STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ORANGE COUNTY EMPLOYEES ASSOCIATION, Charging Party, v. COUNTY OF ORANGE, Respondent.	Case No. LA-CE-667-M PERB Decision No. 2350-M December 23, 2013

Appearances: Llesena Ontiveras, Senior Labor Relations Representative, for Orange County Employees Association; Office of the County Counsel by Gabriel J. Bowne, Deputy County Counsel, for County of Orange.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Orange County Employees Association (Association) to a proposed decision (attached) of a PERB administrative law judge (ALJ). The complaint, and underlying charge, alleges that the County of Orange (County) terminated the employment of John Claxton (Claxton) via a layoff in retaliation for filing and pursuing grievances and participating in other activities protected by the Meyers-Milias-Brown Act (MMBA).[1] The complaint alleged that, by this conduct, the County violated MMBA

[1] The MMBA is codified at Government Code section 3500 et seq. All further section references are to the Government Code.

sections 3506[2] and 3503[3] and thereby committed unfair practices under MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a) and (b).[4]

An informal settlement conference was held on May 4, 2012, but the parties were unable to resolve their differences. A formal hearing was held on August 6 through August 8, 2012. The parties filed closing briefs on or before October 19, 2012, at which time the record was closed and the matter submitted for decision. On February 15, 2013, the ALJ issued a proposed decision concluding that the Association had failed to establish that the County retaliated against Claxton for engaging in protected activities. The ALJ ordered that the complaint and underlying unfair practice charge be dismissed. The Association timely filed exceptions on March 12, 2013, and the County timely filed a response on April 9, 2013.

The Board itself has reviewed the entire record in this matter including the complaint and answer, the hearing record, the proposed decision, the Association's exceptions and the County's response thereto. We conclude that the ALJ's findings of fact are generally supported by the hearing record and his conclusions of law well-reasoned and consistent with applicable law. Accordingly, we hereby adopt the ALJ's proposed decision as the decision of the Board itself except where specifically noted below, and respond to the exceptions.

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[2] MMBA section 3506 provides: "Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502." Section 3502 provides, in pertinent part: "[P]ublic employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."

[3] Section 3503 provides, in pertinent part: "Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies."

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

FACTUAL BACKGROUND[5]

Claxton began his employment with the County in the Probation Department on or around December 18, 1998. On December 21, 2007, Claxton transferred to the County's Public Administrator – Public Guardian agency (PA-PG) where he worked in a trainee position as a Deputy I. Claxton was supervised by Chief Deputy Tim Beason (Beason).

On or about April 18, 2008, Claxton was placed on administrative leave.[6] An allegation had surfaced concerning Claxton's retention of his Probation Department badge, which required investigation. On June 19, 2008, a Notice of Intent to Discharge was issued. Claxton was discharged on July 7, 2008.

Claxton grieved his termination. That grievance went to binding arbitration and the matter was heard on January 21 and 23, 2009. On April 24, 2009, the arbitration award issued finding that the six grounds cited by the County in the Notice of Intent to Discharge, including "[u]ntruthfulness and breach of trust," were based in fact, but concluding that a six-month suspension without pay was a more appropriate level of discipline. Pursuant to the arbitration award, Claxton was reinstated effective July 8, 2008, and given a six-month suspension

[5] This section of the decision is not intended to summarize all the relevant facts. For that, we direct the reader to the Findings of Fact in the ALJ's proposed decision. Instead, this section is intended to provide a brief description of Claxton's employment history with the County so that the discussion section of the decision may be understood within a proper chronological context.

[6] PA-PG initially believed that Claxton's move from the Probation Department was a promotion subject to a probation period. The Probation Department, however, considered Claxton's move to PA-PG a transfer, not a promotion. According to the Probation Department, employees who transfer have no right of return and cannot be terminated without cause. The arbitration award, discussed later in this decision, specifically inserts an end note into the decision to explain this aspect of Claxton's employment history. It states that "[u]nder the applicable rules, Claxton's move to the PAPG did not constitute a promotion because the salary differential was too small."

without pay, which ended effective January 8, 2009. Claxton physically returned to work at PA-PG as a Deputy I on May 1, 2009, and was awarded back pay for the intervening time period.

Upon Claxton's return to work, he was given very basic assignments, described by the ALJ as "menial," such as reading materials and policies, purging files, making copies of benefit cards, going through mail, etc. Claxton's supervisor, for all intents and purposes, was Supervising Deputy Sheila Roberge (Roberge). It was the PA-PG's view that the types of misconduct in which Claxton was found to have engaged required Claxton to earn back their trust, especially given that the client population served by PA-PG was vulnerable to being victimized. It was Claxton's view that his work assignments were punitive and retaliatory.

During the 2009-2010 fiscal year, the County was experiencing severe budget shortfalls, which required several departments or agencies to implement layoffs, as early as January 2009. For a period of time, PA-PG was able to avoid layoffs by taking other cost-cutting measures such as drawing down $750,000 in reserves, deleting positions, discontinuing vacation payouts and reducing travel, supplies and service costs. Sometime in September or October 2009, however, revenues generated by PA-PG were not as expected,[7] and layoffs became necessary. Two PA-PG classifications were affected, senior social workers and Deputy Is. Claxton was the only incumbent in the Deputy I classification. He was laid off effective January 20, 2010.

[7] PA-PG generates revenue by billing the state for certain face-to-face encounters or needs assessments called targeted case management and by selling property. For fiscal year 2009-2010, there was a negative 6.34 percent change in actual revenues over fiscal year 2008-2009.

DISCUSSION

The theory of the Association's case is that upon Claxton's return to work following reinstatement as a Deputy I in PA-PG, he was given insubstantial assignments that deprived him of the opportunity to promote to a Deputy II. According to the Association's theory, had Claxton been promoted to a Deputy II, he would not have been laid off. The Association asserts that the County engaged in this concerted strategy to not make Claxton eligible for promotion and eventually lay him off in retaliation for having engaged in the protected activities of participating in the grievance process and seeking the assistance of the Association.

