

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DION SALAS,

Charging Party,

v.

CITY OF ALHAMBRA,

Respondent.

Case No. LA-CE-513-M

PERB Decision No. 2161-M

February 8, 2011

Appearances: Scott Ernest Wheeler, Attorney, for Dion Salas; Burke, Williams & Sorensen by Daphne M. Anneet, Attorney, for City of Alhambra.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the City of Alhambra (City) to the proposed decision of an administrative law judge (ALJ). The complaint issued by PERB's Office of the General Counsel alleged that the City violated the Meyers-Milias-Brown Act (MMBA)¹ when it terminated the employment of Dion Salas (Salas), a probationary employee in the City's public works department, following a meeting in which he complained about his foreman's conduct. The ALJ ruled that the City unlawfully discharged Salas in retaliation for his protected conduct at the meeting.

The Board has reviewed the proposed decision and the record in light of the City's exceptions and supporting brief, Salas' response thereto, and the relevant law. Based on this

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

review, the Board reverses the proposed decision and dismisses the complaint for the reasons discussed below.²

FACTUAL BACKGROUND

The City hired Salas as a probationary concrete finisher on April 3, 2008. When Mary Swink (Swink), the public works director, offered Salas the position, she told him he did not have sufficient skills but that concrete foreman Joe Lugo (Lugo) would work with him to improve his skills so that he could become a permanent employee. Lugo wrote Salas' probationary reports, which were signed by Lugo's immediate supervisor, Street Superintendent Leroy Tafoya (Tafoya), and Swink. In his two-month evaluation, Salas received one "excellent" mark; the rest were "good;" comments were: "Good cement finisher. Making progress on his form setting curb & gutter. Good attitude. Always on time." In his five-month evaluation, he received all "good" marks; comments were: "Dion has made progress on form setting and cement finishing. He observes rules & regulations. He is always on time." Both evaluations stated that the City intended to retain Salas as a permanent employee. In November 2008, Salas received a step increase in wages.

Salas was never verbally reprimanded or written up during his employment with the City. Nonetheless, Lugo testified that Salas would get upset when Lugo tried to instruct him about the proper way to perform concrete work. In contrast, Salas and maintenance man Gary Dominguez (Dominguez) testified that Salas was generally receptive to Lugo's instructions. However, Dominguez also testified about an occasion when Salas and Lugo had a disagreement over how much water to add to the concrete mixture.

² Along with its exceptions, the City filed a motion to reopen the record to admit two declarations regarding the City's current fiscal condition that it claims are relevant to the ALJ's proposed reinstatement order. In light of our dismissal of the complaint, we need not rule on the City's motion.

Although he characterized his relationship with Lugo as “pretty good,” Salas also testified that Lugo had a “bad attitude” toward the crew, never expressed appreciation but frequently criticized, did not provide adequate training, did not give adequate instructions, and expected too much from them. According to Salas, Lugo did not tell the crew when specific jobs had to be completed but instead gave them their assignments on a daily basis and then told them they were not working hard or fast enough when they did not meet his expectations. Concrete crew members Jose Flores (Flores), Luis Hernandez (Hernandez), and Dominguez, testified that, at various times, Salas said to them that the crew was being worked too hard and too fast, and that there was no need to rush because it was “city work.”³ None testified to agreeing with Salas’ comments.

Sometime in November 2008, Tafoya told Lugo not to place Dominguez on the same work team as Salas. Lugo testified that Tafoya told him Dominguez requested to be taken off Salas’ team because he objected to Salas’ jokes. Neither Tafoya nor Dominguez testified about the team change request.

Events of December 8 & 9, 2008

During the week of December 8, 2008, two of the five concrete crew members were absent.⁴ On December 8, Salas and Flores left their jobsite at 2:20 p.m.; Lugo had a standing rule that crew members were not to leave the jobsite until 2:30. Salas testified that they had finished the assigned work and he had to use the restroom at the City yard. They could have informed Lugo by two-way radio that they were returning to the yard, but they did not. Lugo went to the jobsite just after they left and saw that they were gone. He testified that he

³ Flores and Hernandez, who were hired on the same day as Salas, were probationary employees at the time of these statements; Dominguez had been a City public works employee for eight years.

