STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNION OF AMERICAN PHYSICIANS & DENTISTS, Charging Party, v. COUNTY OF SAN JOAQUIN (HEALTH CARE SERVICES) Respondent.	Case No. SA-CE-64-M PERB Decision No. 1649-M June 29, 2004

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

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Union of American Physicians & Dentists (UAPD) to a proposed decision (attached) of the administrative law judge (ALJ). The complaint alleged that the County of San Joaquin (Health Care Services) (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by retaliating against Dr. David Gran (Gran) for his protected activities. Specifically, UAPD alleged that the County terminated Gran's employment because of his organizing efforts on behalf of UAPD. Although the ALJ found that the County was partially motivated by anti-union animus, the ALJ ultimately concluded that the County would have terminated Gran's contract even absent any protected activity. As a result, the ALJ dismissed the complaint.

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

The Board has reviewed the entire record in this matter, including the ALJ's proposed decision, UAPD's exceptions and the County's response. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts the proposed decision as the decision of the Board itself, subject to the discussion below.

DISCUSSION

In its exceptions, UAPD argues that the ALJ relied in part upon inadmissible hearsay in violation of PERB Regulation 32176[2]. Specifically, UAPD argues that part of the evidence in the record that complaints were made against Gran consisted of hearsay statements. UAPD argues that those hearsay statements would be inadmissible in a civil action, and thus, are inadmissible here.

UAPD's argument must be rejected. First, the findings of the ALJ are not based solely on hearsay. Indeed, even if the disputed evidence is not considered, the Board finds sufficient admissible evidence in the record to support the decision. Second, for the hearsay evidence that was admitted, the ALJ properly applied exceptions to the hearsay rule. Third, the County's evidence that numerous complaints were made against Gran was not admitted for the truth of the matter, but to demonstrate the state of mind of the County's decision-makers. Submitted for this purpose, such evidence is not hearsay.

Next, UAPD urges the Board to take notice of its decision in County of San Joaquin (Health Care Services) (2003) PERB Decision No. 1524-M (San Joaquin). In that decision, the Board found that the County had unlawfully retaliated against Gran because of his protected activities. UAPD argues that Gran's subsequent termination, which is the subject of the

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

current complaint, is nothing more than a continuation of the County's retaliatory conduct. As a result, UAPD urges the Board to reach a similar finding.

The Board agrees that it may take notice of its decision in San Joaquin. However, each separate unfair practice complaint must be decided on the merit of its own record. While the ALJ found that anti-union animus played some role in the decision to terminate Gran, the ALJ also found that the County would have taken this action anyway. The Board agrees.

Here, testimony established that Gran had numerous problems with his treatment of patients. There was also a pattern of complaints about offensive comments made by Gran during patient examinations, where sensitivity is paramount. The Board finds that because of these problems, the County would have terminated Gran even absent any protected activity. Accordingly, the complaint and underlying unfair practice charge must be dismissed.

ORDER

The unfair practice charge and complaint in Case No. SA-CE-64-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNION OF AMERICAN PHYSICIANS & DENTISTS, Charging Party, v. COUNTY OF SAN JOAQUIN (HEALTH CARE SERVICES), Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-64-M PROPOSED DECISION (4/2/03)

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 refusing to renew his term of employment.

The unfair practice charge initiating the action was filed on May 29, 2002, by the Union of American Physicians and Dentists (UAPD) against the County of San Joaquin (Health Care Services) (County).[1] Following an investigation, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on July 26, 2002. The complaint alleges that by terminating Dr. David Gran's employment on May 15, 2002, the

[1] On July 19, 2002, UAPD amended its charge. On July 26, 2002, UAPD withdrew an allegation that the County refused to meet and confer with respect to Dr. David Gran's termination.

County retaliated against Dr. Gran because he exercised rights guaranteed by the Meyers-Milias-Brown Act (MMBA).[2] This conduct is alleged to violate sections 3503[3] and 3506[4] of the MMBA and PERB Regulations 32603(a)[5] and 32603(b).[6] The complaint further alleged

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

[3] 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.

[4] 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.

[5] 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.

[6] 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)

that the County interfered with UAPD's right of access by removing union literature from employee mailboxes and ordering Dr. Gran to remain off hospital grounds. This conduct is alleged to violate sections 3503 and 3506 of the MMBA and PERB Regulations 32603(a) and 32603(b). The County answered the complaint on August 12, 2002, admitting certain jurisdictional allegations, but denying the other allegations and denying that it had violated the MMBA.

A formal hearing was conducted by the undersigned in Sacramento on October 2, 3, 28, 29 and 30, 2002. The matter was submitted for decision on December 17, 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).

The County's Health Care Services operates a hospital in Stockton known as San Joaquin Community Hospital (Hospital). The Hospital provides acute care and fulfills the County's obligations as a health care provider of last resort. The Hospital has an obstetrics and gynecology (OB/GYN) department with a staff of seven physicians, who deliver babies and provide necessary care for new and expectant mothers. The OB/GYN physicians also see patients on an out-patient basis.

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or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

Dr. Gran has been employed since 1994 as a physician in the County's OB/GYN department. Dr. Gran completed his residency in 1986. He has been in private practice, is licensed in other states, and has teaching experience.

Director of Health Care Services Roger Speed is the agency's chief administrative officer. Speed is not a physician.

The medical provider staff of the Hospital is internally governed by a set of bylaws and the Medical Executive Committee (MEC), which administers those bylaws. The MEC serves as a peer review process for complaints about substandard treatment of patients. The officers are elected by vote of the medical staff. Dr. Gran served as the president of the medical staff 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.

The physicians at the Hospital are part of a bargaining unit currently represented by UAPD.

Dr. Gran's Protected Activities

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 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. Dr. Adams testified that he responded to the two by stating that as a member of the medical staff and in light of his belief that the bargaining unit had not been established, he had a right to attend. He expected to become a member of UAPD if it were certified as the exclusive representative. After the meetings, he learned he would not be in the bargaining unit.

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.

In late June 2001, and subsequently in November 2001, Dr. Gran drafted petition letters protesting working conditions in the OB/GYN department, citing low morale and management's lack of responsiveness to employee concerns. His signature appears on both letters.

On July 24, 2001, the day after ballots were sent out for the UAPD representation election, 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 representation 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 on the basis of a showing of reasonable cause that an unfair practice had been committed, and the general counsel's office sought and obtained a temporary restraining order from a San Joaquin County Superior Court judge on August 8, 2001. 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.

A representation election was held in July 2001, and the results certified in August 2001. Dr. Gran was an observer at the ballot count.

UAPD filed another unfair practice against the County on October 9, 2001, alleging that the County issued Dr. Gran two warning letters related to discussions of union matters at the work site and ordering him to comply with a plan of corrective action that was issued by the MEC for performance-related issues (Case No. SA-CE-19-M). The warning letters, the second of which threatened termination, were issued on August 23, and September 17, 2001. Speed, who issued the letters, relied in both instances on complaints forwarded to him by staff physicians. The allegations of the unfair practice charge were litigated before the undersigned, who issued a decision on May 16, 2002, finding in favor of Dr. Gran on all counts.[7] The formal hearing was held on February 13 and 14, 2002, and Dr. Gran testified at that hearing. In that case, I found that there was sufficient evidence to infer unlawful intent as to the MEC's

[7] The County has filed exceptions to the proposed decision, but the Board has not rendered a decision in the case.

decision to impose a plan of corrective action. I concluded that primary evidence of unlawful intent centered around the initial departmental investigation that led to a formal recommendation to the MEC and that the MEC as a committee, though it deliberated in a manner that did not reflect overt discriminatory intent, essentially ratified that original discriminatory referral by failing to conduct a full and impartial hearing.

UAPD established a bargaining team for the initial contract negotiations that included Dr. Gran. The negotiations began in the fall of 2001 and continued through the summer of 2002. After reaching impasse, the parties, on July 17, 2002, agreed to terms for an initial MOU. Dr. Gran was an active and vocal member of the team. Pam Reynolds, a County bargaining team member, acknowledged to Patricia Hernandez, a UAPD representative and member of the bargaining team, that Speed was aware of Dr. Gran's participation on the team.

Early Complaints Against Dr. Gran

Dr. Adams was a member of the OB/GYN department for many years. He was department chair from 1994 through 2000. In 2001, he became the Hospital's associate medical director. In this capacity he is the director of anesthesia, approves outside referrals, recruits physicians for the Hospital and fills in for duty in the OB/GYN department. Dr. Adams took credit for recruiting Dr. Gran into the department.

