OVERRULED IN PART by Los Angeles Unified School District (2016) PERB Decision No. 2479

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MELVIN JONES, JR.,	
Charging Party,	Case No. SF-CE-646-M
v.	PERB Decision No. 2267-M
COUNTY OF SANTA CLARA,	May 25, 2012
Respondent.	

Appearances: Melvin Jones, Jr., on his own behalf; Cheryl Stevens, Lead County Counsel, for County of Santa Clara.

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

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Melvin Jones, Jr., (Jones) to a proposed decision of a PERB administrative law judge (ALJ) (attached) dismissing an unfair practice charge. The complaint issued by PERB's Office of the General Counsel alleged that the County of Santa Clara (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by: (1) terminating his employment in retaliation for having engaged in protected activity by filing grievances related to his working conditions; (2) denying Jones the right to have an employee organization representative present at a meeting at which he had a reasonable belief would result in disciplinary action or, in the alternative, the interview posed highly unusual circumstances; and (3) interfering with protected rights by directing him to cease communicating with his co-workers with regard to "any issues and concerns [he] may have."

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

The ALJ determined that the evidence did not establish a violation of the MMBA and dismissed the complaint and underlying charge.

The Board has reviewed the proposed decision and the record in light of Jones's exceptions and supporting brief, the County's response, and the relevant law. Based on this review, the Board adopts the ALJ's proposed decision as its own, subject to a discussion of the following issues raised in the exceptions.

DISCUSSION

Exceptions

PERB Regulation 32300[2] authorizes the filing of exceptions to the ALJ's proposed decision filed within 20 days of the date of service of the proposed decision. The ALJ's proposed decision was served by mail on February 11, 2011. On February 18, 2011, Jones filed 44 exceptions to the ALJ's proposed decision, accompanied by supplemental documentation. Jones submitted additional exceptions and documentation on February 28, March 1, March 4, March 7, and March 8, 2011, for a total of 74 separate exceptions. While the exceptions were timely filed, the filing of multiple documents containing exceptions is discouraged.[3]

Credibility Determinations

The vast majority of Jones's exceptions relate to the ALJ's findings of fact and credibility determinations, and the ALJ's application of the law to those factual findings. It is a well-established principle that the Board will give deference to ALJ credibility determinations absent evidence to support overturning such conclusions. (*Trustees of the*

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

[3] The County filed its response to Jones's exceptions on March 29, 2011. On April 1, 2011, Jones submitted a reply brief to the County's response. Because Board rules do not provide for the filing of reply briefs, this reply is not considered.

California State University (San Marcos) (2010) PERB Decision No. 2093-H; see also *Anaheim City School District* (1984) PERB Decision No. 364a ("[T]he Board has determined that it will normally afford deference to administrative law judges' findings of fact involving credibility determinations unless they are unsupported by the record as a whole."]) Having reviewed the record in its entirety, we find no basis to overturn the ALJ's credibility determinations, factual findings, or legal conclusions. We briefly address the remaining issues raised in the exceptions.

Additional Evidence on Appeal

On June 21, 2011, Jones requested that the Board consider additional evidence and/or reopen the record. Attached to the request is a payroll warrant dated April 24, 2009, which Jones asserts he did not receive until June 17, 2011.[4] Jones asserts that the warrant shows he was granted 56 hours of leave without pay in April 2009. Also attached are what appear to be pages from a memorandum of understanding (MOU) between the County and SEIU Local 715 for the period June 19, 2006 to June 14, 2009.[5]

When considering a request to reopen the record to admit new evidence, the Board applies the standard set forth in PERB Regulation 32410(a) for a request for reconsideration based on the discovery of new evidence. (*State of California (Department of Parks and Recreation)* (1995) PERB Decision No. 1125-S.) The regulation provides, in relevant part:

> A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was

[4] On April 20, 2012, Jones submitted what he asserted was the original of the same pay warrant.

[5] On May 18, 2012, Jones submitted additional evidence and argument and requested that the Board take official notice of two requests for injunctive relief (I.R.) he filed (PERB Case Nos. I.R. 618 and I.R. 620). For the reasons set forth herein, these requests are denied.

> submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

The new documents fail to meet this standard. While Jones asserts that he did not receive the April 2009 pay warrant until June 2011, he has failed to explain why he did not seek to obtain it earlier and therefore failed to establish that it could not have been discovered prior to the hearing with the exercise of reasonable diligence. He also failed to explain why the 2006-2009 MOU pages could not have been discovered and submitted previously.[6] More importantly, Jones has failed to demonstrate the relevance of these documents to the issues before the Board or that the proffered evidence impacts or alters the decision in this case. While Jones asserts that the evidence shows that the County "granted" him 56 hours of leave without pay, it does not establish that such leave was authorized, but appears simply to reflect the County's entry of the time as unpaid leave for accounting purposes. Therefore, we decline to consider the new evidence on appeal.[7]

Failure to Accommodate Medical Condition

Jones asserts that the ALJ failed to take into account his medical condition (asthma) in making credibility determinations during the hearing. We find this exception to be without merit, as the record clearly reflects that the ALJ accommodated Jones's medical condition by allowing multiple breaks upon request. While Jones submitted some evidence concerning the possible side of effects of his asthma medication, there is no evidence in the record to indicate that his asthma or medication affected his ability to testify competently.

[6] We note that another section of the MOU offered by Jones was admitted into evidence at the hearing.

[7] The multiple exceptions also include multiple attachments, including some that do not appear to have been admitted into evidence at the hearing. In the absence of a showing that the standards under PERB Regulation 32410(a) have been met, we also decline to consider any new documents attached to the exceptions.

