STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

HEALTH SERVICES AGENCY PHYSICIANS ASSOCIATION, Charging Party, v. COUNTY OF SANTA CRUZ, Respondent.	Case No. SF-CE-111-M PERB Decision No. 1849-M August 16, 2006

Appearances: Allison & Nordquist by Derek W. Allison, Attorney, for Health Services Agency Physicians Association; Renne, Sloan, Holtzman & Sakai by Charles D. Sakai, Attorney, for County of Santa Cruz.

Before Duncan, Chairman; Shek and Neuwald, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by the Health Services Agency Physicians Association (Association) of a Board agent's partial dismissal (attached) of its unfair practice charge. The partial dismissal portion of the charge alleged that the County of Santa Cruz (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by making unilateral changes to the terms and conditions of employment of the bargaining unit, denying the Association's requests for information, discriminating against bargaining unit members and contracting out services.

The Board has reviewed the entire record in this matter, including, but not limited to, the unfair practice charge, the amended charges, the partial warning and partial dismissal letters of the Board agent, the Association's appeal and the County's response. The Board

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

finds the partial warning and partial dismissal letters to be without prejudicial error and adopts them as the decision of the Board itself.

ORDER

The partial dismissal of the unfair practice charge in Case No. SF-CE-111-M is hereby AFFIRMED.

Members Shek and Neuwald joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax:(510)622-1027

November 17, 2005

Dr. Kathleen Loughlin, Secretary
H.S.A. Physicians Association
1080 Emeline Avenue
Santa Cruz, CA 95060

Re: Health Services Agency Physicians Association v. County of Santa Cruz
Unfair Practice Charge No. SF-CE-111-M; First Amended Charge
PARTIAL DISMISSAL

Dear Dr. Loughlin:

The above referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 10, 2003. The Health Services Agency Physicians Association (Charging Party) alleges the County of Santa Cruz violated the Meyers-Milias-Brown Act (MMBA) by making unilateral changes to the terms and conditions of employment of the bargaining unit, denying Charging Party's requests for information, discriminating against bargaining unit members, and contracting out unit services.[1]

I indicated to you, in my attached letter dated August 5, 2003, that certain allegations contained in the charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended these allegations to state a prima facie case or withdrew them prior to August 12, 2003, the allegations would be dismissed.

On September 2, 2003, Charging Party filed a first amended charge. The amended charge reiterates many of the allegations addressed in the warning letter and adds several new allegations of unilateral change. A summary of relevant facts and allegations are provided below.

The Association began negotiations over an initial memorandum of understanding with Personnel Director/Chief Negotiator Diana Torres Wong on April 4, 2003. In a bargaining session on April 11, Wong disputed the contention by the Association that extra-help (temporary) employees are included in the bargaining unit. Extra-help employees are included in all other County units. According to the County, extra-help employees are not used for

[1] Charging Party's allegations regarding direct dealing are not subject to this dismissal letter.

positions in the Association unit and at present there are no extra help employees working in the unit.

Association Secretary Dr. Kathleen Ann Loughlin was instrumental in the establishment of the Association unit. Loughlin administers the occupational health program (OHP). On or about May 20, Loughlin picked up a copy of the County's proposed budget for 2003-2004. In that budget, she learned that the OHP was slated for reduction. The budget also indicated that the County planned to eliminate 1.55 FTE clinic physician positions or a combination of 1.55FTE clinic physician and physician assistant/nurse practitioner (PA/PN) positions. PA/PN positions are in the GRU. It was unclear from the budget which clinic physician positions were slated for elimination and/or reduction because certain of the positions may be filled with either clinic physicians or with physician assistant positions and others may only be filled with clinic physicians. Of the 6.8 FTE positions assigned to clinic physicians, there are 6 clinic physicians currently employed, 5 are part-time and 1 is full-time, 1 vacant position and 3 part-time positions being alternatively staff with physicians assistants.