Dr. Adams identified an April 1998 patient complaint of unprofessional conduct against Dr. Gran. According to the written complaint, the patient had been seeing Dr. Adams on a weekly basis during her pregnancy. Dr. Gran was substituting on this occasion. After entering the room and introducing himself, Dr. Gran asked the patient why her pants were off when her due date wasn't for over two months. She explained that, as a result of complications in her previous pregnancy, Dr. Adams had wanted her cervix examined on a weekly basis to ensure

that it was not dilated. At this point, Dr. Gran began making a series of remarks that were offensive and rude to her, including ones of a sexual nature. Then Dr. Gran issued orders contradicting Dr. Adams, who he said with a chuckle "was supposed to be his mentor." After saying the Dr. Adams was "old school" he ordered the patient off disability and returned to work, causing the patient to become extremely upset. The letter of complaint was forwarded to management.

Dr. Adams testified that he spoke with Dr. Gran about the complaint and recalled him explaining that he was very tired and could not recall making the statement attributed to him. Dr. Gran claimed that the patient was overreacting and taking things out of context. At the hearing, Dr. Gran denied that anyone spoke to him about this complaint. I credit Dr. Adams on this point. Dr. Adams recollection was clearer and more detailed than Dr. Gran's. Following the complaint, Dr. Adams wrote to the patient advising her that all follow-up visits would be scheduled with him. Copies were forwarded to Hospital administrators.

In March or April 2000, around the time that he was winding down his chairmanship, Dr. Adams had occasion to relay some staff complaints about Dr. Gran to then-Director of Health Care Services Michael Smith and Dr. Dale Bishop. Dr. Bishop is the County's medical director. He serves in an administrative capacity in overseeing the operations of the medical staff, attending to such matters as supervision of the business aspects of patient care, including such matters as reimbursement of fees, malpractice, and harassment.

Drs. Lee and Sebastian, two OB/GYN physicians, had complained to Dr. Adams about Dr. Gran's check-out procedures. When an OB/GYN physician is completing one of his 24-hour rotations in labor and delivery, he is required to adequately document the conditions of the patients whom he has treated. There were other complaints about Dr. Gran's relationships

with the Family Practice Medicine group and less than exemplary availability in supervising residents. Several meetings were held with Dr. Gran to discuss these matters. They included Drs. Bishop, and Adams, Smith, and Administrative Director Elaine Hatch.

During the same time frame of these events, or approximately June 2000, Dr. Gran, as medical staff president, called a meeting of the nominating committee of the medical staff. Dr. Bishop attended, among others. Dr. Gran was unhappy about the nominating process for chair of the OB/GYN department. He perceived that there was a faction supporting Dr. Lee's nomination to succeed Dr. Adams. The practice at the Hospital is for the department staff to develop a consensus nominee. In this case, no consensus had developed. Dr. Lee was nominated by Dr. Rebecca Stanley. Dr. Gran was nominated by Dr. Philip Ross. Dr. Bishop questioned why there was no consensus. Dr. Stanley explained that Dr. Gran's supporters viewed themselves as the "non-administration track." As an example of the disaffection of this group, Dr. Stanley cited a complaint that the staff was not involved in the interviewing of Dr. Kirby Tran, a new hire. Dr. Bishop testified that he had heard that Dr. Tran reported to Dr. Adams that her interview with Dr. Gran had gone really well, a reason why she had decided to accept the Hospital's offer.

Dr. Gran testified that not just Dr. Stanley but the entire department considered the problem of lack of participation in the interviewing process to be an ongoing one.

Dr. Bishop testified that when he asked Dr. Gran at the meeting if he had been involved in the interview, Dr. Gran denied that he was. Dr. Bishop reported the results of the meeting and Dr. Gran's statement to Smith immediately after it concluded. Smith affirmed to Dr. Bishop that Dr. Gran had been involved in the interviews. Dr. Bishop testified that Smith was upset that Dr. Gran would create the falsehood regarding his nomination to be chair.

Smith told Dr. Bishop he could no longer work with Dr. Gran because of his duplicity. He also directed Dr. Bishop to inform Dr. Gran that his name would be removed as a nominee. Dr. Bishop further testified that when he spoke with Dr. Gran two hours after the meeting, Dr. Gran claimed he could not remember any discussion at the meeting concerning Dr. Tran. Dr. Bishop described Dr. Gran's interaction in these terms:

> And it was in the context of what Dr. Adams had said before, Dr. Adams['s] complaints through the Spring were that it seems like there's this constant tendency of Dr. Gran to get people kind of against him or against each other, so that the Department kind of falls apart. It gets polarized. And Mr. Smith's interpretation of that comment, mine also was it was kind of a polarizing comment.

Dr. Gran acknowledged in his testimony that he met Dr. Tran prior to her hiring during one of his 24-hour shifts, and he talked informally with Dr. Tran, on and off, for an hour or two. He did not consider this an adequate process for interviewing potential hires.[8]

When Dr. Gran denied he interviewed Dr. Tran, Dr. Bishop suggested that Dr. Gran remove his name voluntarily and produced a letter to that effect for Dr. Gran's signature. He agreed to sign it but asked what would happen if he didn't sign it. In the prior PERB case, Dr. Gran testified that he complained to Smith after the installation of Dr. Lee as chair of the department and suggested that the administration manipulated the process for selecting department chairs. Dr. Gran also believed that his withdrawal from the competition was the result of the administration's erroneous interpretation of the MEC bylaws. Dr. Gran threatened legal action or a complaint to the County's board of supervisors. According to Dr. Gran, Smith

[8] Dr. Tran would testify that she was not involved in a "formal" interviewing process.

told him that as president of the medical staff he was part of administration and should abide by its decisions.[9]

Dr. Gran had requested a meeting with the administration to discuss the nominations controversy. The meeting was attended by Smith, Hatch, Dr. Bishop, and Dr. Adams. Dr. Bishop testified that Smith tried to open the meeting on a constructive note. Dr. Gran was anxious about the performance concerns surrounding him. At some point, Smith claimed he could not work with Dr. Gran because he created divisions within the staff. He cited complaints made to him earlier by Dr. Adams. Smith called Dr. Gran a "70 percenter." Dr. Gran asserted to Smith that the medical president was more important that the medical director, to which Smith responded that he viewed it entirely the opposite. Dr. Bishop believed that this destroyed what chances remained for repair of the Smith-Gran relationship.

Within a week or two after the chair election meeting with Smith, a counseling memorandum dated July 8, 2000, drafted jointly by Drs. Adams and Bishop, was issued to Dr. Gran concerning the recent staff complaints.[10] It acknowledged Dr. Gran's value to the department but listed eight bullet points regarding areas where improvement in performance was expected. The eight points were: (1) better availability following his rotation in Labor and Delivery to facilitate transfer of important clinical information on patients; (2) more positive relationships with family practice faculty; (3) better availability to residents and closer clinical supervision; (4) more sensitivity to patient needs and self-awareness about possibly insensitive

[9] This background information is taken from my proposed decision in Union of American Physicians & Dentists v. County of San Joaquin (Health Care Services) (Case No. SA-CE-19-M).

[10] Smith suggested earlier, in April, that Dr. Adams issue the counseling memorandum in response to an inquiry from the doctor.

verbal comments; (5) dressing in more professional manner by limiting scrubs to Labor and Delivery duty; (6) being less divisive in role as president of medical staff by avoiding casting blame without investigating problems; (7) being supportive of Dr. Lee in his new role as department chair; and (8) better understanding of the roles of medical staff in relation to management as contemplated by the medical staff bylaws. The memorandum alluded to the dispute regarding the department chair position, which was deemed a separate matter.

In addition to the matters noted above, the memorandum requested that Dr. Gran interact more "positively" with administration given his new position as president of the medical staff, and speak with more sensitivity in patient encounters. Dr. Adams told Dr. Bishop he was reluctant to issue the letter because of Dr. Gran's positive role in recruiting Dr. Tran. Although the decision was made to issue the letter, Dr. Bishop spoke to Dr. Gran before its issuance to advise him of it in advance and to reiterate that it was issued in the spirit of constructive criticism.

Dr. Adams testified that the memorandum was also issued progressively, that is, after previous informal counselings beginning in 1995 had been only intermittently effective. Dr. Adams believed that Dr. Gran's performance improved for a short period of time following the memorandum, but then "the same problems began to reappear." Dr. Adams testified that Dr. Gran's response to other physicians' requests to improve his sign-outs was to deny any problem and assert that his partners were as bad or worse. By comparison, other physicians responded positively to constructive criticism, in Dr. Adams's opinion. Dr. Adams also asserted that Dr. Gran had from the outset raised baseless complaints about other physicians. Dr. Gran was upset about receiving the letter and asked if he was going to be terminated as a result of the matter.

In the fall of 2000, Hatch reported to Dr. Bishop that Dr. Gran had been spreading the rumor that nurse practitioners had been excluded from a noon conference planned by Dr. Gran and Hatch. This caused the administration to receive a number of complaint calls from nurse practitioners and upset Hatch. Dr. Gran did not recall this incident well enough to formulate a response. Similar complaints were received from nurse mid-wives around the same time. They reported that Dr. Gran had told them they were not invited to Dr. Tran's welcoming dinner. Dr. Bishop sent a counseling memorandum to Dr. Gran regarding improving his relationships with others in the department.