April 13, 2009 Letter

Jones asserts that the ALJ erred in failing to consider a letter dated April 13, 2009, which Jones asserts showed that he was granted time off from work until April 30, 2009. The letter was not introduced into evidence at the hearing and no testimony was offered about it. Instead, it was attached as an exhibit to Jones's post-hearing brief and appears to also have been submitted to PERB's Office of the General Counsel during the investigation of the charge. In reviewing exceptions to a proposed decision, the Board may only consider record evidence. (PERB Reg. 32300(b); *California State University, San Francisco* (1991) PERB Decision No. 910-H.) The fact that a document is contained in a PERB file as part of a party's submission during the investigation of an unfair practice charge does not automatically render it part of the record evidence in an evidentiary hearing before an ALJ; all evidence must be introduced properly and admitted during the hearing.

As set forth in in footnote 9 of the ALJ's proposed decision, the ALJ declined to consider the April 13, 2009 letter as evidence and expressed concerns about its authenticity. Jones requests that we consider the letter as additional evidence pursuant to PERB Regulation 32635(b), which provides: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." On its face, this provision is applicable to appeals from a Board agent's dismissal of an unfair practice charge, not exceptions to a proposed decision after hearing. As indicated above PERB applies the standards set forth in Regulation 32410(a) to requests to reopen the record to admit new evidence. The letter fails to meet those standards, as there is no showing that it was not previously available and could not have been presented at the hearing before the ALJ, explained by witness testimony, and subject to cross-examination. Accordingly, we find no reason to disturb the ALJ's determination on this issue.

County Counsel's Communications with ALJ

Jones objects to what he characterizes as inappropriate ex parte communications between the County Counsel and the ALJ. The first communication is a letter dated February 22, 2011, from County Counsel to the ALJ advising the ALJ of email communications received from Jones and stating that counsel would not respond to those communications. The letter also asserts that counsel did not receive Jones's post-hearing brief in a timely manner. The second communication is a letter dated June 30, 2011 confirming that the ALJ granted the County an extension of time to submit an opposition to a pending motion before the ALJ. Both of these letters were copied to Jones. We find nothing inappropriate in the communications. Moreover, there is no evidence that any of these communications were made a part of the record or considered by the ALJ, or that they caused any prejudice to Jones. Accordingly, we do not find merit to this exception.

Refusal to Allow Jones to Examine County Counsel as a Witness

Jones requests to reopen the record for the purpose of taking the testimony of County Counsel Cheryl Stevens (Stevens), as well as additional witness testimony, concerning alleged statements made by Stevens on behalf of the County in the County's submissions to PERB during the investigation of the charge and in its post-hearing brief. It appears these statements concerned alleged misrepresentations made by Jones on his employment application. Alternatively, Jones asserts that the ALJ's proposed decision should be reversed because the ALJ did not grant a motion by Jones to examine Stevens as a witness in the hearing. Construing the motion as a motion to exclude evidence of a defense based upon application fraud, the ALJ denied Jones's pre-hearing motion to examine Stevens, but informed him that the matter could be considered at a later point in the hearing if the County presented evidence of such a defense during the hearing. Throughout the hearing, the County asserted that its

decision to terminate Jones was based solely upon his failure to report for work and not on the alleged application fraud. The record does not indicate that Jones ever renewed his motion to examine Stevens, and he did not present any rebuttal witnesses. Therefore, we deny the request to reopen the record for this purpose.[8]

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-646-M are hereby DISMISSED.

Chair Martinez and Member Huguenin joined in this Decision.

[8] On August 21, 2011, Jones filed a motion for litigation costs pursuant to Government Code section 11455.30. In light of our decision, this motion is denied.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MELVIN JONES, JR., Charging Party, v. COUNTY OF SANTA CLARA, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-646-M PROPOSED DECISION (February 11, 2011)

Appearances: Melvin Jones, Jr., in propria persona; Cheryl Stevens, Lead County Counsel, for County of Santa Clara.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

Melvin Jones, Jr. initiated this case under the Meyers-Milias-Brown Act (MMBA or Act)[1] by filing an unfair practice charge against the County of Santa Clara (County) on April 20, 2009. On April 14, 2010, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the County (1) retaliated against Jones by terminating his employment, (2) denied him his *Weingarten*[2] right, and (3) interfered with his right to engage in protected activity. This conduct is alleged to violate sections 3506 and 3509(b) of the Act and PERB Regulation 32603(a) and (b).[3]

On May 6, 2010, the County filed its answer to the complaint, denying the material allegations of the complaint and raising affirmative defenses.

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

[2] *NLRB v. J. Weingarten* (1975) 420 U.S. 251.

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

On May 20, 2010, an informal settlement conference was held, but the matter was not resolved.

On June 2, 2010, Jones filed a motion to amend the complaint. On July 1, 2010, the motion was denied.

On November 9 and 10, 2010, a formal hearing was conducted in Oakland by the undersigned. On January 18, 2011, the matter was submitted for decision upon receipt of post-hearing briefs.

FINDINGS OF FACT

At all times relevant herein, Jones was a "public employee" within the meaning of section 3501(d). The County of Santa Clara is a public agency within the meaning of section 3501(c).

Hiring and Placement

The County's Probation Department maintains a juvenile detention facility in San Jose. Juvenile wards reside in the Juvenile Housing Unit. The Probation Department's laundry unit cleans the wards' clothes and linens for the Juvenile Housing Unit and a juvenile ranch unit. The Juvenile Housing Unit facility employs three full-time (regular) employees. A total of three extra-help workers are on staff for both facilities. The normal work shift is 6:00 a.m. to 2:00 p.m., seven days per week. Laundry workers belong to the bargaining unit exclusively represented by the Service Employees International Union Local 521 (SEIU).[4]

Kevin Cooper is the Probation Department's food services manager. He is charged with oversight of the laundry facility. In 2008, Cooper requested a civil service examination for the position of Laundry Worker II. The job specifications described responsibility for operating commercial-type washers in a large laundry facility. Tasks for the position included

[4] SEIU is an employee organization within the meaning of section 3501(a).

the loading of sorted and weighed laundry, adding of soaps, bleaches and other solutions as appropriate to the load, regulating the flow of laundry, and cleaning of the machines.