⁴ The crew consisted of two cement finishers and three maintenance workers.

assumed they went back to the yard for more materials. He gave them the benefit of the doubt and did not report the incident to his superiors.

On Tuesday, December 9, Salas and Flores were at another construction site. At approximately 2:15 p.m., they ran out of “spreaders” and went back to the City yard to make more.⁵ Again they did not inform Lugo, who found out they were gone when he went to check on the site shortly after they left. When Lugo confronted them at the yard, he asked why they left early and whether they finished the two jobs assigned for that day. According to Salas, when he explained why they left, Lugo became angry and said the jobs had to be finished by that Friday. According to Lugo and Flores, Salas then said, “hey, this is city work, if we don’t finish today there’s always tomorrow.” Lugo responded that they were paid to do a job and if it were himself and another crew member, they would have already finished the job. Salas responded “that’s not us,” explaining that he and Flores had less experience and it would take them a bit more time. Salas also said he was used to bosses like Lugo who did not appreciate the work of their crews and called Lugo a “slave driver.”

Lugo also told them they could have made additional spreaders at the jobsite, which he had taught them to do. Salas said he preferred making them at the yard because they could be made to “perfection.” Salas then told Lugo they were being rushed, corners would have to be cut which would require later corrections which would take longer, and someone might get hurt. At that point, Tafoya, who was Salas’ ride home, arrived to pick Salas up and leave for the day. Tafoya asked if everything was OK, and Lugo said it was. Salas then told Lugo, “we’ll continue the meeting tomorrow.”

⁵ “Spreaders” are pieces of wood used in setting forms for concrete.

Salas testified that he did not discuss Lugo on the ride home, while Tafoya testified that Salas complained to him about Lugo during the ride. Salas and Tafoya both claim to have suggested holding a meeting with Lugo the next day.

The December 10 Concrete Crew Meeting

At the start of the workday on December 10, Tafoya called Lugo, Salas, Flores, and Hernandez into his office for a meeting. Tafoya also asked Rick Vegara (Vegara), an asphalt crew member and employee association representative, to attend as a witness.⁶ Lugo suggested that Swink be included because she was the department head, but Tafoya said he wanted it in his office with his crew.⁷

Salas began the meeting by saying that the crew was shorthanded yet the workload was not adjusted down. Lugo replied that it was the proper amount of work for the crew members he had that week.⁸ Salas then asked who told him that the work had to be done by Friday. Lugo replied that the directive came from Deputy Director of Public Works Mary Chavez (Chavez). According to Lugo, Salas kept asking why the work had to be rushed, and Lugo kept assuring him that the deadline came from Chavez. Lugo also testified that Salas repeated his comment that “if we don’t finish today there’s always tomorrow.” Salas then expressed concerns about Lugo’s supervision and requested that Lugo be less critical and more

⁶ The employee association does not represent the City’s probationary employees. Thus, Vegara did not act as Salas’ representative during the meeting.

⁷ Swink testified that she had told Tafoya not to hold meetings with employees in his office, other than regular safety meetings, because she heard rumors he had threatened employees with termination during meetings. Based on these same rumors, Swink had removed Tafoya’s authority to discipline, reprimand, or discharge employees, and had encouraged Tafoya’s subordinates to come to her with their concerns. Tafoya denied that Swink had imposed a prohibition on meetings prior to December 10, 2008.

⁸ Lugo testified that he had decided not to pour concrete that week because the crew was shorthanded. However, there is no evidence that he told this to the crew before December 10.

communicative, stop rushing them to finish work, and discuss evaluations personally with them, which had not been done before. Salas also claimed that he was not receiving sufficient behind-the-wheel practice time to obtain the Class-B driver's license required for him to pass probation, and complained that the crew was afraid to take their full work breaks at the jobsites. Toward the end of the meeting, Salas asked Lugo how the probationary employees were doing; Lugo responded that it was stated in their evaluations.

