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

| | |
|---|---|
| DEVIN STEWART WHITNEY,<br><br>Charging Party,<br><br>v.<br><br>COUNTY OF RIVERSIDE,<br><br>Respondent. | Case No. LA-CE-541-M<br><br>PERB Decision No. 2184-M<br><br>June 7, 2011 |

Appearances: Devin Stewart Whitney, on his own behalf; The Zappia Law Firm by Brett M. Ehman, Attorney, for County of Riverside.

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

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Devin Stewart Whitney (Whitney) to the proposed decision of an administrative law judge (ALJ). The complaint issued by PERB's Office of the General Counsel alleged that the County of Riverside (County) violated the Meyers-Milias-Brown Act (MMBA)[1] when it released Whitney from his probationary position as a public defender investigator after he requested union representation during a meeting with his supervisor and copied a union representative on a memorandum to the chief investigator. The ALJ ruled that Whitney failed to establish that the County released him because of these activities and dismissed the complaint.

The Board has reviewed the proposed decision and the record in light of Whitney's exceptions, the County's response thereto, and the relevant law. Based on this review, the Board affirms the ALJ's dismissal of the complaint for the reasons discussed below.

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

## FACTUAL BACKGROUND

The Law Offices of the Public Defender (LOPD) defends indigent individuals charged with crimes in Riverside County. Gary Windom (Windom) has been the public defender since 1999. Windom has ultimate authority over all personnel decisions within the LOPD, including hiring, firing, and discipline. At all times relevant to this matter, Calvin Freeman (Freeman) was the chief public defender investigator. Freeman reports directly to Windom and oversees investigators in three offices: Riverside, Southwest, and Indio. Paul Mesa (Mesa) has been the supervising investigator of the Southwest office since 2001. Mesa reports directly to Freeman, and supervises six to seven investigators and one investigative technician.

Whitney began his employment as a public defender investigator in LOPD's Southwest office on July 31, 2008. Investigator III Roger Lemasters (Lemasters) was assigned to orient Whitney to the office and its procedures. Lemasters testified that he did most of the training of probationary investigators and served as a mentor and resource to them.

### December 2, 2008 Transportation of Witness to Blythe Courthouse

On December 2, 2008, Whitney was assigned to pick up a witness at 11:00 a.m. and transport her to the Blythe courthouse by 1:00 p.m. When Whitney arrived in the Southwest office that morning, Mesa asked him to pick up the witness earlier, and told him to ask the public defender to take the witness out of order so Whitney could return her home sooner. Unable to reach the witness by phone, Whitney picked her up between 10:30 and 11:00 and arrived at the courthouse by 1:00. Whitney asked the public defender if he could take the witness out of order. The public defender declined, stating that he needed the witness to testify at the end of his case in chief.

The witness did not testify until 5:00 p.m.; her testimony concluded at 5:55 p.m. At the end of her testimony, both attorneys agreed to release the witness but the judge ordered her to

remain at the courthouse subject to recall. Trial resumed at 6:05 p.m., but no further witnesses were called. Once the judge released the witnesses, Whitney drove the witness home. Whitney was paid overtime for the additional hours he worked that day.

When Whitney arrived at work the next day, Mesa called Whitney into his office. Mesa asked Whitney why the public defender did not take the witness out of order so that Whitney could return her home earlier. Whitney replied that he asked the public defender to do so, but he refused. When Mesa pressed him on the issue, Whitney said he had no control over the public defender and stated "we can agree to disagree."

Mesa's Draft Performance Evaluation of Whitney

Under the County's written policy governing Employee Performance Evaluation Reports, probationary employees are to be evaluated "at no less than six month intervals until the expiration of their probation." The standard evaluation procedure in LOPD was that the supervisor would draft the evaluation and send it to Freeman and then Windom for review; sometimes either would send it back to the supervisor for changes. Once a final version was agreed upon, Windom, Freeman, and the supervisor would sign the evaluation before it was presented to the employee.

Mesa testified that he followed a different procedure that he had learned in management training classes, whereby he would solicit employee input before drafting the employee's evaluation. In February or early March 2009, Mesa solicited input from Whitney for his six-month evaluation. Based on Whitney's input and his own observations and materials, Mesa prepared a draft evaluation, which he presented to Whitney for review on March 30, 2009.