We agree with the ALJ that the Association established all but the nexus element of a retaliation claim. Regarding the nexus element, looking at the evidence in the record as a whole, we cannot conclude that the County gave Claxton insubstantial assignments so as to make him ineligible for promotion to a Deputy II in order to retaliate against him for having grieved his termination or having sought the assistance of the Association. As a threshold matter, Claxton's supervisor who was responsible for making the assignments to Claxton was not involved in the decision to lay him off. The assignments were a means to address problems identified in the disciplinary proceedings relating to improper computer usage, dishonesty and breach of trust. Although Claxton assumes that but for his assignments, he would have been eligible for promotion, the evidence in the hearing record is not in his favor. Not only is there no automatic trigger date for promotion, there is also no automatic entitlement to a promotion. The Deputy I position is a trainee position, allowing PA-PG to assess a person's qualifications for promotion to a Deputy II. Claxton viewed his promotion as a given, but that was far from the case given PA-PG's concerns about his basic integrity.

The Association excepts to the ALJ's nexus analysis on three separate grounds. We discuss those grounds next.

Knowledge Regarding Layoffs

First, the Association asserts that the ALJ was wrong in concluding that no one involved in assigning Claxton work after his return to work on May 1, 2009, was aware of the need for layoffs in PA-PG until September 2009, after Claxton's assignments were already underway. The ALJ's conclusion is well supported by the hearing record. During fiscal year 2009-2010, the County's poor fiscal health required severe budget cutting measures. As of February 18, 2009, there were four departments that had experienced layoffs or other types of budget reductions. As of July 3, 2009, there had been layoffs in a few more departments. At least up and through this point in time, the need for layoffs in PA-PG had not been definitively established. Instead, PA-PG found other, less drastic, ways to cut costs.

By September or October 2009, however, revenues generated by PA-PG were not as expected. John Williams, the Public Administrator and the Public Guardian and agency head (PA-PG Williams), informed Thomas Mauk, the County Executive Officer (CEO Mauk), by memorandum dated November 3, 2009, that all other options had been explored and there was no other option but to implement a reduction in force to address the shortfall. PA-PG began working with the human resources department and County Counsel on a plan. PA-PG considered on a classification-by-classification basis the programmatic impacts that would be caused by a layoff. PA-PG determined that senior social workers were performing work that in part duplicated the work of social workers in outside facilities for aging seniors. PA-PG also considered the Deputy I/II classification series. While Deputy IIs carry an independent caseload, the Deputy I classification is a trainee position. Therefore, PA-PG concluded that laying off senior social workers and Deputy Is would have the least impact on the work and

staff. PA-PG's William's reduction in force proposal dated November 23, 2009, was approved by CEO Mauk. As a result, the four senior social workers and the one Deputy I, Claxton, on PA-PG's payroll received layoff notices effective January 20, 2010.[8]

The bases for the Association's assertion that those involved in assigning Claxton work were aware prior to September 2009 that PA-PG would ultimately have a layoff at which time PA-PG could terminate Claxton's employment are unfounded. Noted initially is that Claxton's direct supervisor responsible for giving him assignments, Sheila Roberge (Roberge), was *not* involved in the decision to lay him off. Moreover, that the County had already laid off employees in other County departments or agencies prior to September 2009 was not outcome determinative for PA-PG.[9] Neither was a comment by Beason to Claxton that the County

[8] Noted is the fact that the Association did not present evidence or argument disputing that the County has an economic need for layoffs when it decided to lay off Claxton. Nor did the Association present evidence or argument that elimination of the senior social worker and the Deputy I positions would have the least impact on the work.

[9] In aid of this argument, the Association relies on PA-PG Williams' memorandum to CEO Mauk, referred to above, which states that PA-PG first proposed layoffs in response to a Grand Jury Supplemental Report. PA-PG Williams' memorandum, however, does not state when the Grand Jury Supplemental Report was made public. The Association attached the Grand Jury Supplemental Report and an internet print-out showing a June 30, 2009, publication date to its statement of exceptions. These documents were neither introduced nor admitted into evidence at the formal hearing. PERB Regulation 32300, subdivision (b), states that "[r]eference shall be made in the statement of exceptions only to matters contained in the record of the case." Even were we to consider these documents, we note the following: (1) The Grand Jury Supplemental Report was issued two months after Claxton returned to work when his assignments were already underway; (2) PA-PG Williams' memorandum does not state when he made a layoff proposal in response to the Grand Jury Supplemental Report; and (3) as stated above, the evidence establishes that PA-PG initially pursued less drastic budget cutting measures and only when it was determined in September or October 2009 that revenues were not meeting expectations, did the actual need for more drastic measures like a layoff first arise.

"might have to be doing layoffs," as testified to by Claxton.[10] Notwithstanding the hearsay problem with this testimony, as the above chronology shows, decreasing revenues triggered the need for layoffs after less severe cost-cutting measures were tried. The need for layoffs was not identified until September or October 2009, after Claxton's work assignments had been underway for at least four months.[11] In sum, contrary to the Association's exception, the ALJ was correct in concluding that no one involved in assigning Claxton work was aware of the need for layoffs in PA-PG until September or October 2009.

Differential Treatment

Second, the Association excepts to the ALJ's conclusion that the Association "did not present evidence that other employees who had been disciplined were treated differently from Mr. Claxton." In support of this exception, the Association relies on the testimony of Claxton's attorney at the arbitration, Mary Shumate (Shumate). Shumate testified that based on her experience litigating discipline cases at the County, Claxton had been treated differently

[10] In the same vein, the Association relies on the testimony of Karen Batesol (Batesol), a former PA-PG senior social worker also laid off by the County. She testified that she was told by Beason not to talk to Claxton because he was not going to be there long. She could not remember if she was told by e-mail or in a staff meeting. No e-mail was introduced or admitted into evidence. She testified that she *thought* it was Beason who made the statement. She could not remember the exact words. She admitted to having "ill feelings" towards PA-PG as a result of her layoff. In addition to the hearsay problem, Batesol's testimony is vague and uncertain and therefore unreliable as evidence supporting the Association's assertion that PA-PG was aware of the need for layoffs prior to September 2009. (PERB Reg. 32176 ["Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."].)