The County's Civil Service Rules state in Article XII that with regard to layoff, the provisions outlined in the MOU with each employee organization shall prevail. The SEIU agreement provides as follows regarding layoff rights:

> 23.4: . . . Effective November 1, 1983, the County Personnel Department shall provide affected employees with two (2) weeks written notice of layoff and/or displacement.
>
> 23.5: Whenever it is necessary to layoff one or more employees in a department, the Personnel Director will prepare a list of the order of layoff in accordance with the following;
>
> a. Extra help employees . .
> b. A call for volunteers, in order of seniority
> c. Provisional employees . . .
> d. Probationary employees . . .
> e. Permanent employees shall be laid off in reverse order of seniority as defined in 23.7

On or about May 28, the Association requested a seniority list for its unit positions and the number of positions recommended for layoff in the 2003-04 proposed budget. At their June 4 negotiating session, Association Chief Negotiator Charles Mackh again asked for this information, as well as the specific position codes for each affected position and the Health Service Agency (H.S.A.) programs to be impacted by the layoff. Wong presented Mackh with the seniority lists in writing, but stated that she could not give him the specific position codes for the positions to be eliminated until the Board had approved the budget at its June 26, 2003, meeting. According to the County, Wong explained that the proposed cuts would be a 0.6 FTE PA/PN in the Family Planning Division (the only position in that division) and a 0.7 FTE Clinic Physician position in the OHP (the only position in that division). Wong indicated that the remaining 0.25 FTE was the elimination of a vacant position. Wong stressed that these

were subject to change depending on the Board of Supervisors review and other factors such as early retirement by employees.

According to the County, Wong also went through a layoff scenario using the seniority provisions of the SEIU MOU. • She noted that Loughlin had the most seniority and was in no danger of layoff, that Dr. Jeff Young was the least senior and, absent any changes, would face layoff and that Dr. Marin Muller, the next least senior, would have her hours cut. Mackh reminded Wong that she had not mentioned layoffs at their last session on April 22, when she had stated that the County was actively recruiting' for vacant unit positions. When asked why the Association had not been informed of layoffs as had the GRU, Mackh alleges that Wong responded that neither layoff nor grievance rules applied to the Association unit because no MOU had been negotiated. The County disputes this allegation, stating that Wong informed the Association that, absent agreement on a different procedure, the County would follow the layoff procedures in the GRU MOU.

During negotiations, the Association brought to Wong's attention a vacant position of which she was unaware. Her subsequent research revealed a vacant position that had not been funded since its creation in 1999. This position was then included for elimination in the County's June 9th supplemental budget, although it represents no cost savings for the County.

According to the County, its practice with SEIU in two previous layoff situations has been to meet after the Board of Supervisors adopted its budget to negotiate the impacts of the layoff. The first meeting with SEIU this year is scheduled for June 28, two days after the budget is scheduled to be adopted. The County will supply SEIU with seniority lists and identify the positions to be eliminated after the budget is adopted.

Sometime prior to May 20, 2003, SEIU requested that the County distribute a joint letter to GRU employees in classifications and departments identified for cuts, which it did on or about May 21, 2003. This letter was not a layoff notice and was not required as part of the MOU. One NP/PA received a copy of the letter. The Association did not request such letters.

During the June 4th session, Wong suggested to Loughlin that she leave county employment and open an outside occupational medicine practice so that the County could contract out for her services and have more open scheduling for medical exams.

At a bargaining session on June 19th , the County provided the Association with a list of the clinic physician positions to be eliminated. The position identified for elimination was the clinic physician assigned to OHP (Loughlin). The County asserts that the elimination of this position is due to its reduced workload and funding.

According to the Association, sometime after June 4, 2003, it became aware that the County had approved new agreements for independent contractors to work as physicians in outpatient clinics to perform "specialized services" on April 29, 2003. This action was taken when negotiations were ongoing and during layoff discussions. According to the County, these contracts have been in place for a number of years and are for non-unit work.

On June 12, Loughlin was told by an outside medical provider that Rama Khalsa, the head of H.S.A., had sent a letter to various community clinics describing the valuable attributes of the "newest and brightest" personnel to be laid off at the clinic. The intent of the letter was apparently to urge the hiring of the laid off employees.