In the category of "Adaptability/Flexibility," Mesa rated Whitney 2.9 (improvement desired). The comments under that rating began:

> Devin is aware of changing circumstances and can usually handle them with minimal help from his supervisor. However, he

> sometimes acts without considering the experience of his supervisor or other senior investigators. I[n] one such case he did not listen to his supervisor about a witness that needed to be transported to Blyth[e]. This caused him a day plus overtime. The reason given was that the D. A. would not excuse the witness. What Devin failed to understand was that it was now the D. A. who was responsible for transporting the witness. In discussing the incident with Devin he stated that "we can agree to disagree" but he never seemed to understand how he could of improved upon his decision made. This is not the right attitude to have and he must understand that others give him advice based upon their past experiences and failures of dealing with situations.

The comments went on to describe another incident in which a senior investigator who observed Whitney during a witness interview suggested to him that the interview could have been shorter while still obtaining the same information. Whitney countered that he disagreed because he established rapport with the witness. Mesa wrote: "This thought process by Devin is similar to his thinking that 'we can agree to disagree.' If Devin is not open to listening to others than [sic] he will never be able to improve upon his way of doing investigations."

Mesa rated Whitney as "meets expectations" in all other categories on the review, for an overall rating of 3.3. Even though he was not required to do so, Whitney signed the draft evaluation on March 30, 2009. Soon after, Mesa sent the draft to Freeman for review, but nonetheless continued to make changes to it.

April 1, 2009 Chapman-Wright Telephone Call

At a training session he was required to attend, Whitney met Thomas Chapman-Wright (Chapman-Wright), another probationary investigator. Whitney learned that Chapman-Wright wanted to transfer from the Riverside office to the Southwest office to be closer to home.

During his lunch break on April 1, 2009, Whitney called Chapman-Wright. According to Whitney, he told Chapman-Wright there were three vacancies in the Southwest office. He then asked Chapman-Wright if he could let Mesa know of Chapman-Wright's interest in a

transfer; Chapman-Wright agreed. Whitney then went to Mesa's office and told him that Chapman-Wright wanted to transfer to the Southwest office.

Chapman-Wright gave a different account of the call. According to Chapman-Wright, Whitney said he had been promoted and would be in charge of transferring Chapman-Wright to the Southwest office and showing him how things worked there. Chapman-Wright responded with surprise because Freeman had told him when he made his transfer request that no investigators could be moved until the budget had been passed. Whitney responded that the Southwest office was short three investigators and said the "squeaky wheel gets the grease."

After the call, Chapman-Wright spoke to his supervisor, Steve Judd (Judd), about Whitney's statements. Judd said he did not know about any transfer, which upset Chapman-Wright. Judd then called Mesa to see if he knew about a transfer. During the call, Judd told Mesa that Chapman-Wright was upset by Whitney's statements.

Judd then called Freeman and asked if Chapman-Wright was to be transferred. Freeman said there would be no transfer. He instructed Judd to obtain a written statement from Chapman-Wright; he then instructed Mesa to obtain a written statement from Whitney.

After speaking with Freeman, Mesa called Whitney to his office. When Mesa relayed Chapman-Wright's version of the call, Whitney was surprised. He then asked Mesa for a conference call to resolve the matter. Mesa declined, saying that was not how things were done at LOPD. Mesa directed Whitney to prepare a written statement of his version of the phone call. Whitney testified he then requested union representation, and Mesa denied the request, saying he was only asking for a written statement. Mesa, on the other hand, testified that Whitney did not ask for union representation during the meeting. Mesa then warned Whitney to be careful who he talked to as people sometimes have their own agenda.

Whitney ran into Lemasters as he left Mesa's office. Whitney asked for Lemasters' advice regarding Mesa's directive to write up his version of the phone call. Lemasters said that if he was in that situation, he would contact the union. Whitney then contacted Kathie Delgado (Delgado), business agent for Laborers International Union of North America, Local 777 (LIUNA), the exclusive representative of the bargaining unit including public defender investigators. Delgado told Whitney to prepare the written statement and to copy her on it.

Whitney prepared the statement that day and gave it to Mesa the next morning. Per Mesa's direction, it was addressed to Freeman with copies to Mesa and Delgado; Mesa testified that he did not notice Delgado's name on the document. During this exchange, Mesa told Whitney not to talk to other investigators outside of the Southwest office. Whitney responded that he had a constitutional right to talk to anybody. Mesa replied that he could not tell Whitney whom to talk to, but that if he continued to speak to people outside of the office, he would have to write more statements. Freeman reviewed the written statements from Chapman-Wright and Whitney but took no further action on the matter.