Jones competed successfully in the examination. Cooper was on the interview panel. In ranking him eligible, Cooper relied on Jones' representation, set forth in a supplementary questionnaire to the application, that he had three or more years of experience in a commercial laundry and extensive knowledge and experience with commercial equipment. Jones noted that he had received a bachelor's degree from San Jose State University in Industrial Technology. One of his courses was in occupational safety and health. Cooper was pleased to learn this. Jones also earned a masters degree in human resource management from Golden Gate University.

Cooper expected Jones to communicate effectively, work well within the team, and function independently. Cooper was impressed with Jones' communication skills. Communication skills come into play when, for example, laundry workers seek the cooperation of juvenile counselors in obtaining the wards' compliance with rules regarding the collection of dirty laundry.

Jones was processed for employment as a probationary employee on March 6, 2009. He reported for duty on March 9. Jerry Stodulka was the immediate supervisor. A typical work day for Jones began with sorting the soiled laundry. After checking the machines, laundry loads were run through their wash and dry cycles. Special orders were processed next. After the laundering work was complete around 11:00 a.m., clean laundry was folded and loaded onto laundry carts for delivery back to the housing units.

Grievances

Jones initiated two informal grievances with Stodulka. On March 15, 2009, Jones complained to Stodulka about being denied overtime. Cooper testified regular overtime is not

normally offered to regular employees. Instead, the "extra-help" employees fill the gap. Jones was temporarily assigned overtime hours as a result of the absence of both a regular employee and an extra-help worker. When the extra-help worker returned, she was assigned the fill-in duties.

Jones testified that Stodulka "skipped over him" and offered overtime to another employee with "less status." Jones notified his SEIU job steward of the purported violation of the memorandum of understanding (MOU) and stated his intention to file a formal grievance. Jones does not identify any specific language in the MOU supporting his grievance.

A short time later, Jones complained to Stodulka in two separate matters about working conditions in the laundry room. Jones testified that the counselors were failing to monitor the wards' submission of their laundry resulting in irregular levels of washing. Jones believed this resulted in a health and safety issue in the housing unit because dirty laundry was being left in the minors' rooms, where germs could multiply. The other complaint concerned wards who were knotting their laundry, despite rules against it. Cooper was informed of both complaints.

Cooper testified that Stodulka intended to address the laundry flow problem with the counselors. He denied this was a health and safety issue. He seemed to recall Jones complaining about the wards knotting up shirts and towels, but asserted that enforcement of orders against knotting should not have been a concern of Jones. Jones maintained that his complaint was lodged with some justification based on his training and experience.

Jones elevated his grievances beyond Stodulka's level. This was accomplished by e-mail, as opposed to submitting them on the SEIU grievance form. Jones first contacted Human Resources Operations Manager Joanne Cox, who is the human resources operations manager for the County. Cox responded that she was referring the e-mail to Janice Lawton, a labor relations specialist in the same department, whom Cox described as "handling" the

Probation Department. The Probation Department has its own human relations section for matters internal to the department (referred to as "Background/Human Resources"). Later, Lawton responded, "You may submit [the grievance] to me, and I will forward a copy to the Department. I will be the one to respond to your grievance." Despite a suggestion that he contact SEIU, Jones indicated his preference for prosecuting the grievances on his own.

SEIU's MOU states that the first formal level of the grievance procedure is the presentation of a written grievance to the "person designated by the appointing authority," with a copy to the labor relations department. The second level is a presentation to the "County Executive's designated representative."

Delores Nnam is the Probation Department's executive administrative services manager. Cooper reports directly to her. Although she was not clear on the meaning of "person designated by the appointing authority," Nnam testified that she expects grievances will be presented informally to the "supervisor," followed by a formal meeting with the supervisor (and typically the SEIU representative). She did not explain whether the first formal level in Jones' case was with Stodulka or Cooper.

Jones also testified that he was fearful of talking with his SEIU job steward. Other laundry workers had warned him not to complain. When Jones was introduced to an SEIU worksite organizer in the laundry room, Stodulka looked at him with an expression of disapproval. Stodulka did not testify.

April 3 Meeting

On April 3, 2009, toward the end of the shift, around 1:40 p.m. Cooper approached Jones and said they needed to talk. Jones testified he asked Cooper if it was a "good meeting or a bad meeting." Cooper answered it was the latter. Cooper escorted Jones to the lunch area

of a different building. Jones asked Cooper for his union representative, but Cooper refused. Cooper said the meeting would proceed.

Cooper told Jones that he and Stodulka had tried to "make this department good," that Jones was "making trouble for the department," and he should have come to Cooper first if he was unsatisfied with Stodulka's response. He added that Jones should "just shut up and do [his] job." Jones mentioned that he thought Cooper was pleased with his health and safety background and believed he had been instructed to look for such issues. Jones added that he was confused and asked if Cooper meant he could not file a grievance. Cooper responded, "Put it like this, who do you work for. . . . You work for the probation department. And so if you're going to be a team player then you be a team player. But if you're going to go off and file a grievance left and right, well, I'm telling you, go through the proper chain of command."

At some point in the meeting, Cooper produced an already completed form entitled "Employee Counseling" and handed it to Jones. In the body of the form, under the heading "Topic(s) For Discussion," Cooper had written:

> In order to preserve a harmonious work environment, any issues and concerns you may have should be discussed with your immediate supervisor. Furthermore, these issues should not be discussed with coworkers in the laundry department. If at any time you feel your issue or concern is not addressed adequately, or in a timely manner, please take your concerns through the chain of command in the Probation Department. I, Kevin Cooper, Food Services Manager, would be the next person to contact. My supervisor is Delores Nnam, Executive Administrative Services Manager for the department and is responsible for the Administrative Services Division to which we belong. In turn, Her [sic] supervisor is Sheila Mitchell, Chief Probation Officer.
>
> In the future it is my expectation that any issues or concerns are taken through the chain of command in the Probation Department. Failure to follow this procedure could lead to further disciplinary action up to and including separation.

