" for him].)

process, a procedure authorized by the Business and Professions Code,[17] and the findings as they relate to issues of patient care are beyond PERB's expertise. The County cites no case authority for this argument, and accordingly, I reject it. PERB has held that decisions which are otherwise vested by statute exclusively within the discretion of public employer may nevertheless be overturned if the discretion was exercised in violation of rights guaranteed by the state's collective bargaining statutes. (McFarland Unified School Dist. v. Public Employment Relations Bd. (1991) 228 Cal.App.3d 166 [11 Cal.Rptr.2d 405] [affirming PERB's decision that school board decisions to deny tenure to probationary teachers are not insulated from review for discriminatory animus].) The MEC's decision is not insulated from PERB review simply because it was made pursuant to the peer review process.

I therefore find that the plan of corrective action was imposed on Dr. Gran because of his protected activities in violation of section 3506 and PERB Regulation 32603(a). This conduct also denied UAPD its right to represent employees in their employment relations with the County by frustrating its attempts to organize the unit employees, in violation of section 3503 and PERB Regulation 32603(b).

The Letters Regarding Union Campaigning at the Worksite

The complaint alleges that Interim Director Speed's August 23, and September 17, 2001, warning letters to Dr. Gran were issued in retaliation for his union activities. The County contends that the letters were not disciplinary in nature because they simply warned Dr. Gran to comply with terms of the court order not to engage in union activities on work time and that, if they were disciplinary, they were not issued because of his union activities. UAPD contends that the letters were threatening and that they were disciplinary, because, at the very

[17] See Business and Professions Code sections 809.1 to 809.6.

least, they evidenced an attempt to build documentation for more serious discipline. UAPD also cites evidence indicating that the letters were pretextual in nature.

I do not believe it to be seriously in issue whether the letters were issued "because of" Dr. Gran's union activities, as required by section 3506. The matters cited in the letters – Dr. Gran's discussion of the union at the work site – were union activities. In order to demonstrate a violation of interference with rights guaranteed by the MMBA or retaliation for the exercise of those rights, it must be shown that there was a causal connection between union activities and the employer's action challenged in the unfair practice. (Carlsbad Unified School District, supra, PERB Decision No. 89 [unified test for discrimination and interference].) That causal connection is demonstrated here.

The pertinent question in an interference/discrimination case is whether at least slight harm to the exercise of guaranteed rights occurred. (Carlsbad Unified School District, supra, PERB Decision No. 89.) I find that the letters constituted at least implied threats of disciplinary action for further union activities. (Los Angeles Unified School District (1988) PERB Decision No. 659.) Indeed, the September 17 letter was explicit in that manner, stating: "Another incident of this nature may result in dismissal." I also find that because the letters evidenced an attempt to document misconduct, "a reasonable person under the same circumstances" would consider such letters to be adverse. (Newark Unified School District (1991) PERB Decision No. 864.)

Whether viewed as discrimination or interference, the critical issue is whether the County's conduct was justified by legitimate business reasons. (Public Employees Assn. v. Board of Supervisors (1985) 167 Cal.App.3d 797, 807 [213 Cal.Rptr. 491]; Carlsbad Unified School District, supra, PERB Decision No. 89.) This issue essentially turns on the veracity of

Speed's contention that Dr. Gran was engaged in union solicitation during working hours or in a manner otherwise disruptive to the County's operations.

In this regard, the County has failed to carry its burden. In both cases, Speed relied on vague complaints by two individuals. He apparently did no further investigation of the matters and failed to inquire of Dr. Gran regarding his version of the events. As to the first incident, for example, in which the director of a medical clinic asserted that Dr. Gran's discussion of the union caused the clinic to fall behind in its schedule, the County offered no evidence to substantiate that claim. Nor did it offer any evidence substantiating the claim that Dr. Gran or the person or persons with whom he was speaking were required to be working at the time. Similarly, as to the second incident, no evidence was offered to rebut Dr. Gran's testimony that he approached Drs. Rossellini and Krueger at a time when they were not treating patients, that the conversation was very brief, and that he only brought up the union in response to a question by one of the physicians.[18]

I therefore find that the County violated section 3506 by issuing Dr. Gran the August 23 and September 17, 2001, letters of warning. This conduct also denied UAPD its right to represent employees in their employment relations with the County by frustrating its attempts to organize the unit employees, in violation of section 3503 and PERB Regulation 32603(b).

[18] Speed also claimed that the two complaints he cited were corroborated by other complaints that Dr. Gran spoke about the union during clinic hours and brought union representatives into clinics during clinic hours. None of this clearly demonstrates that Dr. Gran was engaging in unauthorized union activities that were disruptive to County operations.

## REMEDY

Pursuant to section 3509(a), the PERB under section 3541.3(i) is empowered to:

> . . . 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.