In January 2001, Dr. Bishop became aware of complaints from Phyllis Barenchi, the lead secretary in administration and secretary for the medical staff meetings. Barenchi complained to Hatch, her supervisor, on several occasions. Each time, Hatch testified that Barenchi was extremely upset when she spoke with her. Barenchi did not testify at this hearing. One complaint involved an allegation by Dr. Gran that Barenchi had steamed open secret ballots in the election for president in which Dr. Rodney Felber and Dr. Gran were competing against one another, and Dr. Felber had won. Dr. Gran made this allegation at several meetings attended by medical staff, but never offered any evidence to substantiate the claim.

Hatch advised Barenchi to put her complaints in writing, and she began to do so. Barenchi complained that Dr. Gran suggested that she get a bigger chair, a reference to Barenchi's size in her opinion, in a conversation in which she indicated that she would not be retiring anytime soon. Dr. Gran recalled that conversation differently. He testified that he offered one of two, unused executive chairs in his office out of sympathy for her needing to continue working. Barenchi complained that Dr. Gran made remarks to others that Barenchi

and her staff were being "vultures and scavengers" because Barenchi invited her staff to partake in the lunch buffet provided at physician committee meetings. Barenchi did not want the excess food to go to waste. On another occasion, Barenchi asked Dr. Gran about a speaker for a medical staff quarterly meeting. Barenchi informed him about a request from an analyst from the state Department of Social Services who had requested the opportunity to speak about operational efficiencies in dealing with disabled patients. Dr. Gran dismissed the topic as not valuable. When Barenchi attempted to read some lines from a description of the presentation and stumbled over some words, Dr. Gran told her, "I can read better than you and I have been up 24 hours." In the fourth of the documented complaints, Barenchi wrote that she, Dr. Gran and another staff member were discussing practices of the medical staff, and Barenchi asserted that some practices had always been in place. Dr. Gran objected to the status quo. When he stated that "administration" needs to "butt out," Barenchi responded that the practice was required by licensing authorities.[11] Dr. Gran's retort was, "Its like having sex with your husband, once you have done it, it never changes." Barenchi was offended.

After Barenchi had complained to Hatch three times, Hatch met to discuss the complaints with Dr. Gran. Dr. Gran told Hatch that he was only trying to be humorous and he denied his statements carried any implied meaning that should have been offensive to Barenchi.

At the hearing, Dr. Gran denied that the incident regarding the proposed speaker was brought to his attention. Dr. Gran had requested several times of Hatch that he have a secretary not in administration to do his typing and other tasks while he was the medical staff president. Based on his requests as well as statements by Barenchi made to OB/GYN

[11] Dr. Gran once told Hatch that he did not trust members of the administration.

secretaries that only she would do Dr. Gran's typing, Dr. Gran concluded Barenchi may have been biased against him because of the dispute. He believed the issue of ballots was another source of controversy between them because he had spoken to her about them on several occasions. Without being specific, Dr. Gran suggested that there was a problem with the ballot system being run by the administration.

Dr. Sheila Kapre, who currently holds several positions including chair of the internal medicine department, director of the internal medicine residence program, director the intensive care unit and medical director, was once told by Dr. Gran during his tenure as medical staff president that he thought the hospital was "an impossible place," where nothing gets done and staff is unhappy. Dr. Kapre was led to believe that this view, as well as Dr. Gran's repeated statement to her that the president's position was unappreciated, prompted his statement of intention not to run for a second term as president. This was on the occasion when Dr. Felber was elected president of the medical staff in May 2001. According to Dr. Kapre, at the time he was nominated by his fellow physicians, Dr. Felber did not believe Dr. Gran was interested in running for the position. Indeed, Dr. Gran approached him and asked him why he was interested in the position since it was a "big headache." Yet, after asking Dr. Kapre to seek the position and being rebuffed, Dr. Gran told Dr. Kapre that he intended to advise Dr. Felber not to run because it was not a worthwhile position. After Dr. Felber was nominated at a nominating committee meeting attended by Dr. Gran, during which Dr. Gran expressed no interest in the position, Dr. Gran commenced a write-in campaign to elect himself to the position.

Dr. Kapre also related that a second-year resident complained to her that while doing her gynecology rotation she became very uncomfortable by comments made by Dr. Gran to a

patient during an examination observed by the resident. The experience prompted her at the time to wish that her gynecology rotation would end. Dr. Kapre also testified that another physician complained to her about being uncomfortable about Dr. Gran approaching her individually to request her vote for UAPD. This physician and others apparently thought Dr. Gran's tactics were intrusive.

The First MEC Investigation

Dr. Stanley has been a staff physician in the OB/GYN department for seven years. 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 admitted in the prior hearing that she was intimidated and considered looking for other employment. Dr. Adams did not testify in the prior hearing. In this hearing, Dr. Adams recalled having a conversation with Dr. Stanley about Dr. Gran, but claimed it would be atypical of him to make a statement like Dr. Gran "has got to go." He believed Dr. Stanley's testimony may have resulted from taking the conversation out of context and suggested that it was Dr. Stanley who had brought "serious concerns" to him about Dr. Gran. Because Dr. Stanley did not corroborate the latter claim, testifying in this hearing only that the conversation was a "general" one, I find that Dr. Adams did make the statement and that Dr. Stanley understood it to mean that Dr. Adams wanted Dr. Gran terminated. Although I do not find Dr. Adams credible on this point, I otherwise found him to be a credible witness. He was formal yet congenial, mild in disposition, yielding at times, and not revealing of any bias, at least overtly.

In June 2001, Dr. Lee, then-OB/GYN department chair, again accused Dr. Gran of failing to properly check-out patients which Dr. Lee inherited as the physician following

Dr. Gran's shift.[12] Dr. Lee convened two meetings of the OB/GYN staff, which also included Hatch. At these meetings, Dr. Lee demanded that Dr. Gran explain patient care issues involving a number of patients, whose charts he was given. In my previous decision, I found that the manner in which Dr. Gran was questioned about these patients was irregular, the timing of the investigation, Dr. Adams's "got to go" statement, and other points established evidence of unlawful animus. Dr. Lee referred his concerns to the MEC for a formal inquiry.

The MEC concluded its inquiry in October 2001, following the presentation of a defense by Dr. Gran. The MEC found that Dr. Gran did not fail to render competent care to the patients whose cases were referred. However, the MEC, based on other concerns raised by various members of the committee, ordered that Dr. Gran's clinical activities be monitored for 90 days and that he be required to participate in sexual harassment counseling and psychiatric counseling.

Complaints Against Dr. Gran Following the MEC Investigation

Dr. Stanley succeeded Dr. Lee as chair of the OB/GYN department in November 2001. As chair, Dr. Stanley's duties included directing the department, scheduling physicians for their call schedules and clinic schedules, and overseeing the quality of care. Following the MEC plan of corrective action, Dr. Stanley was given responsibility to oversee the 90-day monitoring process. Dr. Stanley met with Dr. Gran and expressed confidence in his clinical abilities and assured him that she had never had any problems with his sign-outs. During the monitoring period, there were no issues regarding Dr. Gran's delivery of patient care.

[12] This background information is taken from my proposed decision in Union of American Physicians & Dentists v. County of San Joaquin (Health Care Services) (Case No. SA-CE-19-M).

However, Dr. Stanley did receive two written complaints from patients around November or December 2001, regarding Dr. Gran's alleged lack of professionalism in dealing with them.

The first patient complained that Dr. Gran made disparaging jokes during his examination of her, which included a rhetorical question to her about whether she believed in the Immaculate Conception since she was Catholic. The second patient complained that Dr. Gran accused her husband of being sexually active with other partners, and speaking to her in a very demeaning tone. Dr. Stanley discussed the complaints with Dr. Gran and told him she believed his conduct was inappropriate and unprofessional. Dr. Gran told her that he did not recall the patients and essentially denied responsibility. Dr. Stanley did concede that because the second patient complained of pelvic pain, it would have been appropriate to inquire as to whether the patient's husband was sexually active outside of the marriage.

In January 2002, Dr. Adams reported to Hatch that a physician named Dr. Miro Grgurevic complained about Dr. Gran making an offensive and sarcastic remark to him. During a heated discussion about the posting of salaries reflecting additional compensation for extra hours, Dr. Gran told Dr. Grgurevic that he "sounded like a Communist." Dr. Grgurevic has a family that suffered in a country under communist rule. Dr. Grgurevic objected to the posting of the salaries because it revealed he had earned a substantial amount of additional compensation. Dr. Gran couldn't recall ever calling Dr. Grgurevic a communist and no one from management reported the complaint to him.