Based on the facts provided in the original and amended charges, the following allegations fails to state a prima facie violation of the MMBA.

I. Unilateral Change

Charging Party alleges four (4) separate unilateral changes. In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),[2] PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.)[3] Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Association v. City of Stockton (1984) 161 Cal.App.3d 813; Grant Joint Union High School District (1982) PERB Decision No. 196.) Each allegation will be taken up in order.

A. Seniority Lists

Charging party contends that it was not provided with a copy of the seniority list it requested on May 28, 2003, as required by Article 23.5. However, facts provided demonstrate the Association was provided with this list on June 4, 2003. As such, the County did not violate this provision.

B. Extra Help Employees

Charging Party asserts the County's refusal to consider extra help employees as part of the Association's bargaining unit constitutes a unilateral change in the bargaining unit. However, Article 2 of the parties' MOU indicates that the Association represents "all permanent budgeted positions." As extra help employees are not permanent employees, they are not part of the Association's bargaining unit. As such, this allegation must be dismissed.

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

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

C. Work Hours

Charging Party contends the County altered the work hours of employees without meeting and conferring. More specifically, the Association contends the County attempted to divide the hours of the .25 vacant position between bargaining unit members. While the County may have been contemplating such a scenario at one time, the .25 vacant position was slated for elimination on June 19, 2003, and no employees hours were altered. As such, this allegation fails to state a prima facie case.

D. Layoff Provision

Charging Party contends the County failed to meet with the Association regarding layoff alternatives. However, facts provided demonstrate the parties met on June 4 and June 19, 2003, and met on additional occasions to discuss the layoffs. As such, this allegation fails to state a prima facie case.

II. Request for Information

The exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (Stockton Unified School District (1980) PERB Decision No. 143). PERB uses a liberal standard, similar to a discovery-type standard, to determine relevance of the requested information. (California State University (1986) PERB Decision No. 613-H.) Failure to provide such information is a per se violation of the duty to bargain in good faith.

Charging Party contends the County did not provide a copy of the seniority list in violation of the MMBA. However, as noted above, a copy of this list was provided within one week of the request. Additionally, the Association contends the County did not provide the position code for the position to be eliminated during layoffs. This position code was provided to the union on June 19, 2003, as soon as code was made available to the County. As this information was provided within a reasonable amount of time, the allegations must be dismissed.

III. Discrimination and Local Rule Violation[4]

To establish a prima facie case of discrimination in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; 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

[4] Charging Party also alleges a violation of local rule 181.3, which prohibits discrimination based upon protected activity. As the allegations are identical, the same analysis will be applied to both.

(1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Association v. City of San Leandro (1976) 55 Cal.App.3d 553.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following nexus factors should be present: (1) the employer's disparate treatment of the employee (Campbell, supra); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro Police Officers Association, supra.); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro Police Officers Association, supra.); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) employer animosity towards union activists (San Leandro Police Officers Association, supra; Los Angeles County Employees Association v. County of Los Angeles (1985) 168 Cal.App.3d 683.).

With regard to adverse action, the Court of Appeal in Campbell held that if the employer's conduct is "inherently destructive" of important employee rights, proof of unlawful intent is not required under the MMBA, even if the employer's conduct was motivated by business considerations. (Campbell at 423.) However, if the adverse effect on employee rights is "comparatively slight," unlawful intent must be proved if the employer produces evidence of legitimate and substantial business justifications. (Campbell at 424.)

A. **Dr. Young**

While it is clear that Dr. Young engaged in protected activities as an active officer of the Association, the charge fails to demonstrate the County laid off Dr. Young because of his protected activities. It is uncontroverted that Dr. Young was the least senior Physician employed by the County, and as such, the employee slated to be laid off. This decision is consistent with the prior MOU and the County's past practice. Moreover, there is no evidence that Dr. Young was singled out for his activities, as more than 50 other Health Service employees were laid off at the same time. As the charge fails to provide the requisite nexus, this allegation must be dismissed.