At some point during the meeting, Lugo said to Salas, "If [you are] representing the other guys [then] why don't you give these guys a chance to talk and see what they have to say." Flores then said he agreed with Salas, and Hernandez said he was neutral between Salas and Lugo.

Tafoya told the three crew members that he had heard good things about them and did not see any reason why they should not pass their probation. He told them to go back to work, not to kill themselves, but to give an honest day's work. Tafoya testified that he felt everyone had a chance to express themselves. He did not make, or see the need to make, any safety or schedule adjustments or take other action as a result of the meeting.

The Meetings with Chavez

During a regularly scheduled meeting later that morning, Tafoya told Chavez about the earlier concrete crew meeting. According to Tafoya's testimony,⁹ he told Chavez that Salas had complained about Lugo's attitude and the way he treats the crew. He also testified that Chavez did not express concern over him holding the meeting.

Shortly after Tafoya left Chavez's office, Lugo arrived to discuss the concrete crew meeting. Lugo told Chavez that during the meeting Salas complained about never receiving a compliment from him, questioned where the work came from, and objected to being assigned

⁹ Chavez did not testify.

too much work. According to Lugo, Chavez said he is the one who sets the schedule, and the crew does not have the right to question it. Lugo told her that Flores said he agreed with whatever Salas said, and Hernandez said he was neutral. Lugo also told Chavez that Tafoya had to make a crew change, switching Dominguez to another team. Lugo first testified that he did not give Chavez any reason for the switch but later claimed he told Chavez that Dominguez requested to be taken off Salas' team because he objected to Salas' jokes. Lugo also told Chavez that Salas and Flores left the jobsite early two days in a row, but he did not tell her that on December 9 he told Tafoya everything was OK.

The Phone Conversation with Swink

Chavez then phoned Swink, and put the call on speaker-phone for Lugo to participate. According to Swink, Chavez first said she was upset because Tafoya held a meeting "to beat up Joe Lugo." Swink responded that she had not been told about the meeting and Tafoya did not put it in his daily report. Chavez then said that Salas and Flores left the jobsite early on December 8 and 9, and that when Lugo confronted Salas about it on December 9 an argument ensued between them which continued into the meeting of December 10. Chavez said Salas expressed concern about the crew being shorthanded and the level of work expected of those remaining; demanded to know who scheduled the work for them; and complained that Lugo did not praise them. Lugo also mentioned Salas' comment that "this is city work, if we don't finish today there's always tomorrow." Either Chavez or Lugo said that during the meeting Flores expressed his agreement with Salas, and that Hernandez said he was neutral.

Swink responded that Salas had no right to question the workload, and that she was not concerned with the level of work because she trusts Lugo to adjust it to available personnel. She then asked if there were other examples of Salas being insubordinate or having issues with co-workers. Chavez told her that Dominguez asked to be removed from Salas' team, but

neither Chavez nor Lugo said why. According to Swink, Lugo said he asked Dominguez why he made the request but Dominguez did not answer. Lugo also told Swink that he tried several times to help Salas do the work better, but found him to be argumentative and to take suggestions as though he were being personally attacked; Lugo did not go into any detail about any of these incidents nor did Swink ask him for any.

Swink then expressed her opinion that Salas should be released from probation, and asked Lugo if he could do without another crew member; he said yes.¹⁰ Swink denied that either Chavez or Lugo told her that Salas raised safety or work break issues or lack of driver's training during the meeting; Lugo could not remember any of those issues being discussed with Swink during the call.

Salas' Rejection on Probation

After the phone conversation, Swink met with Personnel Director Richard Bacio (Bacio) to discuss the matter. Swink testified that:

... none of us saw the [December 10] meeting as being something that the employees were doing. It was something that Mr. Tafoya had orchestrated and brought about.^[11] And so we were seeing it as that, as that Leroy held a meeting that he wasn't supposed to hold, and once again it was, the purpose of that meeting and the only purpose of that meeting was to embarrass and to, I'd say, beat up Joe Lugo. And so that's how we saw the meeting. We didn't really see it, that the issue of Dion Salas and his performance was not the issue of that meeting.