In a February 8, 2002, memorandum from Dr. Felber on behalf of the MEC, Dr. Gran was warned that his continued failure to complete sexual harassment training and psychiatric counseling, as directed by the October 2001 notice of corrective action, could result in further disciplinary action. Dr. Gran testified that he had appealed the corrective action through the

procedure provided in the medical bylaws and had not yet had his hearing on the matter. Also, the PERB hearing on the matter of the MEC's action was set for formal hearing on February 13, and 14, 2002. Nevertheless, Dr. Gran made several attempts to schedule the sexual harassment training through the County. However, he did not get a response from the contact person he called. On February 19, 2002, Dr. Gran received the sexual harassment training registration form from the County contact person, who had been off work for several weeks. Because he was scheduled to be on vacation for the first class in March, he scheduled the next class on May 28, 2002. Dr. Gran was given notice of his termination on May 15, 2002, and so he did not attend the training. Dr. Gran also attempted to schedule the psychiatric counseling, but after learning that the sessions would entail 10 to 12 hours, he balked at the potential cost and asked his attorney to contact the County to determine who would accept the bill. His attorney got no answer.

In a February 12, 2002, memorandum, Dr. Felipe Dominguez, chair of the pediatrics department, wrote to Dr. Bishop reporting that several members of the department were uncomfortable around Dr. Gran because of repeated inappropriate, unwelcome comments and his intimidating demeanor.[13] He asserted that most of the providers would "definitely not" consider referring young female patients to Dr. Gran. Copies were forwarded to Drs. Stanley and Felber, as well as Speed. The underlying complaints were not raised with Dr. Gran, and he believes that Dr. Dominguez had become very angry recently with him, and, without being specific, he attributed this to his union activities.

[13] One incident was documented by a nurse in the unit. The nurse complained that Dr. Gran interjected himself into a conversation she was having with another doctor, and on another occasion, whispered an unwelcome comment into her ear. At the hearing, Dr. Gran recalled the nurse asking, and himself answering, questions about employment opportunities. He denied doing anything to intimidate her.

In February 2002, Dr. Stanley had occasion to speak with Dr. Gran about improper "check-out" procedures as to a patient admitted for elevated blood pressure, a condition of pregnancy. When an OB/GYN physician rotates off the hospital floor, he is required to alert the incoming physician to problematic patients and, when necessary, describe a plan of management to follow. Pregnant patients exhibiting high blood pressure are considered high priority. At the time of check-out, more than 12 hours after the patient had been admitted, Dr. Gran had failed to see her, write any notes in the chart, review any care management with the patient, or have any plan of management. When Dr. Stanley confronted Dr. Gran, he had no explanation for not seeing the patient. Dr. Stanley ordered Dr. Gran to see the patient and develop a plan of management before responsibility for her case was transferred.

Dr. Stanley also received complaints about Dr. Gran from Dr. G. Cavallaro, the chair of Family Practice, regarding his supervision of resident interns. Dr. Cavallaro did not testify at the hearing. Family Practice trains residents in the OB/GYN practice and part of the training involves learning to deliver babies. In February 2002, Dr. Cavallaro passed on a complaint from a resident who was having difficulty with a high-risk delivery and called for Dr. Gran's assistance several times. Dr. Gran was slow to respond. When he did respond, he allegedly did nothing to assist the intern.

Dr. Gran testified that he responded to the case by running into the delivery room, where the premature baby was delivering rapidly. Dr. Gran gave the intern instructions on how to deal with the high-risk delivery. Dr. Gran did not have time to find another pair of gloves to put on himself and so he had the intern handle the delivery with his consultation. The baby was transferred to neonatology but did fine.

In March 2002, Dr. Cavallaro related another incident to Dr. Stanley involving Dr. Gran. The nurse in charge of labor and delivery approached Dr. Cavallaro regarding Dr. Gran's cavalier response to another intern having difficulty with a delivery: in this case, the baby's head had come out, but the shoulders were not delivering. Dr. Gran had allegedly been called several times on the intercom system and on his personal pager twice. Dr. Gran was seen in the hallway conversing with others. When he arrived, the baby had already delivered.

Dr. Gran claimed that due to some problem with signing out, he was not informed that the intern was handling the second delivery. He responded to the emergency page and walked briskly to the delivery room. When he arrived, he asked if there were any problems but everyone was smiling and no one requested any assistance from him. Dr. Stanley testified that she found these complaints credible because of her own personal observations of Dr. Gran as someone who was lax and likely to just "sit in his chair." Dr. Stanley did not speak to Dr. Gran about either of these cases.

On March 6, 2002, Dr. Stanley called Dr. Gran to inquire whether he knew the names of two physicians who had retired. At the end of the conversation, Dr. Gran concluded the conversation with the words, "hugs and kisses," and then hung up the telephone. Dr. Stanley wrote to Speed insisting that someone speak to Dr. Gran about the inappropriate remarks to his supervisor. Dr. Gran offered to apologize to Dr. Stanley personally and never repeated that phrase to her.

In April 2002, Dr. Tran complained to Dr. Stanley that Dr. Gran had not red-flagged a potentially serious patient when checking out to her. The patient had a vaginal delivery but her placenta was retained. The patient experienced a significant amount of bleeding, followed by a

drop in blood pressure. She required multiple blood transfusions and required an additional surgical procedure to remove the placenta. The delivery was performed by Pam Long, a mid-wife, but Dr. Gran was in charge that shift.

Dr. Tran testified that Dr. Gran's notes on the sign-out sheet only indicated that the patient had post-partum hemorrhaging, a routine complication. About four hours after Dr. Tran came on duty, or around noon, it was reported to her that the patient had a very low urine output. Dr. Tran ordered an emergency lab test. As a result, she ordered a blood transfusion, and the patient responded. About 5:00 p.m., Dr. Tran was called to see the patient urgently. She saw the patient experiencing seizures. Entering her vagina, Dr. Tran removed some of the placenta. Upon further investigation, Dr. Tran learned from the nursing crew that the patient had bled much more than was indicated on the chart and that only "minimal things" were done for her before Dr. Tran came on duty. Although Dr. Tran had never experienced a similar problem following Dr. Gran, she believed that Dr. Gran appears not "to know all the patients very well" and that there are matters to which he could attend while on-call, which fail to get done.

Long told Dr. Tran that she reported the retained placenta to Dr. Gran. Dr. Gran ordered a medication to stimulate expulsion of the placenta. The placenta came out approximately 90 minutes after the delivery of the baby. She reported in the chart that the placenta was in pieces. Dr. Gran did not appear in the patient's room until this time. Long told Dr. Tran that she asked Dr. Gran to inspect the birth canal to determine if the placenta had come out completely. She didn't learn if Dr. Gran actually did that.

Subsequently, the patient was transferred to the intensive care unit where she suffered renal compromise and required additional blood transfusions. Dr. Tran's complaint was that

Dr. Gran had not adequately presented the case to her when he checked out of his rotation, had not adequately treated the patient's blood loss, and his failure to remove a large part of the placenta exacerbated the patient's hemorrhaging. Dr. Tran asserted to Dr. Stanley that the patient almost died because of negligence on Dr. Gran's part. I found Dr. Tran to be a credible witness.

Dr. Gran testified that Long was a very competent nurse midwife. The delivery was expected to be routine. Dr. Gran had gone to sleep at the time of the delivery around 5:00 a.m. In a call it was reported to him that the placenta was retained. Dr. Gran responded that the attending providers should wait a little longer. Thirty minutes later, he received the same report. Dr. Gran inquired about significant blood loss and the response was negative. He ordered drugs to hasten the delivery of the placenta. When further complications were reported, Dr. Gran attended. A loss of blood pressure was countered with fluids. Blood loss was noted, as was the pain reported by the patient. When Dr. Tran came on, Dr. Gran advised her that he had been administering fluids. He claimed that Long advised Dr. Tran that there was significant blood loss and that the patient should be monitored. He checked twice more on the patient before checking out with Dr. Tran and leaving, at around 10:00 a.m. Dr. Gran believed that the nurse mid-wife's chart note on blood loss was too conservative.

The patient's deterioration was considered a possible "sentinel event," triggering a "morbidity and mortality" review of the case. The case was presented to the nurses and physicians involved in the case for a quality-assurance discussion. It was reported that Dr. Gran had once again been paged three times before responding to the patient. Dr. Gran refused to accept any responsibility in the matter.

As a result, on April 16, 2002, Dr. Stanley took Dr. Gran out of the rotation, ordered him to review the patient's chart, and suspended his hospital privileges pending further review of all of Dr. Gran's problem cases. She referred the case to the MEC for review. During Dr. Gran's tenure as president of the medical staff and member of the MEC (a total of six years) only one other referral not involving himself had been made to the MEC for investigation, and that involved the death of a patient.