The County has retaliated against Dr. Gran because of his activities protected by the MMBA, in violation of section 3506 and PERB Regulation 32603(a), as a result of issuing him a plan of corrective action on October 4, 2001. It is appropriate to order the County to rescind and withdraw its plan of corrective action and restore Dr. Gran to the position he held before the unlawful action. (Rancho Santiago Community College District (1986) PERB Decision No. 602 [rescission of notice of unprofessional conduct]; Trustees of Boston University v. NLRB, supra, 548 F.2d 391, 393-394 [upholding modification of remedial order from reinstatement to equivalent position in a different department to the same position despite acknowledged personality conflict between employee and supervisor]; NLRB v. M & B Headwear Co. (4th Cir. 1965) 349 F.2d 170 [59 LRRM 2829] [reinstatement of employee in provocation-of-insubordination case].) This would include contacting the National Practitioner's Data Bank and notifying it that the plan of corrective action was improperly issued, as well as removing and destroying all copies of the plan of corrective action that may be retained in County files. In addition, Dr. Gran incurred $20,000 or more in fees after hiring an attorney to represent him in the proceedings before the MEC. It is necessary to require the County to reimburse Dr. Gran for his reasonable attorneys fees and litigation expenses incurred as a result of having to defend his license to practice against the charges of malfeasance initiated by the chair of the OB/GYN department. These proceedings would not have occurred but for Dr. Lee's retaliatory motive. If there were issues as to Dr. Gran's medical practices, they would have been raised, if at all, through the normal quality improvement process as

described by UAPD witnesses. Dr. Gran's retention of an attorney was reasonable under the circumstances, and requiring him to suffer the sizeable monetary expense of his defense without compensation would amount to a significant deterrent to union activities as to Dr. Gran and others similarly situated.

In addition, the County has interfered with Dr. Gran's right to engage in activities protected by the MMBA by issuing him the August 23, and September 17, 2001 letters of warning, in violation of section 3506 and PERB Regulation 32603(a). The appropriate remedy is for the County to cease and desist from its interference with protected rights, to remove the letters from Dr. Gran's personnel file, and to destroy all copies.

As a result of each of the above-described violations, the County has also denied UAPD its right to represent employees in their employment relations with public agencies in violation of PERB Regulation 32603(b). The appropriate remedy is to cease and desist from such unlawful conduct.

Finally, it is the ordinary remedy in PERB cases that the party found to have committed an unfair practice be ordered to post a notice incorporating the terms of the order. Such an order ordinarily is granted to provide employees with a notice, signed by an authorized agent that the offending party has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. Thus, it is appropriate to order the County to post a notice incorporating the terms of the order herein at the San Joaquin General Hospital and other clinics at which hospital physicians practice. Posting of such notice effectuates the purposes of the MMBA that employees be informed of the resolution of this matter and the County's readiness to comply with the ordered remedy.

## PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the County of San Joaquin (County) violated the Meyers-Milias-Brown Act (Act), Government Code sections 3503 and 3506 and Public Employment Relations Board (PERB or Board) Regulations 32603(a) and 32603(b),[19] by retaliating against Dr. David Gran, interfering with his right to participate in activities of employee organizations of his own choosing, and denying Union of American Physicians and Dentists (UAPD) the right to represent employees in their employment relations with public agencies.

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

A. CEASE AND DESIST FROM:

1. Retaliating against Dr. David Gran by issuing a plan of corrective action dated October 4, 2001, because of his participation in an employee organization of his own choosing;

2. Interfering with Dr. David Gran's right to participate in the activities of an employee organization of his own choosing by issuing him the August 23 and September 17, 2001, letters of warning; and

3. Denying UAPD its right to represent employees by:

a. retaliating against Dr. Gran by imposing its plan of corrective action; and

b. threatening Dr. Gran because of his participation in activities protected by the MMBA.

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

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

1. Within ten (10) workdays of service of a final decision in this matter, rescind the October 4, 2001, action of the Medical Executive Committee adopting a plan of corrective action for Dr. David Gran, destroy all copies documenting such action, including those contained in Dr. Gran's personnel file, and notify the National Practitioners Data Bank that the referral it made in this regard should be expunged from Dr. David Gran's record.

2. Make Dr. Gran whole for monetary losses and losses he may have suffered as a result of the referral of the complaint to the Medical Executive Committee, including but not limited to the reimbursement of reasonable attorneys fees and litigation expenses incurred in defending against the charges of physician malfeasance. This award shall include interest at the rate of 7 percent per annum.

3. Within ten (10) workdays of service of a final decision in this matter, rescind and withdraw the letters of warning issued to Dr. Gran on or about August 23, and September 17, 2001, and destroy all copies thereof.

4. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations at San Joaquin General Hospital (Hospital) and other clinics at which Hospital physicians practice, where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that the County will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

5. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Pursuant to PERB Regulation 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the PERB 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 95814-4174
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. (PERB Regulation 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (PERB Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (PERB Regulation 32135(b), (c) and (d); see also PERB Regulations 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 PERB Regulations 32300, 32305, 32140, and 32135(c).)

Donn Ginoza
Administrative Law Judge