She later testified that she believed Salas' complaints at the meeting were "more personal attacks toward Joe than it was a concern about their safety or their work level." Swink next met with City Manager Julio Fuentes (Fuentes) and they had basically the same conversation;

¹⁰ Swink could not hire another employee to replace Salas because of an ongoing hiring freeze.

¹¹ Swink was aware that Tafoya did not like Lugo, and that Tafoya and Salas had been carpooling to and from work.

she testified Fuentes was angry that Tafoya held the meeting. Both Bacio and Fuentes agreed with Swink's decision to reject Salas on probation.¹²

After these meetings Swink called Chavez and told her the rejection decision had been made, and that she would call Salas to her office that afternoon. In the early afternoon, Swink, Chavez, Tafoya, and Salas met in a conference room at city hall. Swink explained her philosophy on reviewing probationary employees and then told Salas that he was being released from probation because he "no longer fit into the organization." Salas asked for a reason; she responded she did not have to give him any. She told him to gather his things and leave before everyone got back to the City yard from their jobsites.

After Salas left the room, Swink told Tafoya that she was upset he held a meeting without talking to her first, and accused him of trying to run things his way knowing that she would be leaving the department soon.¹³ She testified that Tafoya became angry and started to storm out of the room. She told him to sit down, which he did; she then said Chavez was soon to take over the department and that she had confidence in her. Tafoya left the room and accompanied Salas out of the building.

A few days later Salas received a dismissal notice in the mail; the reason cited was "[e]mployee did not pass probation." Flores was not terminated or disciplined, and passed his probation upon Lugo's recommendation.

¹² Neither Bacio nor Fuentes testified.

¹³ Swink was about to be promoted to Director of Utilities.

Swink's Decision

Swink testified that she did not believe Salas was “the fit that we needed in the City of Alhambra:”

I was concerned that I had an employee that was leading other employees with a bad example that he was questioning his supervisor, he was being insubordinate, that he was demanding answers, and I was very concerned at the attitude of this person.

Specifically, Swink stated that she made the decision to reject Salas because of: (1) his complaints about the concrete crew being worked too hard; (2) his leaving the jobsite early two days in a row; (3) his lack of respect for Lugo; and (4) his problems getting along with others. Swink said that Salas' complaints about being worked too hard concerned her because they raised doubts about whether he could or would perform at the required level. She was also greatly disturbed by Salas' comment to Lugo that City workers did not need to work as hard as private contractors. She felt that it was improper for Salas to leave the jobsite early without Lugo's permission. Swink also believed that Salas' questions and comments during the December 10 meeting were insubordinate and aimed at denigrating Lugo in front of the crew, and she was concerned that Salas would not take direction from Lugo. Finally, because the public works crews are small, she said she could not afford to have an employee who could not get along with others, thereby limiting the number of possible work team configurations.

Swink admitted that her decision to reject Salas on probation was based solely on information she learned during the call with Chavez and Lugo. Before making her decision, Swink did not speak with any of the other participants in that morning's concrete crew meeting. She did not ask Lugo why Salas and Flores left the jobsite early on December 8, nor did she speak to Salas or Flores about that incident or the similar one on December 9. She did not ask Lugo for any specifics about instances when Salas had been argumentative with him. Nor did she speak with Tafoya or Dominguez about the latter's request not to work with Salas.

DISCUSSION

1. Timeliness of the City's Exceptions

Salas claims in his response that the City's exceptions were untimely because they were filed 25 days after the ALJ's proposed decision was served on the parties. PERB Regulation 32300(a) provides that exceptions to a proposed decision may be filed "within 20 days following the date of service of the decision."¹⁴ PERB Regulation 32130(c) provides, in relevant part, that a "five day extension of time shall apply to any filing made in response to documents served by mail if the place of address is within the State of California."

On January 25, 2010, PERB served the ALJ's proposed decision on the parties by mailing copies of the decision to their representatives of record at the representatives' addresses in California. Because the proposed decision was served by mail, pursuant to PERB Regulation 32130(c) the City had an additional five days to file exceptions. The City filed its exceptions on February 19, 2010, exactly 25 days after service of the decision. The City's exceptions thus were timely filed.