Jones suggested that Cooper never made explicit the nature of the complaints he allegedly raised with coworkers that prompted the counseling.

Cooper's version of the meeting differed in some material respects. Cooper sensed that Jones' overall reaction to the meeting was positive. The meeting lasted for 45 minutes. Cooper denied that Jones ever asked for a union representative. Cooper was aware the Jones had raised some issues with Stodulka. His main objective was to quell a potential problem in terms of Jones' relationships with his coworkers. Cooper had received the report that after Jones was denied overtime, he told another worker that Cooper and Stodulka were "too stupid to do their jobs." Jones also reportedly stated that Eva was "too stupid" to have passed the qualifying examination for a regular position.

Cooper testified: "I explained to Mr. Jones that when I say not to discuss these matters with the employees, I'm saying to create a harmonious work environment if you have issues with someone's qualifications at work, do not discuss them with other employees because it creates a[n] unharmonious work environment. You're telling the one employee that another employee is too stupid to have her job and doesn't deserve her job. That's not what we do here." Cooper also testified that he explained to Jones, "This is not about the grievance and that he had every right to file a grievance." The point of emphasis was that Jones needed to avoid disparaging the qualifications of others. Cooper ended the meeting by instructing Jones to fill out the comments section on the counseling form and return it for further discussion.

Jones responded with the following comments: "I am confused and concerned that / about hinderance [sic] and/or retaliation as to said claus [sic] of union contract. As of 4/3/2009 I have <u>not</u> been provided with email, and phone # info as to 'counseling' with Mr. Cooper on 4/3/2009. I had <u>not</u> been even given a 'chain of command' procedure --- at <u>all</u>. <u>Note</u>: My <u>two</u> grievances were filed prior to 4/3/2009. Also, I have never discussed any such issues with

co-workers." Jones added that Cooper had promised him a booklet containing the chain of command.

On cross-examination, Jones attempted to elicit Cooper's admission that the meeting was a factfinding mission. Cooper denied this, claiming that since Jones was only a two-week employee with whom he had never spoken, the meeting was intended to be a forward-looking counseling session. Jones also attempted to elicit Cooper's admission that he engaged in questioning for investigative purposes. Cooper denied this as well. Jones identified no specific questions that were posed. Cooper confirmed that a counseling memorandum is not considered discipline and is not placed in the personnel file.

Corroborating Cooper, Nnam testified it was her understanding from Cooper that he was meeting to address Jones' criticisms of other employees. Cooper reported to Nnam on the meeting after it occurred.

I credit Cooper's denial that Jones asked for a union representative. Based on his demeanor and the overall presentation of his case, I did not have confidence in Jones' recollection of events. Jones was nervous and combative, and while he demonstrated some skill in presenting his case, his evasiveness on cross-examination and the shading of many of his answers betrayed a decidedly subjective outlook on the events in question.[5] Cooper, on the other hand, was reserved and professional during the hearing, including the times he was present as an observer.

The logical probabilities favor Cooper as well. The context of the meeting and Jones' decision to forego SEIU representation lead me to doubt he would ask for a representative (especially during his first face-to-face contact with Cooper) on the sole basis that Cooper told

[5] There were a couple of notable instances of bolstering. For example, in his e-mail correspondence complaining about the late laundry, Jones asserted that germs would multiply. At the hearing he suggested that the wards placed feces in the towels.

him it was not going to be a "good" meeting. Most new probationary employees would be reluctant to involve the union on the basis of so little information for fear of creating a negative impression. Cooper noted that Jones seemed to be seeking reassurance that he would be able to pass probation. Then, too, since the counseling memorandum had been drafted before the meeting, and it confirms the purpose was corrective action rather than discipline, there would have been no reason for Cooper to approach the meeting with investigatory purposes. I was left with the strong impression that Jones' version of the meeting was crafted after-the-fact with a view to establishing the elements of his *Weingarten* allegation.[6]

Shortly after the meeting, Jones lodged a third grievance by e-mail alleging a denial of his *Weingarten* rights.

Health Complaints and Commencement of Medical Treatment

Jones testified that during the April 3 meeting he complained about nosebleeds suffered that day. Jones had not suffered nosebleed before that day. Although he apparently did not express this to Cooper, Jones attributed the nosebleeds to chlorine vapors in the laundry room. Jones had noted the presence of a strong odor of chlorine when entering the facility in the morning. Taking the initiative to investigate, he discovered that the ventilation system was not working properly.

Cooper denied Jones complained about nosebleeds, but admitted he asked if he could wear a protective mask. Cooper learned of the nosebleeds in an e-mail from Jones, during the subsequent time when Jones had not been appearing for work. Again, I credit Cooper on this point based on his more credible presentation.

[6] Jones' written response to the counseling memorandum, wherein he complains he was never provided a copy of the organizational chart for chain-of-command purposes corroborates the thrust of Cooper's testimony. Jones testified that following the chain of command in his case was excused because Cooper had already threatened him regarding his grievance activity.

Cooper was aware of the malfunctioning vent. Stodulka told him that a work order had been submitted for its repair. Jones testified that Eva told him that the faulty vent had aggravated her asthma. In response to this issue, instructions were issued to keep the windows open. Cooper experienced the smell of chlorine during the washing cycles, but believed the odor ceased when the laundry operations were completed, usually around 11:00 a.m. No other employees had complained about the smell. Cooper appeared to be skeptical that the vapors could be a serious problem, noting that the chlorine was automatically dispensed from closed containers connected to the machines with tubing and rubber stoppers.