[11] The Association also points to the County's failure to pay Claxton's professional association membership dues on August 28, 2009, to support the Association's position that the County knew before September 2009 that there would be a need for layoffs in PA-PG. These dues are paid by the County on behalf of the employees in the Deputy PA-PG classifications. Ann Barlow, PG-PA's manager of administrative services during the relevant period of time, testified that the professional association was transitioning from one set of secretaries to another, and that it did not have on record everyone that should have been included. Given this evidence and the fact that Claxton returned to work mid-way through the year, it cannot be concluded that the County's failure to pay Claxton's dues supports the Association's position that PA-PG was aware of the need for layoffs prior to September 2009.

upon his return to work than other employees. Upon cross-examination, however, Shumate was asked directly:

> So you don't know if they treated him the same or different than other people that are returning from misconduct?

Shumate responded, "Correct."

The Association also relies on the arbitration award in support of its disparate treatment argument. The Association argues that the make-whole remedy did not allow the County to treat Claxton differently than other employees upon his return to work in terms of the assignments he was given and the conditions under which he was placed. The Association also argues that the arbitration award did not impose conditions on Claxton's reinstatement other than allowing the County to place Claxton on a reasonable performance improvement plan. We are not persuaded by these arguments.

The make-whole order is not an employee management or work plan, but rather a remedial mechanism intended to make an employee who has been wronged financially whole. In imposing a six-month suspension without pay on Claxton and recognizing the necessity of a performance improvement plan, however, the arbitration award cannot be seen as a vindication for Claxton, as the Association's argument suggests. The arbitrator found that all six reasons provided for in the County's Notice of Intent to Discharge were founded in fact. The arbitrator found that Claxton committed the following specific acts of misconduct: (1) improper computer use; and (2) retention of his Probation Department badge, then offering to use it in his work at PA-PG and being dishonest when he claimed that he had lost it. With respect to the badge issue, the arbitrator concluded that Claxton was not a credible witness at the arbitration. The arbitrator stated that he could not "criticize the Department for deciding not to continue the employment of a deputy who cannot be trusted" given the mission of PA-PG to "protect[] those who cannot protect themselves from the dishonesty of others." The arbitrator

ultimately decided to impose a six-month suspension without pay rather than sustain a discharge because he found certain aspects of Beason's testimony to be lacking in candor.[12]

In reviewing the hearing record in its entirety, we conclude that the ALJ was justified in concluding that the Association failed to demonstrate that other similarly situated employees were treated differently. In fact, no evidence was presented as to how other employees returning from a six-month, or any other, suspension without pay had been treated by PA-PG or even by other departments or agencies within the County, let alone how an employee whose misconduct involved dishonesty had been treated. That the County circumscribed Claxton's responsibilities upon his return to work, giving him assignments that were basic and did not involve a caseload, was within its prerogative. Such conduct does not demonstrate disparate treatment for purposes of establishing nexus.

Performance Incentive Program (PIP)

Last, the Association excepts to the ALJ's conclusion that the PIP is used by the County only as a guideline and therefore deviations therefrom do not demonstrate the nexus required to support a retaliation claim. In support of this exception, the Association asserts that the ALJ erred in identifying Claxton's transfer from the Probation Department to PA-PG as a promotion requiring a mid-cycle review after three months. According to the Association, Claxton was a lateral transfer and maintained the same annual review date he had in his prior

[12] The arbitrator wrote:

> My reaction to the testimony that was presented to me in this case is best summed up by Shakespeare, when he wrote: "A plague o[n] both your houses." (Romeo and Juliet, Act. III, Sc. I.) I have no sympathy for Claxton and initially started to write a decision in which I sustained the discharge. However, I could not in good conscience do so in light of Beason's equally suspect testimony which he gave under penalty of perjury.

position with the Probation Department. The Association asserts that Claxton did not receive a mid-cycle review, nor did he receive an interim progress review.

According to the PIP manual, the PIP process is a "new performance management program" requiring a mid-cycle performance review and a final performance review. Prior to the final performance review, an employee at risk of receiving a below standard rating is to be provided with an improvement plan as well as an interim progress review after three months if the employee has not improved. New employees and newly promoted employees are on a six-month performance planning cycle. Other employees are on an annual performance planning cycle. Employees whose status has changed come under other performance planning timing requirements depending on whether the status is new employee probation, promotional probation, transfer, leave of absence without pay, part time, or retirement/separation. With a transfer, an employee maintains the same annual review date, i.e., presumably their initial hire date, upon transfer to a new position in a new agency or department. Notably absent from this list of status categories are return from administrative leave and return from suspension.

Although we do not agree with the ALJ's characterization of PIP as only a guideline, despite Barlow's testimony to that effect,[13] we do see potential for confusion in identifying Claxton's correct status both upon transfer to PA-PG from the Probation Department and upon his return to work on May 1, 2009, for performance planning purposes. And while certain performance planning processes were not complied with to the letter of the PIP manual, there was substantial compliance with the PIP process in terms of providing Claxton feedback on his performance consistent with the arbitrator's decision allowing PA-PG to place Claxton on a

[13] Article XXVI of the 2009-2012 Memorandum of Understanding between the County and the Association, which sets forth an exception to the requirement that PIP time be taken off within one year, states that "[a]ll other performance management components of PIP remain in effect." None of the documents in evidence concerning PIP suggest that its performance management provisions and timeframes are guidelines to be used, or not, at the County's discretion.

reasonable performance improvement plan upon his return to work. In the eight and a half months between Claxton's return to work and his layoff, Claxton received four improvement plans, three in May 2009 and one in November 2009,[14] and participated with Roberge in the PIP conciliation process[15] in December 2009 to resolve their outstanding performance planning issues.

Nonetheless, the Association points to the following passage in the PIP manual in support of its argument that PA-PG's deviations from the PIP manual constitute circumstantial evidence of retaliatory motive:

> It is the responsibility of the manager and supervisor to have knowledge of the scheduled employee performance review date for each employee, and to ensure that performance planning is conducted and completed in a timely manner.