April 24, 2009 Rumor About Eric Martin

In 2008, the County transferred investigator Eric Martin (Martin) from the Southwest office to the Juvenile Division after several investigators filed a complaint about his behavior. On or about April 24, 2009, Whitney heard from another County employee that Martin was being transferred back to the Southwest office. When Whitney returned to the office midday on April 24, he told Mesa about the rumor. Whitney testified that he shared the rumor with Mesa so Mesa could dispel it. Mesa told Whitney he should focus on his work and not get involved in spreading rumors.

After this conversation, Mesa phoned Freeman and told him he wanted to release Whitney on probation. Freeman responded that they needed to bring the issue to Windom so he could make the final decision.

April 28, 2009 Meeting

On April 28, 2009, Freeman and Mesa met with Windom about ongoing issues with Martin. After discussing Martin, Mesa recommended that Whitney be released on probation. Mesa provided Windom with his draft evaluation of Whitney. As Windom read through the comments in the "Adaptability/Flexibility" section, he asked Mesa to elaborate on them; Windom also made notations on the draft. Windom asked Mesa if Whitney's statement that "we can agree to disagree" indicated Whitney could not take constructive criticism; Mesa said it did.

When Windom asked about other similar incidents, Mesa described the Chapman-Wright phone call and Whitney's response to Mesa's instruction not to talk to investigators in other offices. Windom commented that Whitney's conduct demonstrated a poor attitude and lack of flexibility. Mesa then told Windom that Whitney had told him a rumor about Martin's transfer back to the Southwest office. Mesa said that Whitney would not take direction or listen to his advice. Mesa did not tell Windom that Whitney had included Delgado as a "cc" recipient on his written statement about the Chapman-Wright phone call.

Windom testified that Mesa's report concerned him because it would be difficult to develop an employee who would not listen to his supervisor. He feared that if Whitney showed this behavior as a probationary employee, it would likely worsen once Whitney became permanent. Based on Mesa's report, Windom decided to release Whitney on probation.

On May 1, 2009, Whitney was given a letter signed by Windom releasing him from probation; the letter did not provide any reason for the release. It also informed Whitney that under the memorandum of understanding (MOU) between the County and LIUNA, he could not appeal the release.

LIUNA's Involvement in Southwest Office Issues

Prior to Whitney's employment, LIUNA was involved in several matters concerning investigators in the Southwest office. At some unidentified time, Mesa announced in a staff meeting that the County was going to change the way it computed overtime. When investigators questioned the County's interpretation of the overtime laws, Mesa told them to contact human resources or their union. Ultimately, with Windom's permission, LIUNA business agent Delgado spoke to the investigators about the overtime change. At another unidentified time, Windom allowed Delgado to participate in meetings about asbestos abatement that would affect unit members.

In 2006 or 2007, Lemasters, then an Investigator II, was being assigned Investigator III-level cases. Lemasters inquired several times when the County would administer an examination for Investigator III; each time he was told "sooner than later." Lemasters eventually called Delgado, who contacted Windom on Lemasters' behalf. Soon after, the County administered the Investigator III examination; Lemasters was subsequently promoted to Investigator III.

As noted above, Martin was an investigator in the Southwest office prior to the start of Whitney's employment. Four investigators in the Southwest office, Lemasters, Michael Izquierdo (Izquierdo), Jack Spencer (Spencer), and Richard Estrada (Estrada), expressed concerns about Martin's behavior to Mesa. Mesa informed Freeman about the concerns. Freeman told Mesa to obtain statements from the investigators, which he did. Lemasters

testified that sometime during Mesa's investigation of the complaints about Martin, he told Lemasters that Windom looked unfavorably on employees who did not try to handle issues within the department; Mesa denied making any such statement. When the investigators did not feel the County was addressing their concerns, they called Delgado for assistance. Martin also contacted Delgado and filed a complaint against the four investigators.