On April 6, 2009, Jones e-mailed the Probation Department's human resources representative seeking to expedite his enrollment for medical coverage. He stated he needed to see a doctor regarding eye irritation and nosebleeds "as to work conditions." The next day Jones received confirmation of enrollment with Kaiser Permanente. However, because Jones reported the condition as possibly work-related, the human resources representative instructed Jones to see the County's workers' compensation medical group, U.S. Healthworks, as well. Jones was told to obtain the appropriate forms from Stodulka. On April 7, Cooper confirmed this instruction and directed to proceed to the County's doctor.

Also on April 6, Nnam sent an e-mail to Jones stating she was in receipt of his grievances and was requesting a meeting to discuss them on April 10. The e-mail states that Jones was welcome to bring a union representative. Lawton was copied on the e-mail. The same day, Jones responded by "respectfully request[ing] that [Nnam] cease and desist and follow the union contract as to such." He cited the fact that the grievances were at the formal stage.[7]

[7] Ultimately, a principal labor relations representative from the Office of Labor Relations informed Jones on April 20, 2009, that the three grievances mentioned, as well as nine others Jones had presented, were being denied because Jones refused to discuss the issues

On or about April 7, Cooper replied in writing to Jones' response to the counseling memorandum. He promised to provide Jones a department organizational chart. Cooper was unable to meet with Jones that day and for several days thereafter because Jones had taken time off to seek medical treatment. Also on April 7, Nnam sent an e-mail to Jones confirming the April 10 meeting, adding that his failure to attend would be viewed as insubordination.

On April 7, Jones executed an unfair practice charge alleging retaliation, coercion and threats against his job security as a result of having filed grievances.[8]

On April 8, Jones visited his Kaiser physician. He was directed to use a face mask when exposed to chlorine fumes and obtain an over-the-counter saline spray to keep his nostrils moist. The next day, a second Kaiser physician generated a note verifying that Jones was ill and unable to attend work from April 9, through April 10, 2009, but was cleared for return on April 11 without restrictions.

On April 10, Jones was seen by the U.S. Healthworks physician regarding his nosebleeds. The progress report states that the physician discussed the matter with Cooper. The physician inquired with Cooper about the chlorine issue. Cooper responded by explaining that the chlorine was stored in enclosed containers. The physician concluded that the condition was not work related, and he released Jones to return to work without restrictions.

At the same appointment, Jones complained about shortness of breath and was given a lung capacity test. He asserted that the test confirmed he had an abnormal lung condition,

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with either his supervisor or a labor relations representative, and thus the County was without a basis to substantiate any of the claims.

[8] According to e-mails from Jones presented by the County, the authenticity of which was not disputed, Jones filed charges with the National Labor Relations Board (NLRB) and the Occupational Health and Safety Administration on April 8.

which he attributes to asthma. Nowhere do the test results state such a deficiency. The only notation suggestive of the overall results states: "normal spirometry."

Cooper expected Jones to be at work on April 10. However, because Jones submitted a request for bereavement leave for the passing of his grandmother, he was granted leave for April 10 and 11.

On April 10, Jones informed Cooper of his desire to initiate a reasonable accommodation request due to asthma. Cooper responded with an e-mail, attaching the appropriate forms and directing Jones to file his "Form A" with Probation Department Equal Employment Opportunity Officer Rebecca Flores. Also on April 10, Jones notified Cooper by e-mail that due to his nosebleed diagnosis he would be absent on April 11, 12, and 13, and that he would provide further information following a doctor's appointment on April 13.

On April 13, Jones was examined by a Kaiser internal medicine physician. A report generated by the doctor states that Jones was seen for nosebleeds. No definitive cause was described, though high blood pressure was suggested as a possible cause. Jones received a referral to the allergy clinic for evaluation of allergies.

Reasonable Accommodation Request

Following the Kaiser appointment but also on April 13, 2009, Jones called Flores around 1:00 p.m. He asked for directions to her office and an appointment to review his Form A. Flores responded that she was available later that day and the afternoon of the next. Shortly after the call ended, Flores was surprised by a second call from Jones, announcing he was in the lobby. Flores obliged Jones by meeting him and accepting his form. Since she had time and wanted to review the form in his presence, she asked Jones to go to her office for that purpose. Jones declined, stating he did not have the time.

According to Jones, Flores intimated that day that his reasonable accommodation request would "go favorably" if he dropped his discrimination/retaliation claims. Flores denied making such a statement. I credit Flores. Flores was not assigned to the human resources area that handles grievances, and there is no evidence suggesting she would have been aware of Jones' grievances. She denied as much. Moreover, Flores had previous experience adjudicating reasonable accommodation claims for the Department of Fair Employment and Housing (DFEH). Her demeanor throughout the hearing was professional. I doubt that a person with her background would make a risky offer that would compromise the County's obligation to comply with all employment laws simultaneously.

Later that day, Jones sent Flores an e-mail to confirm delivery of the Form A. He ended with the following: "Also, please take note of the fact that until my ADA request is resolved (e.g. approved) I will remain on 'sick' leave (paid or unpaid) . . . which means I will not be at work until said resolution." Jones testified that Flores granted him time off to complete his medical appointments. He believed this extended to April 30, 2009. Flores testified that she has no authority to approve time off.[9]

[9] The County's written response to Jones' DFEH discrimination complaint contained a reference that he was granted time off for medical appointments. The response does not identify Flores by name and does not indicate what appointments were covered. In his post-hearing brief, Jones attaches as an exhibit a letter signed by Flores dated April 13, 2009, with notations "Confidential" and "In person / Hand Delivery." No attempt was made to introduce it at the hearing, and thus it is not considered as evidence. Jones offered no testimony that a letter from Flores was hand-delivered on April 13, the first day he met her in person. Flores purportedly writes, "As of April 13, 2009 this office grants your request for time off work. . . . Please take note your expected return to work is April 30, 2009." As noted above, according to the version of the Form A presented by the County, the form it claims to have received contains no request to April 30. At the hearing, Jones was asked if he had something in writing from Flores excusing him beyond April 13. He said he had something, but could not locate it. Though the April 13 letter was provided to PERB prior to the hearing, it remains suspicious in terms of authenticity, and like the differing Form A, casts further doubt on Jones' credibility.