2. Retaliation

To establish a prima facie case that an employer retaliated against an employee in violation of MMBA section 3506 and PERB Regulation 32603(a),¹⁵ the charging party must show that: (1) the employee exercised rights guaranteed by the MMBA; (2) the employer had knowledge of the employee's exercise of those rights; (3) the employer took an adverse action against the employee; and (4) the employer took the adverse action because of the employee's

¹⁴ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

¹⁵ Under PERB Regulation 32603(a), it is an unfair practice for a public agency to "[i]nterfere 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."

exercise of guaranteed rights. (*Santa Clara County Counsel Attorneys Assn. v. Woodside* (1994) 7 Cal.4th 525, 555-556; *Novato Unified School District* (1982) PERB Decision No. 210.)¹⁶

a. Protected Activity

The statutes administered by PERB, including the MMBA, regulate specific conduct by public employers and employee organizations concerning employer-employee relations. (*Los Angeles Community College District* (1979) PERB Order No. Ad-64.) These statutes do not regulate every aspect of the public employer's conduct. (*Ibid.*) Thus, PERB may only remedy retaliation that was taken because an employee exercised rights guaranteed by one of the statutes PERB administers.

The complaint in this matter alleged that Salas engaged in activity protected by the MMBA when, during the December 10, 2008 meeting, he "expressed concerns about Mr. Lugo's negative attitude toward the crew, Mr. Lugo's failing to communicate with the crew, and his making the crew complete tasks in the City Yard faster than they were able to safely perform them." Although the record establishes that Salas raised these issues at the December 10 meeting, we conclude for the following reasons that his statements were not protected under the MMBA.

MMBA section 3502 gives public employees the right to "represent themselves individually in their employment relations with the public agency." Interpreting similar language in Educational Employment Relations Act (EERA)¹⁷ section 3543, PERB has held that individual complaints related to employment matters made by an employee to his superior

¹⁶ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

¹⁷EERA is codified at Government Code section 3540 et seq.

are protected. (See, e.g., *Pleasant Valley School District* (1988) PERB Decision No. 708.)

This right of self-representation, however, is not unlimited. For instance, the Board has held that employee complaints to employers are protected when those complaints “are a logical continuation of group activity.” (*Los Angeles Unified School District* (2003) PERB Decision No. 1552; *State of California, Department of Transportation* (1982) PERB Decision No. 257-S.) Conversely, PERB has found such complaints to be unprotected when they are undertaken for the employee’s sole benefit or are the result of a personal grudge. (*Los Angeles Unified School District, supra*; *State of California, Department of Transportation, supra*; see *Mushroom Transportation Co. v. National Labor Relations Bd.* (3d Cir. 1964) 330 F.2d 683, 685 [“mere griping” is not protected activity].)

Nothing in the record indicates that Salas’ complaints at the December 10, 2008 meeting were a continuation of, or even related to, group activity. There is no evidence that he and the other crew members discussed his concerns with Lugo’s supervision before the meeting, or that he was acting as their spokesman at the meeting. Nor is there evidence that Salas’ complaints were an attempt to initiate group action by the other crew members. (See *Regents of the University of California (Einheber)* (1992) PERB Decision No. 949-H [an employee’s efforts to organize other employees to provide criticism of management constituted protected activity].)

According to Lugo, during the meeting Tafoya asked Flores whether he agreed with Salas and Flores responded that he did. However, Flores himself did not testify as to what he said, if anything, during the meeting. Moreover, he testified that he did not feel he was being asked to do too much work and that he had told Lugo so. There is also no evidence that Flores and Salas conferred about working conditions before the meeting. Based on this evidence, we cannot conclude that Flores was part of any group activity with Salas. Additionally, it is clear

from the record that Hernandez did not share Salas' views regarding Lugo and was not part of any concerted activity with him.

The record also shows that Salas held animosity toward Lugo at the time of the December 10, 2008 meeting. Prior to that date Lugo and Salas had disagreements over how particular work was to be done and Salas became upset when Lugo attempted to offer constructive criticism of Salas' work. On several occasions Salas complained to co-workers about Lugo giving the concrete crew too much work, saying that they did not need to work that hard because it was "city work." On December 9, the discussion between Lugo and Salas over why he and Flores left the jobsite early became heated and ended with Salas telling Lugo, "we'll continue the meeting tomorrow."