The MEC reviewed Dr. Stanley's referral and ultimately found that the patient's case did not warrant disciplinary action based on substandard care.[14] On July 2, 2002, the MEC agreed to reinstate Dr. Gran's hospital privileges. Based on recommendations of the MEC's internal review committee and an outside reviewer, the MEC also identified a list of concerns to be addressed by Dr. Gran, if he desired "to have a successful practice at this hospital as a member of the Medical Staff, " and ordered that he complete an out-of-state, professional evaluation program prior to the expiration of his current term of employment. Among the concerns were adequacy of patient work-ups and diagnoses, excessive reliance on staff to alert him to patient care issues,[15] responses to pages, supervision of residents, and sensitivity toward patients, and cooperation in the peer review process. The letter concluded with the caveat that the MEC expected Dr. Gran's acknowledgement "for the first time" that his performance could be improved, and that had this been shown at Dr. Gran's hearing before the committee on April 23, there "likely would have been no action to restrict [his] privileges."

[14] Long told the MEC that she expressed concern to Dr. Gran that the placenta did not look right. Dr. Gran told the MEC that he assumed that Long did not want him to look at the placenta because she did not insist that he do so.

[15] The MEC asserted that Dr. Gran was wrong to assume that Long did not want him to look at the placenta.

Dr. Gran responded in a September 27, 2002 letter, expressing dismay that he had not been fully reinstated based upon the lack of clinical concerns sufficient to justify continued restriction of his privileges and indicating that this, in part explained his failure to respond to the list of concerns. Dr. Gran nevertheless did respond to the list of concerns. He also proposed a class for improving communications skills, but asked the County to assume the expense due to financial hardship. He cited the undersigned's decision in his favor in regard to the point about cooperation with the peer review process. He did not indicate completion of the program recommended by the MEC.[16]

At the time she made her referral to the MEC, Dr. Stanley no longer wished to have Dr. Gran in the department and testified that she would not send a loved one to Dr. Gran. She had come to the point where she refused to accept patients from Dr. Gran because of his lax check-out procedures. Although this is a hospital setting, Dr. Stanley felt unreasonably at risk for malpractice because of what she felt was a lack of reliable information from Dr. Gran regarding the patients on his watch. Dr. Stanley believed that Dr. Gran's failure to conduct exams of all patients during his shifts and poor check-outs were repetitive in nature. She was aware that Dr. Lee had similar issues with Dr. Gran. However, she conceded that her concerns about Dr. Gran only became serious in the last year of Dr. Gran's employment. Even at this time, however, she was not prepared to recommend that Dr. Gran be terminated.

Dr. Bishop believed that Dr. Stanley previously had no agenda against Dr. Gran, and only came to have serious concerns about Dr. Gran around this time. Dr. Bishop knew from Dr. Stanley that her colleagues were very upset by the April check-out problem and that

[16] Dr. Bishop indicated that a malpractice action had been filed against Dr. Gran in the spring of 2002 regarding an ectopic pregnancy. No other details were provided.

Dr. Stanley came to her position about no longer working with Dr. Gran as a result. He also knew that this was the third department chair to voice objections to working with Dr. Gran as a team member. Dr. Bishop stated that the providers in labor and delivery have a very close relationship because their work is complicated and difficult; poor communication places patients at risk. In addition, Long reported to Dr. Bishop that she felt intimidated by Dr. Gran and that Dr. Gran was so hostile to some other members of the department that patient care was at extreme risk. In one conversation, Long was in tears discussing the hostility and anger within the department with Dr. Bishop. I found Dr. Bishop to be probably the most credible of the County's witnesses. He testified without hesitation and appeared to be a committed professional, who was non-confrontational and could be objective. For example, Dr. Bishop explained that when Dr. Gran challenged his credentials to be medical director and asserted he knew a member of the board of supervisors who might assist in terminating certain unworthy administrators, he withdrew from further interactions with Dr. Gran. Dr. Bishop testified that no other physician had been cited with as many complaints as Dr. Gran.

As noted above, Dr. Ross is also a member of the OB/GYN group. Dr. Ross believes that Dr. Gran is capable of providing "good, competent care." In his opinion, Dr. Gran's check-outs were "satisfactory" and that Dr. Gran flagged critical cases. Dr. Ross disputed Dr. Stanley's contention that physicians in the OB/GYN department have the right to refuse acceptance of patients from the previous shift, because all of them work as a "team." Dr. Ross also recounted his testimony from the previous hearing regarding the meetings in May 2001 when Hatch and Dr. Lee held the adversarial meeting with Dr. Gran regarding a list of patient issues. He recalled Dr. Stanley being upset with the aggressive questioning at that meeting and stating that she "couldn't handle" it.

Dr. Patricia Apolinaro, a Hospital pediatrician and fellow member on the UAPD bargaining team, worked with Dr. Gran in labor and delivery on at least two occasions during her eight years of employment with the County. She had never heard any complaints about Dr. Gran from other staff members, and never had reason to complain about Dr. Gran's handling of patients.

Cynthia Wood, a nurse who has worked with Dr. Gran in labor and delivery, believed that Dr. Gran's behavior was always appropriate and that he was an effective member of the team. Dr. Lee called Wood once for her assistance in identifying a patient that Dr. Gran had seen, and she wondered why Dr. Lee was not asking Dr. Gran about the patient directly.

On April 22, 2002, Dr. Cavallaro reported to Dr. Bishop that Dr. Gran had told a newly hired obstetrician that "he was foolish to accept a job at [the] Hospital and even more foolish to buy a house because his job is at risk." On that day, Dr. Stanley also complained that Dr. Gran was undermining her when he told the nursing supervisor that she should not follow Dr. Stanley's recommendation to hire a particular nurse because the nurse had failed a class nine times. Dr. Stanley made the hiring decision despite awareness that the nurse had had some academic difficulties. Dr. Gran claimed he was only passing along information he knew personally that the nurse had not been a serious student at one time.

At the MEC's February 19, 2002 meeting, the MEC had agreed to have Dr. Felber write a letter of concern to Speed regarding Dr. Gran. For reasons not explained – but perhaps related to the April referral – Dr. Felber delayed writing the memorandum until April 26, 2002. In it, Dr. Felber claimed he was frustrated with the legal delays as well as the fact that new complaints continued to be lodged against Dr. Gran. Dr. Felber stated that the MEC was attempting to transfer responsibility for any future professional misconduct to Speed and the

board of supervisors, because the MEC's inability to reach closure on the October 2001, plan of corrective action with respect to Dr. Gran's behavioral treatment, as well as liability concerns.[17] Dr. Gran appealed the decision, as provided in the bylaws procedures, but Dr. Felber claimed that Dr. Gran had delayed and frustrated the process, in part by changing his legal counsel. The appeals hearing was to have occurred within 60 days, but the entire process had been delayed by over six months. Dr. Felber asserted that two department chairs and several other staff physicians had resigned as a result of some of the issues related to Dr. Gran. Dr. Felber himself suggested he might resign.

On April 29, 2002, Dr. Frederic Krueger, the director of Family Practice Residency Program, complained to Dr. Bishop about Dr. Gran's whistling the tune "Popeye the Sailor Man" whenever he approached. Dr. Krueger, a retired naval officer, felt this to be sarcastic and irritating. Dr. Gran admitted whistling in the hallways, but was evasive as to whether the tune was the "Popeye" tune, saying, "I usually whistled what's called the Sailor or the Pilot Song or something – similar melody. It's trivial." He could not recall ever whistling the tune in Dr. Krueger's presence. Dr. Gran denied he ever did anything toward Dr. Krueger that was sarcastic or irritating and claimed he had several "quite pleasant" conversations with him. Dr. Krueger was one of the physicians involved in a reported complaint about Dr. Gran's work-time union campaigning discussed in the previous case.

On May 2, 2002, Dr. Gran had a number of conversations with another physician, Dr. Lance Maki, during the day at an out-patient clinic. Dr. Maki was disturbed by them and

[17] The copy of the memorandum entered into evidence included a two-page addendum listing various complaints lodged against Dr. Gran. Dr. Felber testified that this was not attached to the original sent to Speed. UAPD claims that Speed contradicted Dr. Felber by testifying that it was. I do not read Speed's testimony as a direct admission of that, and I do not find that the matter bears on the credibility of either witness.

reported them to Dr. Adams. Dr. Maki reported that Dr. Gran attempted to engage him (Dr. Maki) in discussions about Dr. Gran's legal issues (which Dr. Maki rebuffed) and to show him legal papers. Dr. Gran also spent time talking with his attorney during clinic hours. Dr. Gran told Dr. Maki that he thought he had a great job with great pay and little work to do. Dr. Gran implied that he was happy with what had transpired with his union and legal issues because it was costing the County a great deal of money. In a memorandum to Speed, documenting Dr. Maki's complaint, Dr. Adams concluded: "This is another demonstration of Dr. Gran's disruptive behavior and the apparent pleasure his [sic] getting from it." Dr. Gran acknowledged discussing the union with Dr. Maki but insisted that they occurred "in between patients on break" and "off-work times."