In the Form A, Jones states his medical condition in the following terms: "Eye and nose irritation to smells/oders (sic) related to Laundry Dept. and/or soiled linen thereto, due to resulting 'hyper-sensitivity' of employee to same." Jones' reasonable accommodation request pertained to the following duties: (1) "Sorting & handling dirty laundry and/or solvents thereto without 'breathing mask' (e.g. N-95 mask);" and (2) "Allow temporary work hour change to 6 am to 12:00 noon for 4-weeks to allow for not having to have lunch period in said facility. And to allow for specific possible allergies to be discovered and tested."

Flores determined that the request lacked sufficient documentation to be approved, specifically, the absence of medical documentation supporting the need for work restrictions. The documentation included the U.S. Healthworks report and accompanying spirometry report, the April 8 Kaiser report, and an appointment scheduled for the next day, April 14, with the Kaiser allergy department.

At the hearing, Jones presented a different copy of the Form A. It contained an additional note at the bottom stating: "I have an appointment with an allergist on 4/14/09 (see attached appointment confirmation). *I need time off of work as an accommodation of approx (est) 3 weeks for anticipated further medical appointments / attention to items noted in A. above.*" (Italics added.)

Jones attended his April 14 appointment. According to documents generated from that visit, the physician prescribed an allergy plan, including use of a nasal spray and antihistamine tablets to address runny nose and itchy eyes. An asthma plan was also prescribed, which included a prescription for an albuterol inhaler. Jones scheduled a follow-up visit on April 27 with the allergy clinic. Jones presented no evidence of treatment for asthma prior to working for the County.

Early on April 14, Jones notified Flores in an e-mail that while attending his appointment he would be unavailable by telephone and asked Flores to send him any questions by e-mail. Flores responded, asking for clarification as to whether e-mail was his preferred mode of communication. In the final e-mail of the day Jones replied that e-mail was his preference. He noted that he had complaints pending with the DFEH and PERB.

Jones admitted that he did not have a written doctor's verification excusing him from work after April 13.

County's Decision to Release

On April 15, Cooper sent a letter to Jones citing his absences on April 11, 12, and 13 as being unauthorized in the absence of a doctor's excuse. The letter referenced the MOU, which requires a physician's verification for sick leave in excess of three working days. Cooper granted Jones until April 20 to provide a doctor's note covering his days of absence, and to report back to work immediately unless he presented verification of the need for additional days off for medical reasons. The letter warned of disciplinary action up to and including termination.

Jones did not report to work as directed. He testified he was justified in doing so because Flores had granted him permission until April 30 to complete his medical assessments. In his April 13 e-mail stating his intent not to return to work, he characterized the basis as his need to resolve the reasonable accommodation issue to his satisfaction (i.e., "until said resolution"). Jones did not point to any specific e-mail or verbal statement of such grant of permission, but appears to rely on Flores' silence in the face of his claimed need for further medical assessments, and the note on his version of the Form A notifying her of the request for time to April 30.[10]

[10] But see footnote 9, above.

By letter dated April 21, 2009, Nnam notified Jones that the department was releasing him from his probationary status as a Laundry Worker II. The merit system rule identifying absence without leave as justifiable cause was cited as the basis for the decision. Nnam noted the April 10 Healthworks and April 13 Kaiser notes were the only documentation that could be considered a response to Cooper's April 15 demand for a doctor's excuse. Neither provider excused Jones from work or identified medical restrictions as to regular duties.

By letter dated April 23, 2009, Jones requested an administrative hearing. The County scheduled one for May 11, 2009. On May 5, Jones submitted a written response in lieu of appearance. The County's administrative review officer reviewed Jones' written submission and found nothing to justify the unauthorized absences. The release was upheld.

Jones submitted a letter dated November 2, 2010, from an allergy and asthma physician stating that Jones has been an asthma patient since March 22, 2010.

ISSUES

1. Did Cooper interfere with Jones' right to engage in protected activities by instructing him on April 3, 2009, that his issues and concerns were to be discussed with his immediate supervisor and not with coworkers in the laundry department?

2. Did Cooper deny Jones his *Weingarten* right during the April 3 meeting?

3. Did the County discriminate against Jones by releasing him from probation because he had engaged in protected activities?

CONCLUSIONS OF LAW

Interference

The test for whether a respondent has interfered with the rights of employees under the MMBA does not require proof of unlawful motive, only a showing of at least slight harm to employee rights resulting from the challenged conduct. It has been stated that "[a]ll

[a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons." (*Public Employees Assn. v. Board of Supervisors* (1985) 167 Cal.App.3d 797, 807.)

Whether statements made to an employee are coercive is judged by an objective standard. The question is whether under the circumstances the statements would reasonably tend to coerce employees in the exercise of their rights. (*Clovis Unified School District* (1984) PERB Decision No. 389, pp. 14-15.)

In his post-hearing brief, Jones does not address the interference claim contained in the complaint. Nevertheless, the complaint refers to the April 3 meeting, and the issue reasonably construed is whether Cooper's counseling and the accompanying memorandum, instructing Jones to follow the chain of command and not to speak to other employees about his "issues and concerns," constituted a threat or otherwise coercive statement. This must be determined in the context of the exchange between the two during their face-to-face meeting.