B. **Dr. Loughlin**

Charging Party also contends the County discriminated against Dr. Loughlin because of her protected activities. Again, it is clear that Dr. Loughlin engaged in protected activity by assuming a leadership role in the Association. However, facts provided fail to demonstrate the County took any adverse action against Dr. Loughlin because of her protected activity. Dr. Loughlin was not reprimanded or in any way disciplined, nor did she receive a negative evaluation or any other form of retaliation. As such, this allegation must also be dismissed.

IV. Contracting Out

Charging Party contends the County contracted out physician services without first meeting and negotiating with the Association. As noted in the August 5, 2003, warning letter, the facts surrounding this allegation are sparse. Charging Party provides documentation demonstrating the County approved money to contract with physicians to provide services. However, the charge does not indicate whether any physicians were actually hired. That is, it is unclear whether the County actually contracted out any bargaining unit work. Without such facts, the allegation must be dismissed.

Right to Appeal

Pursuant to PERB Regulations,[5] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulation 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

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

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a

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

party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By
Kristin L. Rosi
Regional Attorney

Attachment

cc: Charles Sakai

KLR

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax:(510)622-1027

August 5, 2003

Kathleen Loughlin, M.D., Secretary
Health Services Agency Physicians Association
746 Western Drive
Santa Cruz, CA 95060

Re: Health Services Agency Physicians Charging Party v. County of Santa Cruz
Unfair Practice Charge No. SF-CE-111-M
PARTIAL WARNING LETTER

Dear Dr. Loughlin:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 10, 2003.

The Health Services Agency Physicians Association (Charging Party) alleges that the County of Santa Cruz violated the Meyers-Milias-Brown Act (MMBA)[2] by making unilateral changes to the terms and conditions of employment of the bargaining unit, denying Charging Party's requests for information, bypassing Charging Party and dealing directly with unit members, and discriminating against individual unit members for engaging in protected activities.[3] My investigation has revealed the following.

Charging Party was certified as the exclusive representative of a unit of clinic physicians and psychiatrists on March 15. Employees in the new unit were previously represented in a general unit by SEIU Local 415. Negotiations over an initial memorandum of understanding began with County Personnel Director/Chief Negotiator Diana Torres Wong on April 4, 2003. In a bargaining session on April 11, Ms. Wong disputed the contention by Charging Party that extra-help (temporary) employees are included in the bargaining unit. Extra-help employees are included in all other County units. At present there are no extra help employees working in unit positions.

Association Secretary Dr. Kathleen Ann Loughlin administers the occupational health program at the Occupational Health Clinic (OHC). On or about May 20, Dr. Loughlin obtained a copy of the County's proposed budget for 2003-2004. The budget included plans to eliminate 1.55 FTE clinic physician positions or a combination of 1.55 FTE clinic physicians and physician assistant/nurse practitioners (non-unit) position. It was unclear from the budget which clinic physician positions were slated for elimination and/or reduction. The budget was later

[1] All dates herein are 2003 unless otherwise stated.

[2] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA may be found at www.perb.ca.gov.

[3] Those allegations not addressed herein shall be dealt with in a separate context.

amended to include the elimination of one vacant physician position which was apparently unfunded. Approximately 50 other Health Services Agency employees were also slated for elimination.

On or about May 28, Charging Party requested seniority lists for the positions in its unit and the specific numerical codes for the positions recommended for layoff in the budget.[4] At the June 4 negotiating session, Charging Party repeated its request for this information. Ms. Wong provided the seniority lists, but stated that she was unable to provide the position codes for the positions to be eliminated until the Board had approved the budget at its June 26 meeting.

The County's practice in two previous layoff situations was to meet with SEIU after the Board of Supervisors adopted its budget to negotiate the impacts of the layoffs. The first meeting with SEIU this year was scheduled for June 28, two days after the budget was scheduled to be adopted.