[14] The first improvement plan, dated May 1, 2009, was used to inform Claxton about his new work schedule, including meal and rest breaks. The second improvement plan, which incorporated the gist of the first improvement plan and also is dated May 1, 2009, identifies performance issues relating to Claxton's violations of the County's Information Technology Usage Policy and Code of Ethics including his misuse of County time and resources, falsification of work hours, and untruthfulness. The improvement plan requires Claxton to read and memorize the County's Information Technology Usage Policy and Code of Ethics, an article entitled "Ethics Liabilities and Legal Issues for the PA/PG Practitioner," and sections of the Probate Code covering guardians, powers of attorney, wills and intestate succession and administration of estates. The third improvement plan, dated May 29, 2009, reviews Claxton's work history and the County's expectations before laying out an improvement plan that includes a description of his assignments, permissible computer usage and time keeping requirements. The fourth improvement plan, dated November 18, 2009, identifies numerous performance areas where improvement is needed. The improvement plan provides a chronicle of problems, e.g., mistakes made in purging files, instances showing a lack of initiative, failure to ask questions, be proactive or seek direction, etc. This improvement plan notes that in the approximately six and a half months since Claxton returned to work, Claxton had taken 150.5 hours off from work, commenting "[t]his is a large amount of time spent absent from a training position."

[15] This is a confidential process designed to provide employees and supervisors a method to resolve issues related to the performance management process and the PIP. The subject employee and supervisor first will attempt to reach agreement with the assistance of members of a mediation team. If no agreement is reached, the matter shall be heard before a neutral third party for a final and binding determination.

As the ALJ noted, however, the PIP manual also states the following:

> It is the responsibility of the employee to know his or her scheduled review date and to ensure, by the Plan Options described in this manual, that each component of PIP is completed in a collaborative manner with his or her supervisor, and within the specified timeframes.

Regardless, based on our reading of the PIP manual, considering Claxton's move to PA-PG to be a transfer rather than as a promotion, Claxton should have maintained December 18, the date he started employment with the County, as his annual review date. The Probation Department would have been responsible for Claxton's final performance review for the December 18, 2006 through December 17, 2007, cycle. Claxton's mid-cycle performance review should have occurred on June 18, 2008, after his transfer to PA-PG, but he was on administrative leave at that time. Upon Claxton's return to work on May 1, 2009, if his original review cycle was still in place, he should have received his mid-cycle review on July 18, 2009. Although that did not occur, he did receive three improvement plans prior to that date. Finally, although he did not receive his final performance review on December 18, 2009, Claxton and Roberge were resolving performance planning issues in the PIP conciliation process at that very same time and had come to agreement.

In sum, we do not infer from any of the deviations from the performance review process cited by the Association a nexus, or a retaliatory motive. Our overall impression of the evidence is that the assignments Claxton was given and the conditions under which he worked upon his return to work on May 1, 2009, were designed to address the problems uncovered by PA-PG before Claxton engaged in protected activities and upon which he was discharged, i.e., improper computer usage on work time[16] and dishonesty regarding his Probation Department

[16] Amongst other things, Claxton used his computer on occasion at work for his outside real estate business.

badge. Although the arbitrator did conclude that discharge was unwarranted, harsh discipline, a six-month suspension without pay, was imposed.

The Deputy position involves managing the affairs and protecting the assets of the vulnerable elderly and mentally ill populations in the County. For the County, integrity is a baseline qualification for the position and Claxton's proven dishonesty about his badge was a cause for great and ongoing concern. As Barlow explained:

> [T]he deputy position is a very important position. They are responsible for the most vulnerable people in our society that are adults. They are people who are not able to care for themselves, so they have to have somebody who is extremely trustworthy and above reproach. And if I couldn't believe that he was going to be truthful with us, how was he ever going to testify in court? How could he ever go out into the field on his own? How do we know that he would not take property? I mean there was all sorts of things that just did not, would not set well with somebody who was supposed to be entrusted with so much control over vulnerable people.

PA-PG did not trust Claxton and believed it was important for Claxton to earn back their trust. In the meantime, PA-PG had to determine the best way to utilize Claxton in an area of work that requires the utmost in integrity, a characteristic the County found lacking in Claxton. The County did not deliberately hinder Claxton's ability to promote to a Deputy II in retaliation for utilizing the grievance machinery, as the Association asserts. Rather, the County was keeping Claxton on the proverbial short leash in light of the severity of his misconduct and its obligation to protect PA-PG's programmatic mission. Accordingly, we conclude that the Association's exceptions regarding the ALJ's nexus analysis have no merit.

We also conclude that notwithstanding the evidentiary holes in the Association's theory, as discussed above, the theory itself is premised on a fundamentally faulty notion, i.e., that Claxton was correct to view a promotion as something he was automatically entitled to rather than something he needed to work hard to earn. Altogether, Claxton was employed with

PA-PG for a total of approximately 15.5 months, including the time period during which he was on administrative leave prior to his discharge. Admitted into evidence at the formal hearing was a chart showing hire and promotion dates for Deputy 1s. The shortest time between hire as a Deputy I and promotion to a Deputy II is six months; the longest time, 32 months; and the average time, 13.54 months.[17] More importantly, promoting to Deputy II is not simply a timing issue. It is a matter within the discretion and prerogative of the County entailing a determination of readiness for the responsibilities of the position. It is important to remember that the County initially wanted to return Claxton to the Probation Department believing his move to PA-PG to be a promotion and subject to a probationary period. Thus, even prior to Claxon's discharge and engagement in protected activities, PA-PG had already determined that he was not a good fit. Moreover, it is unrealistic to assume entitlement to a promotion fresh off a six-month suspension without pay, particularly given the nature of Claxton's proven misconduct and the inherent difficulty of addressing a lack of trust engendered by his previous dishonesty in a performance improvement plan. And although the chart does not state whether any of the employees promoted from a Deputy I to a Deputy II had been suspended for six months without pay, we assume that if there were such an example, the Association would have brought that evidence forward.

Finally, noted is the fact that the Association does not except to the ALJ's conclusions of law regarding the County's burden of proving its affirmative defense. The ALJ concluded that even if the Association had established a prima facie case of retaliation, the County would have met its burden of proving that retaliation was not the true cause of Claxton's termination.