Cooper acknowledged awareness of Jones' grievances and his issues surrounding them. Cooper credibly testified that he attempted to assure Jones he did not object to the grievances themselves. Although Cooper did not explicitly identify the filing of the grievances with the County's human resources department rather than internally, the counseling regarding the chain-of-command and behind-the-back criticisms of coworkers suggests the more plausible explanation for the counseling. Because Jones never attempted to resolve his issues with Cooper informally prior to filing formal grievances, this, too, informs the question of Cooper's intent in counseling Jones.

The fact that Cooper followed up his verbal counseling with the written memorandum turns the focus to the contents of the memorandum. If Cooper intended to issue a threat, it is unlikely he would have commemorated the counseling in writing. He would have chosen to avoid any record of the meeting. Thus, there is a strong likelihood that the memorandum mirrored what was conveyed in the meeting. The memorandum was carefully constructed and consistent in emphasizing one particular point: raising issues through the chain of command. Cooper specifically identifies the chain of command starting with the "immediate supervisor" (Stodulka's name is not actually mentioned), himself, and then Nnam. Although the warning to Jones not to discuss his issues with coworkers remains a questionable statement by suggesting disapproval with concerted activity, it is set within the context of the chain-of-command instruction.

As to additional statements made during the meeting, Cooper did not specifically deny that he was upset with Jones for making his department look bad and instructed Jones to shut up and focus on his work. And Jones asserted that Cooper never revealed precisely what kind of unrest he had allegedly fomented with coworkers. Regardless, these kinds of statements do not rise to the level of an unlawful threat when considered in context. The essential point was that matters outside of Jones' immediate control and responsibility should not concern him. A closely related point was that Jones should stop disparaging Cooper, Stodulka and Eva in front of his coworkers for their purported incompetence. Avoidance of gossip, disparaging and potentially insubordinate commentary in the workplace is consistent with this purpose. (See *Oakland Unified School District* (2007) PERB Decision No. 1880, pp. 20-21 [personal attack not advancing any legitimate employee interests].)[11] By filing formal grievances with the

[11] Jones' inability to comply with reasonable directives was revealed, when three days after the counseling memorandum, he rebuffed Nnam's instruction to meet with her to address

County human resources department, Jones was broadcasting internal issues to those outside the department. Though management should not retaliate simply for this, it has a legitimate concern when the communications are made without providing the supervisory staff an opportunity to mediate the concerns. (See *Riverside Unified School District* (1987) PERB Decision No. 622 [supervisor's frustrated statement disapproving of employee's apparent unwillingness to "join the team" by agreeing to perform a particular task and intention to "find someone who would" not unlawful].)

To the extent the complaint alleges that Cooper was impliedly threatening Jones or instructing Jones to cease protected activity, the evidence fails to demonstrate that it was reasonably likely such a statement had a coercive tendency as to protected activity.

Weingarten Claim

Under the statutes administered by PERB, including the MMBA, employees have a right of participation by their employee organization representative in meetings conducted by the employer and its agents, which are investigatory in nature or which otherwise present circumstances that can be described as "highly unusual." (*State of California (Department of Forestry)* (1988) PERB Decision No. 690-S; *Rio Hondo Community College District* (1982) PERB Decision No. 260; *Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617, 626.) This right parallels the longstanding rule of the NLRB, as described in *NLRB v. J. Weingarten*, *supra*, 420 U.S. 251. The *Weingarten* right attaches to the meeting whether or not the employer chooses to label it "investigatory" in nature. (*Rio Hondo Community College District*, *supra*, PERB Decision No. 260, p. 17.) However, it

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the grievances, asserting his right to present them to human resources staff outside the department.

does not attach to "run-of-the-mill," "shop-floor conversations." (*Regents of the University of California* (1983) PERB Decision No. 310-H, p. 28.)

Because a meeting with management whose essential purpose is to elicit incriminating evidence has potential to impact the employment relationship, denial of the assistance of the employee organization frustrates the statutory purposes of representation. (*Placer Hills Union School District* (1984) PERB Decision No. 377, pp. 38-40.) But if the meeting's purpose is otherwise, such as when the employer simply intends to deliver notice of a disciplinary decision already made, the right does not attach. (*Id.* at p. 38; *Trustees of the California State University* (2006) PERB Decision No. 1853-H.) For a violation to be found, the employee must have: (a) requested representation, (b) for an investigatory meeting, (c) which the employee reasonably believed might result in disciplinary action, and (d) the employer denied the request. (*San Bernardino County Public Defender* (2009) PERB Decision No. 2058-M.)

Jones failed to establish that he made a request for union representation or that the meeting was investigatory in nature. The purpose of the *Weingarten* rule is to ensure the employee has the benefit of a representative when statements elicited during the meeting may lead to discipline. In this case, the purpose of the meeting was not to investigate potential discipline. Jones admits Cooper did not reveal the nature of the disparaging comments he allegedly made about his supervisors. Therefore, Cooper's apparent objective was not to elicit any admission or response as to the purported negative comments. Even assuming that the counseling memorandum itself might be considered discipline under the MMBA---despite the County's practice of not considering it formal discipline---Cooper's announcement of discipline without also engaging in investigation was not unlawful. (*Placer Hills Union School District, supra*, PERB Decision No. 377, pp. 38-40.)

The County did not deny Jones his *Weingarten* right.

Release from Probationary Employment

To demonstrate that the County discriminated against him in violation of MMBA section 3506 and PERB Regulation 32603(a), Jones must show that (1) he exercised rights under MMBA, (2) the County had knowledge of his exercise of those rights, (3) it took adverse action against him, and (4) the action was taken because of his exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210; *County of Yolo* (2009) PERB Decision No. 2020-M.)