On July 24, 2008, Freeman met with Mesa, Martin, Spencer, Izquierdo, Estrada, and two other Southwest office investigators.[2] Freeman testified that he told the attendees he was concerned about the impact the Martin complaints were having on the office's work. Estrada testified that Freeman said LOPD could have handled the matter without LIUNA, but that he did not interpret this comment as a negative one about the union. Izquierdo testified that he did not remember Freeman or Mesa mentioning LIUNA during the meeting; both Freeman and Mesa denied that Freeman had done so. Shortly after the meeting, Martin was transferred to the Juvenile Division.

At the time of the hearing, Lemasters, Estrada and Martin were still employed by the County as investigators; Estrada had resigned in 2009 but Mesa persuaded him to return a few months later. Izquierdo resigned from the County for personal reasons. Spencer left County service in November 2008; it is unclear whether he was released on probation or resigned in lieu of release.

[2] Lemasters testified he did not attend the meeting because he was on vacation.

## DISCUSSION

### 1. Exceptions' Compliance with PERB Regulations

The County argues that Whitney's exceptions fail to comply with PERB Regulation 32300(a), which sets forth the required content for exceptions to an ALJ's proposed decision.[3] "Compliance with [PERB Regulation 32300(a)] is required in order to afford the respondent and the Board an adequate opportunity to address the issues raised." (*Temecula Valley Unified School District* (1990) PERB Decision No. 836.) Interpreting similar language in PERB Regulation 32635(a), the Board found an appeal substantially complied with the regulation when it sufficiently placed the other party and the Board "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H.) While they are not as lucid as the County may wish, we find that Whitney's exceptions adequately notify the County and the Board of the issues Whitney raises on appeal. Therefore, his exceptions are in substantial compliance with PERB Regulation 32300(a).

Nonetheless, the exceptions contain allegations for which no evidence was presented at the hearing, such as statements made to Whitney during his hiring interview and statements by Lemasters to Whitney about how Mesa liked to "test" new investigators. PERB

---

[3] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32300(a) states, in relevant part:

> The statement of exceptions or brief shall:
>
> (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
>
> (2) Identify the page or part of the decision to which each exception is taken;
>
> (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception;
>
> (4) State the grounds for each exception.

Regulation 32300(b) states: "Reference shall be made in the statement of exceptions only to matters contained in the record of the case." Because the record contains no evidence to support these factual allegations, we cannot consider them in our review of Whitney's exceptions. (*California State University, San Francisco* (1991) PERB Decision No. 910-H.)

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),[4] 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 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.)[5]

a. Protected Activity

On April 1, 2009, Whitney phoned Delgado for advice about Mesa's directive that he provide a written statement of his version of the phone conversation with Chapman-Wright. Delgado responded that Whitney should write the statement and include her as a recipient. Whitney included Delgado's name on the "cc" line of his written statement to Freeman. Seeking the assistance of the exclusive representative in connection with a workplace issue is

[4] 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."

[5] 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.)

protected activity. (*County of Riverside* (2009) PERB Decision No. 2090-M.) Thus, this conduct by Whitney was protected under the MMBA.

An employee's request for union representation during a meeting with management is also protected activity. (*City of Modesto* (2009) PERB Decision No. 2022-M; *Barstow Unified School District* (1996) PERB Decision No. 1164.) Whitney testified that he requested union representation during the April 1, 2009 meeting in which Mesa instructed Whitney to prepare the written statement, and that Mesa denied the request. Mesa denied that Whitney requested union representation during the meeting. Based on Whitney's subsequent phone call to Delgado, the ALJ concluded it was "more likely than not that Whitney requested a representative and was denied one."

"[W]hile the Board will afford deference to the [ALJ's] findings of fact which incorporate credibility determinations, the Board is required to consider the entire record, including the totality of testimony offered, and is free to draw its own and perhaps contrary inferences from the evidence presented." (*Santa Clara Unified School District* (1979) PERB Decision No. 104.) Here, the ALJ made no determination that Whitney's testimony about the April 1, 2009 meeting was more credible than Mesa's. Rather, the ALJ's finding that Whitney requested union representation was based solely on Whitney's later call to Delgado, which the ALJ concluded made it "more likely than not that Whitney requested a representative and was denied one." This finding, however, fails to account for Lemasters' testimony that when he spoke with Whitney immediately following the meeting with Mesa, he advised Whitney to ask for union representation if he believed any negative consequences could result from writing the statement. Since the record contains no evidence that Whitney was aware he could or should seek union representation before speaking with Lemasters, we find that the evidence did not

establish that Whitney requested union representation during the April 1, 2009 meeting with Mesa.