Sometime prior to May 20, SEIU requested that the County distribute a joint letter to its bargaining unit employees in classifications and departments identified for cuts, which it did on or about May 21. This letter was not a layoff notice and was not required as part of the MOU.[5]

In or about the first week in June, a clinic physician who was not the least senior was verbally informed by the County that he was scheduled for layoff.[6] The County's notification came

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[4] Article XII of the County's Civil Service Rules state that with regard to layoff, the provisions outlined in the MOU with each employee organization shall prevail. Article 23.4 of the SEIU agreement provides as follows:

> Whenever it is necessary to layoff one or more employees in a department, the Personnel Director will prepare a list of the order of layoff in accordance with the following;
>
> a. Extra help employees . .
> b. A call for volunteers, in order of seniority
> c. Provisional employees . . .
> d. Probationary employees . . .
> e. Permanent employees shall be laid off in reverse order of seniority as defined in 23.7

[5] Article 234 of the SEIU agreement provides:

> . . . Effective November 1, 1983, the County Personnel Department shall provide affected employees with two (2) weeks written notice of layoff and/or displacement.

[6] Charging Party has not provided the identity of this doctor.

shortly after the physician testified on Association Vice President Dr. Jeffrey Young's behalf in a PERS hearing regarding Dr. Young's seniority credits.

At a bargaining session on June 19th, the County provided Charging Party with a list of the bargaining unit positions proposed to be eliminated. The position identified for elimination was Dr. Loughlin's position at the OHC. Dr. Loughlin has since accepted another unit position, causing Dr. Young, the least senior unit member, to be laid off.

Unilateral Change Allegations

Government Code section 3505 provides, in pertinent part:

> The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

PERB Regulation 32603(c),[7] provides that it shall be an unfair practice for a public agency to:

> Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.)[8] Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School

[7] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. and may be found at www.perb.ca.gov.

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

District (1981) PERB Decision No. 160; San Joaquin County Employees Charging Party v. City of Stockton (1984) 161 Cal.App.3d 813; Grant Joint Charging Party High School District (1982) PERB Decision No. 196.)

Charging Party contends that, unlike SEIU, it was not provided written notice of the impending layoff as required by Article 23 of SEIU's MOU. The County's failure to comply with this provision of the MOU would arguably be a unilateral repudiation of the MOU. However, the two week written notice provision was not required at the time the charge was filed because the layoffs had not yet been approved by the County Board of Supervisors. Moreover, the letter provided to SEIU employees was not the two week notice letter, but a jointly authored letter by SEIU and the County regarding budget concerns. For these reasons, it appears that the County has not violated Article 23, and this allegation must be dismissed.

Article 23.5 of the MOU requires the County to compile a seniority list in conformance with the layoff provisions. Failure to provide the list would arguably be a unilateral repudiation of this portion of the agreement. However, a seniority list was provided to Charging Party on June 4. Therefore, it appears that the County has not violated Article 23.5, and this allegation also must be dismissed.

The County's assertion that extra help employees are not part of Charging Party's bargaining unit arguably constitutes a unilateral change to the unit it was certified to represent. Although not specifically included in recognition clauses for other employee organizations, extra help employees are considered part of the bargaining units. However, it is apparently not the County's practice to employ extra help employees in positions assigned to the Charging Party's unit, and there are currently none so employed. Therefore, without more, the County's mere assertion does not appear to be a violation of the MMBA.

Request for Information Allegations

Section 3500(a) of the MMBA provides:

> [I]t is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations.[9]

[9] In addition, during bargaining the parties have

> the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of t i e in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public

Thus the exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (Stockton Unified School District (1980) PERB Decision No. 143). PERB uses a liberal standard, similar to a discovery-type standard, to determine relevance of the requested information. (California State University (1986) PERB Decision No. 613-H.) Failure to provide such information is a per se violation of the duty to bargain in good faith.

On May 28, Charging Party sent a letter to the County requesting a copy of the seniority lists for the classifications in its unit as well as the numerical codes for the positions to be eliminated. At a bargaining session on June 4, Charging Party again requested this information. The seniority lists were provided, but the County stated that the position code information was unavailable at that time.

On June 19, the County presented Charging Party with the position code for the least senior clinic physician (and only unit employee) who was slated for layoff. Since the information was provided to Charging Party, and since Charging Party fails to demonstrate that any harm was caused by the three week delay, this allegation does not state a prima facie violation of MMBA and should be dismissed.