Facts establishing that the adverse action was taken *because of* the exercise of protected activities may be shown by the following factors: (1) timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, (2) the employer's disparate treatment of the employee, (3) the employer's departure from established procedures and standards when dealing with the employee, (4) the employer's inconsistent or contradictory justifications for its actions, (5) the employer's cursory investigation of the employee's misconduct, (6) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons, (7) employer animosity towards union activists, and (8) any other facts that might demonstrate the employer's unlawful motive. (*County of Yolo*, *supra*, PERB Decision No. 2020-M; *Novato Unified School District*, *supra*, PERB Decision No. 210.)

An employee alleging discrimination in a case involving a decision to reject on probation bears a heavier burden in overcoming the employer's case for non-discriminatory motive. (See *McFarland Unified School District v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166 [probationary teachers may be dismissed without cause]; cf. *Moreland Elementary School District* (1982) PERB Decision No. 227 [regardless of employee's status, employer in discrimination case need not prove just cause].)

Jones contends that nexus evidence exists in the form of timing, disparate treatment, departure from standard procedures, inconsistent and contradictory justifications, cursory investigation, and demonstrated animosity toward the union or union activities. He relies on the County's purported failure to provide all the reasons it released him during the County's hearing process,[12] to be lenient in granting time off for medical appointments, to conduct a full investigation into his reasonable accommodation request and the justification for his release, contradictions between the testimony of Cooper and Nnam and the officially stated reasons for the release, and Cooper's failure to disclose the nature of the allegedly derogatory comments he had made about coworkers.

Based on review of the entire record, the only evidence I find in support of the factors of discriminatory intent is the close temporal proximity between the initiation of Jones' grievance filings and his release from probationary employment.

Although Nnam did testify that the County discovered alleged misrepresentations subsequent to the hiring and offered it as further justification, this evidence did nothing to undermine the official reason for termination: Jones' failure to report to work as directed absent a qualifying medical excuse. I therefore reject the claim that the County offered any shifting justification for the release.

Jones suggests that the County's investigation of the grounds for release were cursory. However, there was little in dispute that would have required investigation. Jones believed that Flores had granted him time off until he had completed his doctors' appointments and

[12] The County submitted a response to the Board agent investigating the charge, designating it confidential, wherein it disclosed that an investigation undertaken by Nnam revealed that Jones materially overstated his qualifications during the examination process in terms of his experience with commercial washers. The County elicited testimony to the same effect and argued that this was an additional reason for dismissing Jones, though never shared with Jones for reasons of confidentiality.

obtained a conclusive diagnosis of his allergies and/or asthmatic condition. He asserted that Cooper should have known his Americans with Disabilities Act request was still in process and that its investigation was an impediment to going forward with the release. Fatal to this claim is Jones' failure to respond to Cooper's April 15 letter explaining the purported basis for his absence without official leave (i.e., the alleged promise by Flores releasing him until his medical diagnosis was completed).

Construed most favorably toward Jones, the circumstances of his release suggest that Jones was the victim of his own misunderstanding about his right to be on leave without a medical release. Even this highly charitable view does not reflect animus on the County's part toward Jones' protected activity. Moreover, Jones asserted to Flores that he intended to be off work until his reasonable accommodation request had been "resolved." No reasonable employer could be expected to concede to such an open-ended request. Flores, who had worked for the state agency enforcing non-discrimination in employment, appears to have adhered to County protocol for processing reasonable accommodation requests.[13] Cooper, for his part, followed the contractual rule authorizing demand for a physician's verification of illness in excess of three days.

Jones identifies no substantial evidence of departure from standard procedures or disparate treatment. Jones relies on testimony from Flores that the County is "very lenient" in granting time off for medical appointments. The statement is removed from context. Jones presented no evidence from the County's written policies or unwritten practice that extended, uninterrupted periods of leave are granted to employees seeking to obtain a definitive diagnosis

[13] Flores testified that reasonable accommodations are to be granted after a face-to-face "interactive" meeting in which the employer explores in detail the nature of the employee's request for accommodation. Consistent with his practice of avoiding the principals in his disputes, Jones never made himself available for such a meeting.

as to symptoms causing them concern. Indeed, this is contrary to the customary employer practice of requiring an employee to periodically visit a treating physician to obtain clearance to remain off work, or identify restrictions prohibiting a return to full duties.

Further, the County's failure to disclose the basis for its doubts about the veracity of Jones' employment application statements about prior experience with commercial washing machines does not demonstrate disparate treatment, departure from standard procedures, or failure to justify. Since it was never articulated as a basis for the release in the documents served on him, Jones would have suffered no harm in terms of his ability to defend against the charges of absence without leave.

I find no animus based on the apparent tension created by Jones' asserted breach of the chain of command as a result of filing his grievances with Office of Labor Relations rather than the Probation Department Background/Human Resources section. Documents presented by the County indicated that the Office of Labor Relations did not view his direct filing as problematic. Nevertheless, the record is clear that Jones circumvented Cooper, denying him any opportunity to address the grievances, and that he directly refused to communicate with Nnam regarding the same.

Finally, Jones' bare testimony that Stodulka gave him a look of disapproval when he was talking with his union steward, standing alone, is insufficient to demonstrate anti-union animus beyond mere speculation.

Close timing, without more, is insufficient to demonstrate a nexus between the adverse action and the protected conduct. (*Charter Oak Unified School District* (1984) PERB Decision No. 404.)[14] Accordingly, I find that Jones has failed to demonstrate that the County

[14] Noted also is the pattern suggested here where a charging party seeks redress before multiple administrative agencies simultaneously. The existence of the protected right of access

discriminated against him on the basis of his protected activity, and therefore it did not violate the MMBA.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. SF-CE-646-M, *Melvin Jones, Jr. v. County of Santa Clara*, are hereby DISMISSED.

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies

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to these agencies is not intended to provide culpable employees a shield against legitimate managerial prerogatives.

and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subd. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

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

Donn Ginoza
Administrative Law Judge