[17] There is nothing in the hearing record that explains the discrepancy between the evidence concerning hire and promotion dates as represented in the chart and the following class specification for the Deputy I classification: "There is no permanent status in this class. Incumbents must successfully complete probation and qualify for promotion to the Deputy II level within the one-year probation period or be subject to termination of their trainee status and/or [sic]."

As the ALJ explained, "it cannot be said that 'but for' Claxton's protected activities, he would have been promoted and therefore protected from layoff." In discussing an employer's affirmative defense in a retaliation case, the ALJ did not have the benefit of the Board's decision in *Palo Verde Unified School District* (2013) PERB Decision No. 2337 *(Palo Verde)*, which articulated the following standard:

> Once a charging party establishes a prima facie case of retaliation, the burden shifts to the respondent to establish both: (1) that it had an alternative non-discriminatory reason for the challenged action; and (2) that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity.

The ALJ relied on *Baker Valley Unified School District* (2008) PERB Decision No. 1993 *(Baker Valley)* in his articulation of the standard for the proposition that "the focus of this analysis 'is not whether the employer had a lawful reason for the action but whether it took the action for an unlawful reason.'" In *Baker Valley*, the school district argued that PERB had no authority to second-guess its reasons for not renewing a teacher because the administrative hearing procedure in the Education Code provides the exclusive means for making that assessment. In other words, the school district argued that the Educational Employment Relations Act (EERA)[18] may not supersede these Education Code sections under a preemption-type analysis. The Board in *Baker Valley* rejected the school district's argument holding:

> The District's argument misconstrues PERB's inquiry in a retaliation case. PERB does not determine whether the employer had cause to discipline or terminate the employee. (*San Bernardino City Unified School District* (2004) PERB Decision No. 1602.) Rather, PERB weighs the employer's justifications for the adverse action against the evidence of the employer's retaliatory motive. Thus, PERB's inquiry is not whether the employer had a lawful reason for the action but whether it took the action for an unlawful reason. (See *McFarland Unified School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166, 169 [276 Cal.Rptr. 26] [stating

[18] EERA is codified at section 3540 et seq.

> "the District has cited no authority, nor can it, for the proposition that its power to deny tenure for any lawful reason insulates it from the scrutiny of the PERB when an unfair labor practice complaint alleges that tenure was denied in retaliation for the exercise of a protected right"].)

Context is critical. In stating that PERB's inquiry is not "whether the employer had a lawful reason," the Board was responding to and rejecting the school district's argument that the Education Code provides the exclusive measure of what is lawful in a non-renewal setting and that PERB has no authority to evaluate the school district's proffered reasons. Inclusion in the proposed decision of this statement from *Baker Valley* without providing the context in which it was made is problematic because it could be construed to mean that the employer need not demonstrate that it had an alternative non-discriminatory reason for the challenged action under the first prong of *Palo Verde*. Under the standard as set forth in *Palo Verde*, however, the outcome in this case does not change. The evidence amply demonstrates that the County had a non-discriminatory reason for the adverse action and that it acted because of that alternative non-discriminatory reason, rather than because of the employee's protected activity.

ORDER

Based upon the ALJ's findings of fact and conclusions of law, the foregoing discussion and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-667-M are hereby DISMISSED.

Members Huguenin and Winslow joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ORANGE COUNTY EMPLOYEES ASSOCIATION, Charging Party, v. COUNTY OF ORANGE, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-667-M PROPOSED DECISION (02/15/2013)

Appearances: Llesena U. Ontiveros, Senior Labor Relations Representative, for Orange County Employees Association; Gabriel J. Bowne and Mark R. Howe, Attorneys, for County of Orange.

Before Eric J. Cu, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, an exclusive representative claims that a public agency laid-off one of its employees in retaliation for filing grievances and/or participating in other activities protected by the Meyers-Milias-Brown Act (MMBA).[1] The employer denies any violation.

On February 11, 2011, the Orange County Employees Association (OCEA) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board). OCEA alleged that the County of Orange (County) violated the MMBA and PERB Regulations[2] by retaliating against represented member John Claxton.

On March 15, 2012, the PERB Office of the General Counsel issued a complaint alleging that the County terminated Claxton's employment in retaliation for filing grievances and for seeking OCEA's assistance in meeting with the County. On April 13, 2012, the

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

County filed an answer to the PERB complaint admitting all the allegations in the PERB complaint except that there was any causal connection between Claxton's termination and his protected activity. The County also filed a motion to dismiss the PERB complaint.

An informal settlement conference was held on May 4, 2012, but the matter was not resolved. On July 20, 2012, PERB denied the County's motion to dismiss the PERB complaint. A formal hearing was held on August 6-8, 2012. On or before October 19, 2012, the parties filed closing briefs. At that point, the record was closed and the matter was submitted to PERB for decision.

FINDINGS OF FACT

The Parties

The County is a public agency within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a). OCEA is an exclusive representative within the meaning of PERB Regulation 32016(b). Prior to his layoff, Claxton was an employee at the County within the meaning of MMBA section 3501(b). Claxton began his employment with the County in 1998, in the Probation department. He later transferred to the Public Administrator-Public Guardian (PA-PG), another County agency. Both of these positions are part of a bargaining unit represented by OCEA.

The Parties' Memorandum of Understanding

OCEA and the County are parties to a Memorandum of Understanding (MOU) that has been in effect at all times relevant to this case. The parties' MOU includes a grievance procedure that culminates in binding arbitration. The MOU also contains a provision specifying that layoffs in the bargaining unit are done by classification. Within each classification, the unit member with the least amount of County seniority is to be laid off first, regardless of seniority at any particular County agency.

The County Performance Incentive Program

The County has adopted a Performance Incentive Program (PIP) to allow managers, supervisors; and rank and file employees to collaborate in setting professional goals and providing/receiving useful feedback. Embedded into this program is the performance evaluation process where employees receive a "mid-cycle" and a "final" review of their work performance. The review cycle for new hires or new promotions is six months. According to the PIP manual,

> It is the responsibility of the employee to know his or her scheduled review date and to ensure, by the Plan Options described in this manual, that each component of PIP is completed in a collaborative manner with his or her supervisor, and within the specified timeframes.