On May 8, 2002, Dr. Dee Pak Shrivastava, who is of Indian descent, lodged a complaint with Dr. Bishop that Dr. Gran told him that he looked "like someone who can fly an airplane, but can't land one," which Dr. Shrivastava interpreted was an insinuation he could be an Al Qaeda terrorist. Dr. Gran denied making this statement, adding, "I can't imagine making that comment." He was not confronted with the complaint.

The County's Decision to Terminate Dr. Gran

Speed was responsible for making the recommendation for Dr. Gran's separation to the board of supervisors. Beginning in December 2001, he instructed Dr. Bishop to forward all complaints regarding Dr. Gran to him. In January 2002, Speed decided to initiate an investigation of Dr. Gran because of the number of complaints that Dr. Bishop and others had been receiving. The County's equal-employment-opportunity officer recommended an investigator who would be seen as neutral. Speed retained the investigator.

Speed made his decision, set forth in a memorandum dated May 14, 2002, before the outside investigator's report was completed. Speed could recall only one other instance in which an outside investigator had been hired, and that case involved a physician's possible Medi-Cal fraud.

The memorandum itself did not state the reasons for the termination. Dr. Gran and UAPD tried unsuccessfully to ascertain the reasons after the notice was delivered to Dr. Gran on May 15, 2002 at the Hospital. On that day, Speed requested that Dr. Gran meet with him. Dr. Gran refused to such a meeting without union representation. Speed nevertheless approached Dr. Gran, handed him the memorandum, told him to get his belongings, and ordered him off the premises immediately. The notice advises Dr. Gran that he may no longer treat patients on behalf of the Hospital, although he retains hospital admitting privileges. The notice also provides for pay through August 12, 2002, or the expiration of the 90-day notice period for non-renewal of the employment contract. Dr. Gran's contract, typical of those of other physicians at the Hospital was for an initial one-year term, ending on June 30, 1999, and self-renewing for successive years, subject to termination by either party with 90 days notice.

At the hearing, Speed offered his reasons for the decision. These included the number of complaints against Dr. Gran that led Speed to believe that Dr. Gran was not a good employee, used poor judgment, and spread falsehoods intended to create dissension within the staff. At the same time, Speed was aware of the patient care issues surrounding Dr. Gran, and he made the decision even though the MEC later reinstated Dr. Gran's medical privileges. He was told of Dr. Stanley's position on Dr. Gran through Dr. Bishop. Speed believed Dr. Stanley to be objective and that her opinion was corroborated by Dr. Felber's April 26 letter on behalf of the MEC. He interpreted that letter as a "no-confidence" vote by Dr. Gran's colleagues, and

he was concerned with the threat of more physicians resigning because of Dr. Gran. Speed called the letter unprecedented and he was "shaken" after reading it.

With respect to poor judgment in interacting with patients, Speed cited Dr. Gran's inappropriate comments of a sexually suggestive nature, and insensitive ethnic comments.[18]

With respect to the falsehoods, Speed cited Dr. Gran's assertion that Barenchi had steamed open the ballot envelopes during the medical staff president's election, his claim made at the prior PERB hearing that the physicians who met to counsel him prior to the September 2001 MEC meeting warned him that he could lose his house if he did not play a submissive role before the committee,[19] and his statements to staff that the Hospital was firing all of the old doctors.

With respect to creating dissension, Speed cited Dr. Gran's characterization of the hospital as "not a good place to work" and one where you had to "watch your back." Speed also cited Dr. Gran's claim that he was protected by a member of the board of supervisors who was a friend.

At the hearing, Dr. Bishop added that he was of the opinion that Dr. Gran was competent to practice medicine but that "on a relationship level" he was deficient. He believed that Dr. Gran's poor relationship skills did compromise his patient care to some extent. Dr. Bishop cited Dr. Gran's conflicts with Drs. Stanley, Adams and Lee. He noted that Dr. Stanley refused to work with Dr. Gran any longer.

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[18] Dr. Bishop had received complaints that Dr. Gran showed a lack of cultural sensitivity to Spanish-speaking patients.

[19] Speed was not present at the meeting at which Dr. Gran was counseled by his colleagues.

Post-Termination Events

After Dr. Gran left the County he was briefly retained by the Gill Group, a private OB/GYN group practice. Dr. Raymond Burns of the Gill Group testified that in July 2002, a patient complained to a nurse practitioner about Dr. Gran. The patient claimed that she suffered sexual harassment during her visit with Dr. Gran. Interviews with other staff members who had worked with Dr. Gran were then conducted. Finally, Dr. Burns met with Dr. Gran to discuss the patient's complaint. Dr. Burns testified they had a "lengthy discussion" at the conclusion of which, he terminated Dr. Gran and advised him to undergo counseling. It was later reported to Dr. Burns that the patient continued to undergo counseling therapy at the time of this hearing. Dr. Burns testified that Dr. Gran did not deny the accusation. Dr. Gran was noncommittal about seeking counseling, according to Dr. Burns.

Dr. Gran acknowledged having the discussion with Dr. Burns about the patient complaint. He claimed that his questioning of the patient was of a routine nature relating to whether she was sexually active. He wanted to know if she was active with men or women. He recalled Dr. Burns stating that things just "weren't working" and that Dr. Gran's parting was a mutual separation. He denied that Dr. Burns recommended counseling regarding sexual harassment. Dr. Gran was evasive during this line of questioning, stating that Dr. Burns may have suggested that he attend a "meeting on communication skills." I credit Dr. Burns's testimony in this matter. He testified forthrightly, without hesitation, and his recollection of the events appeared sharp. Dr. Burns had no apparent interest in these proceedings. Dr. Gran, on the other hand, was evasive and slow to respond to questions concerning the matter.

ISSUE

Did the County retaliate against Dr. Gran for his protected activities when the County terminated him from employment?[20]

CONCLUSIONS OF LAW

The complaint in this case alleges that the County terminated Dr. Gran from employment "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

[20] I find that UAPD has waived its claims, as alleged in the complaint, that the County interfered with employee rights by removing union literature from employee mailboxes and banning Dr. Gran from Hospital grounds. No evidence was presented as to the mailbox issue, nor was it argued in UAPD's post-hearing brief. As to the ban on Dr. Gran, the issue was not argued in UAPD's post-hearing brief, nor was any remedy requested in that regard. In any event, as to the latter claim, there is insufficient evidence on which to base any finding against the County.

corrective action. (California State University, Hayward (1991) PERB Decision No. 869-H; Novato Unified School District (1982) PERB Decision No. 210.)[21] Motivation may be proven 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

[21] 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.).

Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 730 [175 Cal.Rptr. 626].)

I find that Dr. Gran engaged in protected activities and that the County, specifically, Speed, who made the decision to recommend Dr. Gran's termination, was aware of those activities. Dr. Gran led the organizational campaign leading to the certification of UAPD as the exclusive representative of the County's physicians in August 2001. Thereafter he continued to engage in protected activities by prosecuting three PERB unfair practice charges and participating on the UAPD bargaining team. Speed knew of these activities as well.

As to the disputed issues in the case, UAPD contends that a prima facie case is supported by several indicia of unlawful animus. Dr. Gran received disparate treatment in the manner in which he was investigated for alleged disciplinary problems because Speed took the unusual step of hiring a private investigator and because the two patient care referrals to the MEC were suspect. Speed then recommended Dr. Gran's termination to the board of supervisors before he received the investigator's report. Speed did not provide Dr. Gran with an explanation for his termination at the time he was notified and despite attempts thereafter to obtain that information through UAPD. The justification Speed offered at the hearing was shifting and contradictory because he relied on complaints by other physicians, despite the MEC's restoration of medical privileges following the second referral. Then he spoke of poor judgment in dealing with others and Dr. Gran's fomenting of dissension among staff. In addition, UAPD relies on the pattern of animosity toward Dr. Gran which began after he became active in its organizing campaign. Assuming a prima facie case, UAPD contends that the County has failed to carry its burden of demonstrating that it would have terminated Dr. Gran but for his protected activities, citing the MEC's clearance of Dr. Gran as to the

allegations of substandard care and the County's reliance on a series of trivial second-hand complaints against Dr. Gran. UAPD notes that many of these complaints involve hearsay and multiple hearsay, and many were never investigated.

The County contends that Speed had legitimate business reasons for recommending Dr. Gran's termination to the board of supervisors, and that his contract would have been terminated regardless of his involvement in protected activities. Speed relied principally on recommendations from Dr. Gran's peers, including Dr. Stanley, who as the department chair had completely lost confidence in him, as well as the MEC's concerns over the inadequacy of his patient work-ups and diagnoses, responses to pages, charting of patient files, supervision of residents, and questionable demeanor toward patients and staff. These concerns had arisen before, and Dr. Gran had proven himself to be incorrigible with respect to rectifying these matters. In addition, Speed found Dr. Gran to be dishonest.