b. Employer's Knowledge of Protected Activity

As found above, Whitney engaged in activity protected by the MMBA when he phoned Delgado for advice about Mesa's directive to prepare a written statement and included her name on the statement as a recipient. There is no evidence in the record that Mesa knew about Whitney's phone call to Delgado. However, Delgado's name appears directly below Mesa's on the "cc" line of Whitney's written statement to Freeman about the Chapman-Wright phone call. Mesa testified that, although he knew Delgado was a LIUNA representative, he "overlooked" her name on the statement when he received it. In light of the fact that Delgado's name was directly below Mesa's, we find this testimony unpersuasive. Accordingly, we find that Mesa had knowledge of Whitney's protected activity.

Freeman testified that he read Whitney's written statement about the Chapman-Wright phone call and that he had known Delgado as a LIUNA representative for approximately ten years. Because it is highly likely that Freeman noticed Delgado's name in the "cc" line of the statement, we find that he knew of Whitney's protected activity. Finally, although Windom also knew Delgado was a LIUNA representative, he never saw Whitney's written statement. Further, Mesa testified that he did not mention Delgado's involvement to Windom. Thus, we find that Windom did not know about Whitney's protected activity.

c. Adverse Action

PERB has long held that the release of a probationary employee is an adverse action. (*California State University, Fresno* (1990) PERB Decision No. 845-H.) Thus, the County took adverse action against Whitney when it released him on May 1, 2009.

d. Nexus Between Protected Activity and Adverse Action

"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 and standards when dealing with the employee (*Santa Clara Unified School District, supra*); (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*; *Novato Unified School District*, *supra*.)

Windom was unaware of Whitney's protected activity at the time he made the decision to release Whitney on probation. Thus, Windom could not have been motivated by Whitney's protected activity. Nonetheless, Windom based his decision solely on Mesa's recommendation, and Mesa knew that Whitney had sought LIUNA's assistance in the Chapman-Wright matter. These facts present a classic scenario that triggers application of the subordinate bias liability theory. Under this theory, a supervisor's unlawful motive may be imputed to the decisionmaker when: (1) the supervisor's recommendation, evaluation, or report was motivated by the employee's protected activity; (2) the supervisor intended for his or her conduct to result in an adverse action; and (3) the supervisor's conduct caused the decisionmaker to take adverse action against the employee. (*Staub v. Proctor Hospital* (2011) 131 S.Ct. 1186, 1194; *Reeves*, *supra*, 121 Cal.App.4th at p. 116; *State of California (Department of Parks and Recreation)*, *supra*, PERB Decision No. 328-S.) Because Mesa admitted that he intended for his recommendation to result in Whitney's release on probation, and it actually caused that result, we need only determine whether Whitney's protected activity was a motivating factor in Mesa's recommendation.

Whitney's protected activity occurred on April 1, 2009. Mesa recommended to Windom that Whitney be released on probation on April 28, 2009. The closeness in time between Whitney's protected activity and Mesa's recommendation supports an inference of unlawful motive. However, Whitney has failed to establish any other factors that would support such an inference.

Whitney argues that the County departed from established procedures when it failed to give him a three-month performance evaluation, which he claims would have given him the opportunity to correct the deficiencies Mesa used as the basis for his release on probation. The County's written performance evaluation policy requires evaluation of probationary employees "at no less than six month intervals." The record does not establish that the County or LOPD had a practice of giving probationary employees a three-month evaluation. Consequently, Whitney has not shown that the County departed from established procedures.

Whitney also contends that LOPD conducted a cursory investigation of his alleged misconduct because neither Freeman nor Windom investigated the incidents Mesa relied upon for his recommendation. A decisionmaker's reliance on reports by subordinates does not constitute a cursory investigation unless the decisionmaker had reason to believe the reports to be biased or inaccurate. (*Escondido Union Elementary School District* (2009) PERB Decision No. 2019.) Nothing in the record demonstrates that Windom had any reason to believe Mesa's reports were not truthful; indeed, Windom testified that he trusted Mesa to provide him with accurate information. Additionally, Mesa's recommendation was based on statements Whitney made in conversations with him after each of the three incidents, not on the incidents themselves. Thus, an investigation into the substance of the incidents would not have addressed the actual reasons for Mesa's recommendation.