Under the PIP process, an employee not meeting expectations may be placed under an "Improvement Plan" outlining the County's performance expectations, objectives for the employee, and timeframes for meeting those objectives. Similar to the traditional PIP evaluation process, employees under a Performance Plan receive an "interim progress review" after three months.

The Public Administrator-Public Guardian

As its name implies, the PA-PG agency has two main purposes. The Public Administrator (PA) oversees the estates of deceased County residents that have no capable descendants. The Public Guardian (PG) manages the affairs of living County residents who are unable to do so on their own due to mental illness or other infirmity. This case primarily concerns the operations in the PG. The two main units in the PG are Probate and Lanterman-Petris-Short (LPS). Each unit is overseen by a Supervising Deputy. The Probate unit typically handles cases for County residents afflicted with diseases associated with aging such as

Alzheimer's disease or dementia. LPS, on the other hand, deals with residents who are temporarily and involuntarily committed to a psychiatric institution.

Much of the work in the PA-PG agency is performed by the Deputy PA-PG series of classifications, which includes Deputy I, Deputy II, and Senior Deputy. The Deputy I position is considered a probationary training position to prepare the incumbent for transition into the Deputy II or Senior Deputy position. Although the position description for the Deputy I position states that the transition to Deputy II is supposed to occur within 12 months, multiple witnesses testified that there is no fixed timeframe for promotion. More than one third of all Deputies were not promoted within 12 months.

Typical responsibilities for the Deputy classification could include managing assets, paying bills and other expenses, inventorying personal and real property, testifying at legal proceedings involving the resident or the resident's estate, and selling assets at public auction. Performance of these duties involves both field work and office work. For example, a Deputy may need to visit a residence to inventory property to either protect those assets or to prepare them for sale at a public auction. In addition, Deputies must maintain records for each individual that could include medical expenses, court filings, and other important information relating to clients' property or medical condition.

Deputies in the two units perform similar job duties but there are some notable differences. Typically, LPS clients are only under PA-PG conservatorship temporarily, which means Deputies have more-strict timelines for acting in those cases. Probate clients, on the other hand, may be under conservatorship for the rest of their lives.

John Claxton's 2007-2008 Employment at PA-PG

Claxton began working at the PA-PG as a Deputy I on December 18, 2007. He described it as a promotion from the Probation department. Approximately five other

individuals were hired into the same position around that time. The County has not since hired anyone else into the Deputy I classification. Claxton was assigned to the Probate unit.

As part of the PA-PG training regimen at the time, new Deputy I's were initially given large reading assignments. Based on the estimates given by the different witnesses, the reading assignments took between a week and a month to complete. At the same time, new Deputies also "shadowed" more senior staff during their field work, such as attending inventories of property, public auctions, or court proceedings.

During this time, Claxton was supervised by Chief Deputy PA-PG Tim Beason. Claxton received generally good feedback from Beason, who even suggested that he would promote Claxton if he himself was promoted. Claxton did not receive a formal performance evaluation.

Some other senior staff had some concerns about Claxton's work. Deputy II Gema Aranda did not feel that Claxton took her instructions seriously based on a conversation she had with him about a piece of real estate. Aranda recalled instructing Claxton to have the PA-PG Property Manager position handle real property profiles. Claxton stated that he could look up property profiles because he was a licensed real-estate agent. Aranda instructed Claxton to follow the PA-PG procedures. Claxton did not deny that this exchange occurred, but stated that he always followed the procedures for looking up property. Aranda reported her concerns to Claxton's supervisor.

In April 2008, PA-PG Manager of Administrative Services Ann Barlow received an anonymous letter claiming that Claxton was still using a badge he had been issued from the County Probation department. Claxton claimed that he lost the badge. Claxton was placed on paid administrative leave on April 18, 2008. Barlow then began an investigation into the badge allegation, which included interviewing Claxton and other staff and examining

Claxton's computer usage. As a result of its investigation, Barlow concluded that Claxton still possessed his Probation department badge and that he lied about losing it. Barlow also determined that Claxton used his PA-PG computer during the work-day for personal reasons, including performing work for his private real-estate business. On June 18, 2008, the County issued Claxton a Notice of Intent to Discharge his employment, effective July 7, 2008.

The 2008 Grievance

In July 2008, Claxton filed a grievance over the discharge. That grievance went to binding arbitration in January 2009 to determine whether the County had reasonable cause to discharge Claxton. The arbitrator found that Claxton still possessed his Probation department badge and also used his PA-PG computer for non-work purposes. He also found that Claxton was dishonest when he was asked about both issues. The arbitrator nevertheless held that the discharge was inappropriate because he found inconsistencies in the County's position and in the testimony of County witness, Beason. For instance, Beason testified as to knowing of both the badge issue and allegedly poor performance by Claxton, but he did not take any action on them until Barlow independently discovered the same issues. In addition, the arbitrator credited testimony that other PA-PG employees used County computers for personal reasons as well but were apparently not disciplined. The arbitrator thus issued the following award:

> The appeal [of the discharge] is sustained. Claxton is entitled to reinstatement with restoration of back pay and benefits for all the time he was removed, minus six months. Pursuant to Art. X, Sec. 8, subd. B.2.c.3, "[r]estoration of pay and benefits shall be subject to reimbursement of all unemployment insurance and additional outside earning, which the appellant received since the date of the discharge."
>
> Upon reinstatement, the Department may place Claxton on a reasonable performance improvement plan.

Both parties agree that the arbitrator determined, for all intents and purposes, that Claxton should receive a six month suspension and then be brought back to work at the PA-PG with back-pay and an Improvement Plan.

Claxton's Reinstatement

Claxton returned to the PA-PG office on Friday, May 1, 2009. The PA-PG was short-staffed that day, so there were some issues regarding his work station and re-inputting him into the County's payroll system. Claxton was temporarily assigned to work in one of the PA-PG's four conference rooms, which was not a typical workspace. Barlow explained that Claxton was assigned to the conference room because the County had not yet cleared out a cubicle for him and because she felt that Claxton would need space to read through the training materials he missed while he was away from PA-PG.