I agree with UAPD's contention that the manner in which the complaints against Dr. Gran were processed suggests unlawful animus. In my previous decision I found that Dr. Lee's July 2001 referral of his complaint about Dr. Gran's clinical practices as they related to check-outs and charting was irregular because of the timing of the referral in relation to Dr. Gran's organizing activity, Dr. Adams's threatening statement that Dr. Gran "has to go," the confrontational manner in which the cases were presented to Dr. Gran, and other factors. This has to be tempered somewhat, however, by further illumination of those events in this case. Specifically, to my mind it appears that Dr. Lee's more likely motivation to retaliate related to Dr. Gran's attempt to challenge his election to the position of chair rather than his UAPD activity. Also, Dr. Lee had raised concerns about Dr. Gran's check-outs with Dr. Adams the previous year, before any UAPD activity. Regardless of whether Dr. Gran's

activity in regard to challenging Dr. Lee's chair position may be considered protected under the MMBA as individual employee activity in the nature of grievance adjustment, it appears now that the manner in which Dr. Gran undertook that activity involved disingenuous tactics (lying about, or at least exaggerating, his lack of participation in the recruitment of Dr. Tran as a way to justify his nomination). (See Trustees of Boston University v. NLRB (1977) 548 F.2d 391 [94 LRRM 2500] [discussing rule balancing employer's right to discipline an employee for offensive conduct in dealing with other employees during the course of protected activity].) Nevertheless, it can be inferred that Dr. Lee was closely associated with Dr. Adams, and Dr. Adams, despite his protestations of neutrality, does appear to have been closely allied with management.

In this case, however, the focus is on Speed and his motivations, not Dr. Lee's. The timing of Speed's order placing Dr. Gran on administrative leave (raised in Case No. SA-CE-6-M), in the midst of the voting period for the representation election is suspicious. (See County of San Joaquin (Health Care Services) (2001) PERB Order No. IR-55-M.) Further, although not discussed in my previous decision, some unlawful animus on Speed's part is evidenced by his issuance of the two warning letters for Dr. Gran's discussion of union matters at the work site, particularly the close timing of them in relation to his prosecution of the unfair practice charges. Nothing was presented in the prior case to show that Speed interviewed Dr. Gran for his side. (Trustees of the California State University (1990) PERB Decision No. 805-H [inadequate investigation].) Nevertheless, additional evidence taken in this case mitigates that showing somewhat because of the repeated complaints by staff members that Dr. Gran imposed himself on others inappropriately. Granted, the demarcation between work time and non-work time for purposes of regulating organizational activities is

less clear in the hospital setting with physicians, who typically do not have clearly defined breaks. But it now appears that Speed did have some basis to doubt Dr. Gran's ability to self-police his organizing activities. By way of example, I note the subsequent complaint that Dr. Gran spoke to Dr. Maki repeatedly during the day and attempted to educate him about his legal actions with the County.

Speed's employment of the independent investigator is also questionable, not due to his hiring of one, but because he made his decision to terminate Dr. Gran before he received the report. Speed testified that he decided upon an outside investigator because he did not want to be perceived as being biased in light of the County's ongoing litigation with Dr. Gran. This I find to be at least plausible on the surface, and so I reject UAPD's claim that its unprecedented nature suggests animus. Speed had been personally named in some of the previous unfair practice charges. Nor do I find the timing of this decision suspect. The County had received two patient complaints about Dr. Gran's lack of professionalism in the fall of 2001, and Dr. Bishop credibly testified that he had begun receiving a number of informal complaints from staff about Dr. Gran's inappropriate behavior. The administration was aware of similar complaints dating back to the July 2000 counseling memorandum, and the October 2001 MEC plan of correction action included concerns about sexual harassment on Dr. Gran's part. Still, Speed decided to recommend Dr. Gran's termination before receiving the investigator's report and he provided no explanation for the timing of his decision in light of that obvious question. Dr. Gran was never contacted by the investigator for his side of the matter.

I do not find the second MEC referral based on the patient with the retained placenta to be irregular, notwithstanding the fact that the only other MEC referral in recent times not involving Dr. Gran was one in which a patient died. In this case, the patient nearly died,

multiple blood transfusions were required, and the MEC had already been alerted to problems with Dr. Gran's check-out procedures. Dr. Stanley had had a good relationship with Dr. Gran prior to the events in early 2002 and testified for him in the prior case.

The failure of Speed to offer a justification for his decision to terminate Dr. Gran is another indicia of unlawful animus I find present in this case. (Novato Unified School District, supra, PERB Decision No. 210.) Also, I believe Speed lost his temper when Dr. Gran refused to meet with him on May 15, 2002 without union representation, because he ordered Dr. Gran to gather his belongings and leave the premises immediately, despite the fact that the notice of termination was prospective for 90 days.[22] My observations of Speed's demeanor in both cases corroborates this inference. I conclude that Dr. Gran's refusal to even meet with him was largely the reason why Speed refused to explain his reasons for terminating Dr. Gran. At the same time, I note that Dr. Gran's contract of employment with the County, like those of other physicians, is an at-will contract which can be terminated upon 90-days notice. The language of the contract obviates any claim that just cause is needed for termination. Though it is possible that Speed may have been advised that no reasons were required to exercise the right of non-renewal, no rebuttal was offered by the County on this point.

I also agree with UAPD's contention that Speed exhibited unlawful animus when he testified that Dr. Gran's lying was a factor in his decision, citing specifically Dr. Gran's testimony in the prior PERB hearing regarding the statements Dr. Gran attributed to Drs. Dominguez, Pucelik and Shrivastava at the informal meeting just prior to the October 2001

[22] A discrepancy I am unable to reconcile is the fact that the notice of termination states that Dr. Gran retains his hospital privileges, but Dr. Stanley testified that she terminated those privileges pending a review by the MEC, which was not completed until July.

MEC meeting that resulted in the plan of corrective action.[23] This admission by Speed, as well as his treatment of Dr. Gran when delivering the notice of termination, reflect either his lack of understanding about the rights of employees to engage in protected activity or animosity toward those rights, and to some extent probably both.

Based on the foregoing, I find that UAPD has demonstrated a prima facie case that unlawful animus was a factor motivating the County's decision to terminate Dr. Gran.

The County's justification for the termination begins with Dr. Stanley's opinion that Dr. Gran was a liability to the OB/GYN department. At first blush, Dr. Stanley's testimony appears problematic. In the prior hearing, she testified that Dr. Gran was a competent physician, and she repeated that to Dr. Gran during the 90-day monitoring period. In this case, she testified in the most emphatic terms possible, that she could no longer work with Dr. Gran. She testified that she would not refer a loved one to Dr. Gran and that by the time she had made her referral to the MEC in April, she refused to accept patients from Dr. Gran because of his lax check-out procedures. In contrast, Dr. Ross testified that Dr. Gran's check-outs were adequate and that because all of the OB/GYN physicians are part of a team it is not possible to refuse to accept patients as a result of a change in the rotation.

What does distinguish Dr. Ross's opinion and Dr. Stanley's prior opinion from her current one is that Dr. Stanley is now the department chair. As chair, she is responsible for fielding and responding to complaints from other physicians. During her term as chair, she became aware of a number of complaints about Dr. Gran's lack of diligence in treating

[23] I credited some but not all of Dr. Gran's testimony regarding that meeting, as against the testimony of all three of the physicians. After the current hearing, I am less convinced of Dr. Gran's credibility as a witness. I made no specific finding in the prior case as to Dr. Gran's claim that others told him he could lose his house if he was not compliant before the MEC, the statement specifically cited by Speed at the hearing in this case.

patients. As to the case involving the patient with the retained placenta, I attribute the problems to a lack of attentiveness by Dr. Gran. Dr. Gran relied on the fact that the delivery itself was being handled by Long, whom he described as a "very competent" midwife. I note this because Long complained in tears to Dr. Bishop that Dr. Gran was intimidating staff and poisoning morale within the department. Dr. Stanley was no doubt aware of these concerns as chair.

In the prior case, Dr. Gran made a point, with which I was somewhat sympathetic, that physicians on the 24-hour rotation rely greatly on the midwives and residents to assist with deliveries in what is an extremely busy environment. Nevertheless, there is one physician who has supervisorial responsibility for the entire staff during the rotation. Ultimate accountability rests with that physician. Dr. Stanley had observed on her own that Dr. Gran was apt to be seen sitting in his chair, that is, that he was not constantly making the rounds. While chair, she personally inherited a patient who had not been seen by Dr. Gran during his rotation despite having been admitted for 12 hours. Dr. Stanley confronted Dr. Gran with this issue and he offered no explanation for not having seen the patient. Dr. Gran's problems with inadequate check-outs and failing to see patients had been noted earlier and were documented. Then, too, there were the corroborating complaints from the director of Family Practice that on two occasions that Dr. Gran failed to respond promptly to pages for assistance by residents. Thus, Dr. Stanley simply had much more evidence including first-hand knowledge on which to base her change of opinion.