Even so, Freeman or Windom could have asked Whitney about his version of the conversations with Mesa. Yet an employer's failure to interview an employee in connection with a disciplinary matter evidences unlawful motive only when the employer routinely interviews employees under such circumstances. (*State of California (Department of Health Services)* (1999) PERB Decision No. 1357-S.) Here, there is no evidence that LOPD or the County regularly interviewed probationary employees before releasing them. Moreover, in his

hearing testimony Whitney did not dispute the substance of his conversations with Mesa following each of the incidents, and in fact admitted that he made the statements that most troubled Mesa. Accordingly, we find that Freeman's and Windom's failure to investigate Mesa's reasons for recommending Whitney's release on probation does not support an inference of unlawful motive.

Although he hardly mentions the issue in his exceptions, Whitney spent considerable time at the hearing attempting to establish that LOPD management harbored animus toward employees who used union representation. Lemasters, Estrada, and Izquierdo testified there was a general feeling among Southwest office investigators that management frowned upon them using union representation. However, neither Estrada nor Izquierdo could recall any statements to that effect by LOPD management. Lemasters also had difficulty recalling management statements about not using union representation; the only specific statement he could recall was that, during the investigation of the Martin complaint, Mesa told him that Windom liked employees to resolve issues within the department. Izquierdo testified that Freeman made a similar comment during the July 24. 2008 meeting about the Martin issue; yet neither he nor any other attendee recalled Freeman or Mesa mentioning LIUNA during the meeting. Furthermore, the record shows that LOPD was responsive to LIUNA once it became involved in investigator issues and that no investigator had been treated adversely as a result of LIUNA involvement. These facts do not establish that LOPD management held animus toward union representation.

Finally, although not raised in the exceptions, we note that the County failed to give Whitney a reason for his release on probation. The May 1, 2009 letter merely informed him of his release and said that he could not appeal the release under the LIUNA MOU. An employer's 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.) Here, Lemasters testified that it was the County's practice not to give any reason when an employee was released on probation. Thus, its failure to give Whitney a reason for his release does not indicate unlawful motive.

In sum, Whitney has not shown that his protected activity of seeking assistance from LIUNA was a motivating factor in Mesa's decision to recommend his release on probation. Accordingly, he has failed to establish a prima facie case of retaliation.

e. The County's Affirmative Defense

Assuming for the sake of argument that Whitney had established a prima facie case of retaliation, we nonetheless would conclude that the County proved it would have rejected Whitney on probation despite his protected activity of seeking LIUNA's assistance.

Once a prima facie case is established, the employer bears the burden of proving 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.)

When conducting the "but for" analysis, the proper inquiry is whether the employer's true motivation for taking the adverse action was the employee's protected activity. (*Regents*

*of the University of California* (1993) PERB Decision No. 1028-H.) In making this determination, "PERB weighs the employer's justifications for the adverse action against the evidence of the employer's retaliatory motive." (*Baker Valley Unified School District* (2008) PERB Decision No. 1993.) Once PERB determines that the employer did not take action for an unlawful reason, its inquiry is at an end; PERB has no authority to determine whether adverse action not motivated by protected activity was just or proper. (*Regents of the University of California*, *supra*; *San Ysidro School District* (1980) PERB Decision No. 134.)

Mesa's recommendation to release Whitney on probation was based on: (1) Whitney's failure to follow his directions during the witness transport to Blythe and his statement the next day that "we can agree to disagree"; (2) Whitney's statement following the Chapman-Wright incident that he has the right to speak with anyone; and (3) Whitney's relation of the Martin transfer rumor to Mesa despite Mesa's instructions not to become involved with employees outside of the Southwest office. Mesa testified that these incidents caused him to doubt Whitney's ability to develop as an investigator. On the other hand, Whitney's protected activity of listing Delgado as a "cc" recipient on his written statement regarding the Chapman-Wright conversation is relatively minor in nature. Thus, we conclude that Whitney's protected activity was not the true motivation for Mesa's recommendation. Accordingly, the County proved it would have released Whitney on probation even if he had not sought LIUNA's assistance regarding the April 1, 2009 written statement.

## ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-541-M are hereby DISMISSED.

Chair Martinez and Member McKeag joined in this Decision.