That morning, Beason issued Claxton an "Improvement Plan" specifying Claxton's work schedule and break times. The document also gave specific instructions about how to report deviations from his assigned schedule to his supervisor. After returning from lunch that day, Claxton brought a newspaper with him to read. Beason objected to his reading the newspaper during the workday. Roberge instructed Claxton not to interact with other Deputies and to come to her with questions.

Later in the day, Beason issued Claxton a second "Improvement Plan," stating that Claxton had violated both the County Information Technology (IT) policy as well as the County's Code of Ethics. The document also noted that Claxton had misused County time and resources and was untruthful. Claxton was directed to "read and memorize" the County's IT policy and Code of Ethics. Claxton was also directed to read through training materials on various subjects, including ethics, the Probate Code, intestate succession, and powers of attorney. Beason did not give Claxton a timeframe for completing the task.

On May 2, 2009, Claxton took two weeks off to take a pre-planned vacation. Shortly after his return, Beason informed Claxton that he would be supervised by Supervising Deputy Sheila Roberge and that she would issue him a new Improvement Plan. Around that time, Claxton was assigned to work in a cubicle in the same general workspace as other deputies.[3] His assigned cubicle was next to Roberge's. At the time, Roberge had recently been named the Supervising Deputy of the newly created Internal Audit unit at the PA-PG. As part of her duties, Roberge had some responsibility over developing PA-PG training materials. Roberge did not supervise any other employees.

On May 29, 2009, Roberge issued Claxton another Improvement Plan. In that document, Roberge described her observations that he did not review reading materials assigned to him in great detail. Roberge also informed Claxton that he would be assigned to work in the LPS unit because those cases were less likely to involve real estate issues. Roberge later testified that LPS cases also required less work away from the office. Roberge instructed Claxton to adhere to his schedule, to not misuse County time or equipment, and to be truthful.

Claxton's primary work from May to July 2009 was reading various training materials from the time he was away from the office. He received 26 reading assignments in all. Part of the reason for the high volume of reading was because the PA-PG changed its training procedures significantly earlier that year.

According to Roberge, Claxton responded to this assignment sarcastically, making comments such as "that will take me 20 minutes to read, or "I'm done, what else do you have for me?" Roberge testified that Claxton did not seem engaged and also did not appear to

[3] At some point, the County assigned Claxton to work in another conference room, typically used for interviewing PA-PG clients. The timing and the duration that Claxton was assigned to this workspace was not made clear for the record.

appreciate the seriousness of the work of the PA-PG. However, Roberge never tested or otherwise evaluated Claxton on his familiarity with the reading material other than to ask him if he had any questions for her.

Starting in July 2009, the County assigned Claxton to reorganize and remove extraneous paperwork from other deputies' case files. According to Roberge, the purpose of the assignment, called "purging" case files, was to familiarize Claxton with different documents from LPS case files as well as teach Claxton about PA-PG's new filing protocols. Claxton considered the assignment to be more simplistic, describing it as merely removing all the documents from before a certain date. However, Claxton admitted to being unfamiliar with many of the documents he encountered in his review.

All other Deputies were responsible for purging files. Typically, the other Deputies met as a group for a "purging party" where they purged documents from their case files for hours at a time. It was not typical for purging files to be a Deputy's only job assignment. Purging was Claxton's primary assignment from July until November 2009.

According to Roberge, Claxton did not perform this task well. She would speak to Claxton or leave him notes regarding mistakes he made only to see Claxton repeat similar mistakes again. Claxton does not deny either making mistakes in his purging assignment or receiving feedback about his mistakes from Roberge.

On October 19, 2009, Claxton filed a grievance contending that the County failed to comply with the arbitrator's back-pay award. That grievance did not resolve until July 2010.

In November 2009, the County assigned Claxton to collect various clients' benefits cards, such as Medicare, Medi-Cal, or private insurance cards, from other Deputies, scan them, then place them in the appropriate client case file. According to Roberge, the purpose of the assignment was to familiarize Claxton with the PA-PG filing system, including how to

locate different case files. Overall, Roberge did not feel that Claxton was ready to be promoted to Deputy II due to his work performance and attitude. Barlow had the same opinion. She was particularly troubled by the fact that the arbitrator found that Claxton lied about his Probation badge during both the PA-PG investigation and during the arbitration." Barlow felt this finding could have adverse consequences because Deputies are sometimes required to testify in court on PA-PG matters.

Claxton did not perform this duty to Roberge's satisfaction either. According to Roberge, Claxton would sometimes be unable to locate the correct file for certain benefits cards and, instead of seeking assistance, would simply put the cards back where he found them. Claxton did not deny doing so.

In December 2009, Claxton was assigned to oversee the case files of another LPS Deputy who was out on extended leave. Claxton was primarily tasked with reviewing incoming mail regarding the other deputy's cases and to bring issues that needed immediate attention to Roberge for action. Claxton was not authorized to act upon the cases himself. According to Roberge, Claxton performed this duty to her satisfaction. Overall, Roberge did not feel that Claxton was ready to be promoted to Deputy II due to his work performance and attitude. Barlow had the same opinion. She was particularly troubled by the fact that the arbitrator found that Claxton lied about his Probation badge during both the PA-PG investigation and during the arbitration." Barlow felt this finding could have adverse consequences because Deputies are sometimes required to testify in court on PA-PG matters.

On or around December 18, 2009, Claxton requested OCEA's assistance in discussing his Improvement Plans with Roberge. A meeting was arranged and Roberge agreed to include "core and customized competencies" in his Improvement Plan, and to have regular meetings with Claxton about his work.

The 2009-2010 Budget Shortfall and Layoffs

The County experienced budget shortfalls throughout the latter part of the decade. As a result, the County Executive Officer (CEO) cut the budgets of various County departments, including the PA-PG.[4] The PA-PG initially addressed these cuts by spending down its reserve funds, eliminating vacant positions, and cutting other expenses. The PA-PG also eliminated supervisory and warehouse positions. Barlow initially believed that these cuts were sufficient to address its needs for the 2009-2010 fiscal year, but in September 2009, the CEO informed Barlow of the need for additional drastic cuts. At that point, the PA-PG management team determined that layoffs were necessary. Many other County departments were also considering layoffs as well.