The fact that the MEC restored Dr. Gran's hospital privileges in July 2002 does not, in my opinion, vindicate Dr. Gran's claim of competence as against that of Dr. Stanley. One of the specific conditions of restoring privileges was a response from Dr. Gran as to how he

would improve patient work-ups, avoid excessive reliance on staff to alert him to patient care issues, and better supervise interns. Dr. Bishop explained that the OB/GYN staff is a team that requires cooperation for the delivery of competent care.

As chair, Dr. Stanley was also made aware of the two patient complaints during the 90-day monitoring period that Dr. Gran had made crude and offensive remarks during examinations. This would constitute another reason why Dr. Stanley would not want to refer a loved one to Dr. Gran. It relates to a matter that goes not strictly to medical competence, but is no less important. As evidenced by the "hugs and kisses" sign-off, Dr. Stanley had personal experience with Dr. Gran's predilection for making comments of a sexual nature that were positioned right at the border of offensiveness. Especially given that the "hugs and kisses" comment came within weeks of her counseling of Dr. Gran on the patient she inherited from his shift, Dr. Stanley had reason to question Dr. Gran's motives in making that statement.

The "hugs and kisses" comment is also highly significant in terms of the pattern of complaints of Dr. Gran's indiscretions when discussing sexual matters with patients and staff. If there is any position where sensitivity in this area is paramount it is one in the OB/GYN department of a public, hospital-of-last-resort.

While I had occasion as a result of my participation in both of the PERB cases to question Dr. Stanley's objectivity because I suspect that Dr. Stanley may have a tendency to over-react to situations, especially those of a controversial nature, and because her two opinions were so drastically different, if she were being arbitrary in rejecting Dr. Gran, I have little reason to conclude that she formed that opinion on the basis of anti-union animus. (See Moreland Elementary School District (1982) PERB Decision No. 227 ["lack of 'just cause' is

. . . not synonymous with anti-union animus"].) Dr. Stanley did, after all, testify for Dr. Gran in the first hearing.

The "hugs and kisses" comment is also one constituting part of a pattern of Dr. Gran's staff interactions which Dr. Bishop aptly described as "polarizing." This pattern became much more pronounced in the last few months prior to Dr. Gran's notice of termination. The "Popeye the Sailor" whistle in the presence of Dr. Krueger, the Dr. Shrivastava, Al Qaeda reference, and the intrusions into Dr. Dominguez's department, were all directed at individuals whom Dr. Gran had apparently come to identify as being against him in his effort to defend himself against alleged retaliation by the Hospital. Similar behavior was reported in the complaints by Barenchi, a person whom Dr. Gran viewed as biased toward the administration, and the incidents where Dr. Gran placed blame on the administration with regard to Dr. Tran's recruitment and welcoming dinner.

The campaign literature and some of the petitions suggest that the County was failing to address the vital concerns of staff and that some staff felt intimidated by management during the organizational campaign. And I believe union organizers deserve latitude with respect to their subjective views of management during an organizing campaign. But, apart from the litigation surrounding Dr. Gran, there is little evidence that the UAPD campaign was unusually vitriolic. Moreover, Dr. Gran's "we-they" attitude predates the UAPD campaign, and there is evidence that Dr. Gran used this as a tactic at times to advance his personal political agenda. An example of this was Dr. Gran's attempt to influence Dr. Felber not to run for president of the medical staff. Though seemingly bound up with protected activity, I agree with the County that such conduct is unprofessional, divisive and corrosive on morale. Dr. Kapre noted that the Hospital's staff constitutes a small community of physicians relative to other facilities.

Speed based his decision on Dr. Stanley's input, relayed through Dr. Bishop, the MEC's no-confidence vote, as reflected in Dr. Felber's April 26, 2002 letter, and his opinion that Dr. Gran was not a "good employee," used poor judgment, especially as it related to patient interactions, spread falsehoods and created dissension within the staff. The spreading of falsehoods and creation of dissension was well-documented, notwithstanding UAPD's claims that the matters were trivial. They are not trivial considered in their totality. I am unable to find that the allegations of Dr. Gran's poor attitude and his union participation were in the County's view synonymous. (Cf. NLRB v. Florida Medical Center, Inc. (5th Cir. 1978) 576 F.2d 666 [98 LRRM 3144].)

I hasten to add that the matters that do concern me are Speed's heavy reliance on Dr. Felber's letter, his citing Dr. Gran's prior testimony before PERB as an example of Dr. Gran's lying, and his dispensing with the results of the investigator. I was not particularly impressed by the quality of Dr. Felber's testimony in either of the two hearings, in part because of his demeanor. I sensed he was not fully objective in dealing with the issues surrounding Dr. Gran. The contents of Dr. Felber's letter reflect irritation with Dr. Gran's internal appeal of the notice of corrective action and his prosecution of the previous unfair practice charge, actions which I construe to be protected activity. I also note the somewhat exaggerated tone of his expression of concern in the letter, as found, for example, in his description of the potential for significant County financial liability for Dr. Gran's "unprofessional conduct," and his own threat to resign. On the other hand, Dr. Gran's attempt to undermine Dr. Felber's nomination as president of the medical staff, which I construe to be unprotected conduct, seems the more likely answer to my concerns about Dr. Felber's objectivity than anti-union animus.

Dr. Gran's ability to alienate his colleagues is well established in this record. Because there

were so many sources of complaints against Dr. Gran, I do not give great weight to the reservations I have cited.[24]

Based on the content and quality of Speed's testimony, his demeanor, and his prior actions vis-a'-vis Dr. Gran, I infer that he liked to make decisions decisively, without a lot of hand-wringing. I take this as an indication not so much of arbitrariness as it relates to union activity but as corroboration that he read Dr. Felber's letter simply as a vote of no-confidence by Dr. Gran's peers. I rely on the same analysis in explaining his dispensing with the investigator's report. Based on the timing of Speed's decision, it appears that Dr. Felber's letter, on the heels of the report from Dr. Stanley, triggered Speed's decision to forego the report of the investigator. The reservations I have noted about Speed's motivations are isolated when viewed in the totality. As I have found, anti-union animus played some role in the decision, but I also find that Speed had sufficient grounds otherwise to non-renew Dr. Gran's contract. In this regard, I do not penalize Speed for failing to testify more expansively or persuasively in explaining the reasons he terminated Dr. Gran. Furthermore, the fact that the County has maintained physicians on renewing, at-will contracts suggests that it does so in order to have a lower threshold triggering termination.

Finally, I reject UAPD's contention that Speed's justification was inconsistent or contradictory. There was great consistency as to the types of complaints lodged against Dr. Gran. Similarly, I dismiss UAPD's contention that the County's reliance on hearsay, and

[24] I noted in my previous decision a concern that Dr. Gran might have been too dismissive of the peer review process, engaging in a form of passive-aggressive behavior that was possibly unprotected, but justified, under the circumstances. Here, the County presented evidence that Dr. Gran had not accepted constructive criticism even before his protected activities. And while fresh complaints arose regarding his unprofessional conduct with patients involving sexual harassment after the first MEC referral, he continued to deny the problem and procrastinate in obtaining counseling.

multiple hearsay claims of unprofessional conduct by Dr. Gran, some of which were not investigated, establishes evidence of unlawful animus. I find it sufficient that the nature of the complaints was highly consistent over a long period of time. The individual complaints were corroborative of the truth of Dr. Gran's alleged deficiencies. And their sheer number was unmatched, according to Dr. Bishop. Though not specifically noted above, I do not find Dr. Gran's explanations of these incidents to be credible because he was vague and evasive on most occasions. Ultimately, the issue is not whether the events underlying these complaints occurred as the complainants alleged, but whether the County's motive to terminate Dr. Gran was based on his union activity. I conclude on the basis of this record that, despite evidence of unlawful animus, Dr. Gran would have been terminated regardless of his union activity.

In sum, I find that the County did not retaliate or discriminate against Dr. Gran in violation of MMBA section 3506 and PERB Regulation 32603(a). Accordingly, I also find that the County did not violate UAPD's rights under MMBA section 3503 and PERB Regulation 32603(a). Therefore, the underlying charge and complaint must be dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. SA-CE-64-M, Union of American Physicians & Dentists v. County of San Joaquin (Health Care Services), are hereby DISMISSED.

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

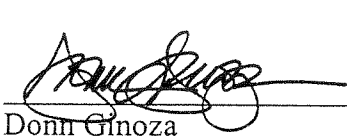
Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Cal. Code Regs., tit. 8, sec. 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. (Cal. Code Regs., tit. 8, secs. 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 California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)



Donn Ginoza
Administrative Law Judge