The lack of support among the other crew members for Salas' criticisms of Lugo's supervision, coupled with Salas' ongoing unhappiness with Lugo, establish that his complaints in the December 10, 2008 meeting were the result of his personal dislike of Lugo's manner of directing work and were not undertaken on behalf of other employees. Accordingly, we conclude that Salas' complaints about Lugo did not constitute activity protected by the MMBA.

Additionally, at the hearing and in subsequent briefing, Salas attempted to establish that he raised safety concerns during the meeting. PERB has held that an employee's reporting of workplace safety concerns is protected activity. (*Oakdale Union Elementary School District* (1998) PERB Decision No. 1246; *Los Angeles Unified School District* (1995) PERB Decision No. 1129; *Regents of the University of California* (1983) PERB Decision No. 319-H.) However, Salas' brief references to safety during his testimony show that he was concerned about the safety of the public from rushed concrete work, not the safety of the concrete crew. None of the other meeting participants remembered Salas raising any safety issues during the

meeting. Therefore, we conclude that Salas did not make a complaint about workplace safety during the December 10, 2008 meeting.¹⁸

b. Other Elements of Prima Facie Case

Assuming for the sake of argument that Salas's complaints at the December 10, 2008 meeting about being worked too hard were protected by the MMBA, the record establishes a prima facie case of retaliation. It is undisputed that Swink, who made the decision to reject Salas on probation, knew of his workload complaints at the meeting. It is also undisputed that rejection on probation is an adverse action. (*California State University, Fresno* (1990) PERB Decision No. 845-H.)

“Unlawful motive is the specific nexus required in the establishment of a prima facie case. . . . Unlawful motive can be established by circumstantial evidence and inferred from the record as a whole.” (*Trustees of the California State University v. Public Employment Relations Bd.* (1992) 6 Cal.App.4th 1107, 1124.) To guide its examination of circumstantial evidence of unlawful motive, PERB has developed a set of “nexus” factors that may be used to establish a prima facie case. Although the timing of the employer’s adverse action in close temporal proximity to the employee’s protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary nexus between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer’s disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer’s departure from established procedures

¹⁸ Because Swink, the decision maker, was unaware of Salas’ complaints about insufficient driver training time and missed breaks, they could not have played a part in her decision. Thus, we need not determine whether they were protected under the MMBA.

and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District, supra*, PERB Decision No. 264; *Novato Unified School District, supra*, PERB Decision No. 210.)

The timing factor is easily established because the City rejected Salas on probation less than eight hours after he complained at the concrete crew meeting about being worked too hard. Swink's lack of investigation before deciding to reject Salas also supports an inference that Salas' complaints were a motivating factor in her decision. These two factors are sufficient to establish a prima facie case of retaliation.

Additionally, we find that Swink's refusal to give Salas a reason for his rejection on probation does not support an inference of unlawful motivation under these circumstances. In *Novato Unified School District, supra*, PERB Decision No. 210, the Board stated that "[e]vidence that a respondent failed to offer justification to the aggrieved employee at the time it took action against him . . . is relevant in deducing improper motive." In support of this statement, the Board cited three National Labor Relations Board (NLRB) decisions. In two of

those decisions, *Mid-Ohio Automotive* (1972) 200 NLRB 680, and *Taft Broadcasting Company* (1978) 238 NLRB 588, the NLRB inferred unlawful motive from, among other evidence, the employer's refusal to give the employee a reason at the time of termination.¹⁹ However, more recently the NLRB refused to draw an inference of unlawful motive when the employer told five probationary employees they were being discharged because they did not "fit into the scheme of things." (*Sacramento Recycling & Transfer Station* (2005) 345 NLRB 564, 570, 575.) Similarly, PERB has found that failure to give an "at will" employee a reason for dismissal does not indicate unlawful motive in the absence of evidence that the employer was required by policy or past practice to do so. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129.) Consistent with these authorities, we find an employer's failure to offer justification at the time it took action is not a reliable indicator of discriminatory intent unless the employer was required by law, policy, or past practice to give a reason.