Discrimination/Interference Allegations

Government Code section 3506 provides:

> 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.

PERB Regulation 32603(a) provides that it shall be an unfair practice for a public agency to:

> 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.

To establish a prima facie case of discrimination in violation of Government Code section 3509 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; 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 Charging Party v. City of Campbell

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agency of its final budget for the ensuing year. (Government Code section 3505.).

(1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Charging Party v. City of San Leandro (1976) 55 Cal.App.3d 553.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action in protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following nexus factors should be present: (1) the employer's disparate treatment of the employee (Campbell, supra); (2) the employer's departure from established procedures and standards when dealing with the employee (San,Leandro Police Officers Charging Party, supra.); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro Police Officers Charging Party, supra.); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) employer animosity towards Charging Party activists (San Leandro Police Officers Charging Party, supra; Los Angeles County Employees Charging Party v. County of Los Angeles (1985) 168Cal.App.3d683.).

With regard to adverse action, the Court of Appeal in Campbell held that if the employer's conduct is "inherently destructive" of important employee rights, proof of unlawful intent is not required under the MMBA, even if the employer's conduct was motivated by business considerations. (Campbell at 423.) However, if the adverse effect on employee rights is "comparatively slight," unlawful intent must be proved if the employer produces evidence of legitimate and substantial business justifications. (Campbell at 424.)

The OHC is the workplace of several Association officers, including the president, vice president, secretary and negotiators. Although the OHC employs only 6.8 FTE positions, the County slated 2.5 FTE positions for layoff, including one clinic physician and one vacant position. Dr. Young, the employee slated for layoff, is an Association officer; however, he is also the least senior employee.

Charging Party asserts that the County chose the Clinic for layoffs because of its ties with the Association. While it is clear that Dr. Young engaged in protected activities over the last several years, he is also the least senior employee. It should also be noted that of the 50 Health Department employees slated for layoff, only one bargaining unit employee was to be laid off. Beyond timing, Charging Party has failed to state any facts which would establish nexus under the criteria stated above. Thus, without more, this allegation does not state a prima facie violation of the MMBA.

Charging Party contends that a unit employee who testified in favor of Dr. Young at a PERS hearing was informed that s/he would be laid off. Without additional supporting facts regarding this occurrence, including, at the very least, this individual's name, there is insufficient information regarding this allegation to support a finding of a prima facie of a violation.

Contracting Out Services

Sometime after June 4, Charging Party learned that the County had approved new agreements for independent contractors to work as physicians in outpatient clinics to perform specialized services. The County currently employs three contracting psychiatrists, including the Association president, all of whom have been employed on a contract basis for several years, and none of whom are to be laid off. In 2001-2002, the County contracted with three physicians, one of whom was subsequently hired as a County employee. There are currently no independent contracting physicians.

Article 3-6E of the SEIU provides for notification in the event the County is considering contracting out services. The article states:

> The County agrees that prior to taking any action to contract out functions or activities now performed by employees in the General Representation Unit, the County will provide the Union with reasonable written notice and will meet with the Union and discuss alternative ways to achieving the County's objectives. The County agrees that, prior to taking action to layoff employees in the General Representation Unit, the County will discuss alternative ways of achieving the County's objections with the union.

Charging Party has not presented any facts supporting its contention that the County is considering varying from its ongoing practice of contracting psychiatrists or contracting out any current unit work. Therefore, without more, this allegations must be dismissed.

Local Rule Violations

PERB Regulation 32603(g) prohibits an employer from violating a local rule adopted pursuant to the MMBA. Section 181.3B of the County's Employer-Employee Relations Policy prohibits the County from discriminating against employees because of their protected activities. As discussed above, the Charging Party has not presented sufficient information to demonstrate a violation of this provision.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's

representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before , I shall dismiss your charge.

If you have any questions, please call me at the above telephone number.

Sincerely,

Jerilyn Gelt
Labor Relations Specialist