Here, Swink told Salas that he was being rejected on probation because he "no longer fit into the organization." When Salas asked for a reason, Swink said that she did not have to give him one. The record does not establish that the City was required by law or any City policy to give Salas a reason for his rejection on probation, or that it had a past practice of doing so. Indeed, Swink testified that it was her long-standing practice not to give a reason when she rejected an employee on probation. Accordingly, we find that Swink's failure to give Salas a specific reason for his termination does not support an inference of unlawful motive.

¹⁹ In the third cited decision, *Savin Business Machines* (1979) 242 NLRB 435, the NLRB inferred unlawful motive from the employer's failure to give the employee prior notice that his conduct could lead to discipline or termination; this is not the same as failing to give a reason for termination.

c. The City's Affirmative Defense

Assuming again for the sake of argument that Salas' complaints at the December 10, 2008 meeting about being worked too hard were protected and thus that a prima facie case of retaliation has been established, we nonetheless would conclude that the City proved it would have rejected Salas on probation despite his complaints.

Once a prima facie case is established, the employer bears the burden of proving that it would have taken the adverse action even if the employee had not engaged in protected activity. (*Novato Unified School District, supra*, PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line* (1980) 251 NLRB 1083, 1089.) Thus, when it appears that the adverse action was motivated by both valid and invalid reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers Distributors, supra*, 29 Cal.3d at p. 729.) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.)

It is clear that the December 10, 2008 concrete crew meeting precipitated Salas' rejection on probation. This does not mean, however, that he was rejected because of his complaints at the meeting. Prior to the meeting, neither Chavez nor Swink, the department employees authorized to make disciplinary and hiring decisions, were aware of Salas' behavior issues; they only became aware of the problems when Lugo came to them to discuss the meeting. At that point, Lugo relayed not just what happened at the meeting but also instances where he or another employee had a problem getting along with Salas. Thus, Swink's failure to take action prior to December 10 does not indicate that she rejected Salas on probation because of his complaints at

that day's meeting. Rather, they reflect the fact that she was unaware of Salas' workplace issues until that date.

Swink testified that she decided to reject Salas on probation because he:

(1) complained about the concrete crew being worked too hard; (2) left the jobsite early two days in a row; (3) lacked respect for Lugo; and (4) had problems getting along with others.

During their phone conversation on December 10, Lugo and Chavez told Swink that during the concrete crew meeting Salas repeatedly asked who assigned the work and commented that, because this was "city work," the crew did not need to complete jobs so quickly. They also told her that Salas and Flores left the jobsite early two days in a row and that Salas said he returned to the City yard early on December 9 to make spreaders. Lugo related to Swink his experiences with Salas' resistance to training and constructive criticism. Chavez and Lugo also informed Swink of Dominguez's request not to work with Salas. Based on this information, Swink concluded that Salas was not willing to perform the quantity of work required of a City concrete finisher, had difficulty working with Lugo and other crew members, and did not respect workplace rules. Thus, although Salas' complaints about being worked too hard appear to have played a part in Swink's decision, the record establishes that her decision also was based on other factors, including Salas' interactions with others outside of the meeting and the manner in which he questioned Lugo's authority at the meeting.

As noted above, Swink made her decision based on information from one source, Lugo, without any corroboration from other employees. Further, Swink's decision was based on her personal feelings about Salas' suitability rather than documented performance problems.

Nonetheless, while this may demonstrate a poor personnel practice, it does not establish that Swink rejected Salas on probation because of his complaints about being worked too hard.

(California State University (San Francisco) (1986) PERB Decision No. 559-H.) Rather,

based on the information she had, it was reasonable for Swink to conclude that Salas's relationship with Lugo was poor and would not improve, and that Salas' willingness to perform at the required level was questionable. We thus conclude that the City proved it would have rejected Salas on probation even if he had not complained at the December 10, 2008 concrete crew meeting about being worked too hard.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-513-M are hereby DISMISSED.

Members McKeag and Wesley joined in this Decision.