The PA-PG management team decided to conduct the layoffs in a manner that would least impact the PA-PG clientele and staff. In reviewing the various PA-PG positions, Barlow concluded PA-PG social workers often performed work that was redundant with other services most of their clients receive elsewhere. Among the various Deputy positions, Barlow concluded that the Deputy I classification was the most expendable because that position operated with the least amount of autonomy and handled less complex cases. At that time, Claxton was the only Deputy I.

On November 23, 2009, the PA-PG ultimately decided to lay off all three of its social workers and its only Deputy I, Claxton. These 4 positions were among more than 270 laid off County-wide. Claxton's layoff was effective January 20, 2010. Claxton filed a grievance concerning the layoff on January 20, 2010. That grievance is currently in abeyance.

[4] The CEO is the officer in the County responsible for managing the County's various agencies. Regarding finances, the CEO allocates funds to each agency but is not involved in how each agency uses the money.

ISSUE

Did the County lay off Claxton in retaliation for participating in the grievance process and/or requesting the assistance of OCEA?

CONCLUSIONS OF LAW

Timeliness of the Charge

The County contends that the case must be dismissed as untimely. PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.[5])

In this case, the PERB complaint alleges that the County terminated Claxton's employment by layoff effective January 20, 2010. This means, under normal circumstances, that the statute of limitations in this case runs from January 21, 2010 until July 20, 2010. (See *SEIU-United Healthcare Workers West (Scholink)* (2011) PERB Decision No. 2172-M.) The instant charge was not filed until February 11, 2011. This means that the case is untimely unless an exception to the statute of limitations applies.

Under the equitable tolling doctrine:

> "the statute of limitations is tolled during the period of time the parties are utilizing a non-binding dispute resolution procedure if: (1) the procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the

[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.)

> procedure; and (4) tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent."

(*County of Riverside* (2011) PERB Decision No. 2176-M, quoting *Long Beach Community College District* (2009) PERB Decision No. 2002.)

All of these elements are present in this case. OCEA filed a grievance, pursuant to the parties' MOU, on Claxton's behalf, over the layoff on January 20, 2010. The parties actively participated in the process until October 28, 2010, when the arbitrator placed the case in abeyance, where the matter remains today. No evidence shows that either party participated in the matter in bad faith or was adversely affected by addressing Claxton's layoff in both the grievance in in the instant unfair practice charge.

The County raises no argument disputing the application of the equitable tolling doctrine. Rather, the County contends that the statute of limitations period should begin before January 20, 2010, because OCEA claims that Claxton was the victim of retaliation dating back to May 1, 2009. This argument is unpersuasive based on a plain reading of the PERB complaint. According to the complaint, the primary issue in this case is whether the County terminated Claxton's employment on or around January 20, 2010, in violation of the MMBA. PERB has unambiguously found that the statute of limitations for a "charge alleging termination for protected activities does not begin to run until the date of actual termination." (*Regents of the University of California* (2004) PERB Decision No. 1585-H.) Accordingly, the County's argument that the statute of limitations should begin prior to January 20, 2010 is rejected.[6] Thus, it is concluded that the statute of limitations period in this case began on

[6] Nothing precludes PERB from considering events occurring outside the statute of limitations period as background evidence of the employer's lawful or unlawful motive. (*Trustees of the California State University* (2008) PERB Decision No. 1970-H, citing *California State University, Long Beach* (1991) PERB Decision No. 893-H; *North Sacramento School District* (1982) PERB Decision No. 264.)

January 20, 2010 and was tolled for a sufficient period of time under the equitable tolling doctrine to make the case timely.

Retaliation for Protected Activities

OCEA alleges that Claxton was laid off in retaliation for MMBA-protected activities. To demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under the MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato USD*).)

Facts relating to several of these elements are not in dispute. The County admitted that Claxton engaged in MMBA-protected activity by participating in the MOU grievance process first from July 2008 until April 2009 regarding his 2008 termination from employment and again from October 2009 through July 2010 regarding proper compliance of the April 2009 arbitration award. It is further undisputed that in December 2009, Claxton sought OCEA's assistance regarding his Improvement Plans. PERB has previously found such activity to be protected. (*City of Santa Monica* (2011) PERB Decision No. 2211-M; *County of Riverside* (2011) PERB Decision No. 2184-M, citing *City of Modesto* (2009) PERB Decision No. 2022-M.) The undisputed evidence also shows that multiple County representatives, including Barlow, Beason, and Roberge, were aware of Claxton's protected activities.[7]

The County also admits that it terminated Claxton's employment by layoff effective January 20, 2010. This amounts to an adverse employment action for purposes of stating a

[7] No evidence was presented that the CEO or other representatives responsible for determining the necessity of County-wide budget cuts were aware of Claxton's activities.

prima facie case for retaliation. (*Regents of the University of California (Los Angeles)* (2008) PERB Decision No. 1995-H.)

The remaining element of a prima facie case is whether there is direct or circumstantial evidence of a causal connection, or nexus, between Claxton's protected activities and his layoff.

Evidence of Nexus

The closeness in time between the charging party's protected activities and the adverse action is an important circumstantial factor in determining the employer's motive. (*North Sacramento School District* (1982) PERB Decision No. 264.) Here, Claxton's January 20, 2010 layoff was close in time to at least some of his protected activities, namely the October 19, 2009 grievance. Claxton's earlier grievance activity, from July 2008 to April 2009, occurred close in time to May 2009, which was when OCEA contends the County began a pattern of conduct culminating in Claxton's unlawful layoff. Temporal proximity between an employee's protected activities and an employer's adverse actions is probative, but not determinative, circumstantial evidence of a causal connection between the two events. (*County of Riverside* (2009) PERB Decision No. 2090-M.)

Regarding other evidence of nexus, OCEA offered nothing disputing that the County had an economic need for laying off employees in January 2010. Nor did OCEA present evidence or argument challenging the County's conclusion that the Deputy I and the Social Worker positions were the most expendable under the circumstances. A superficial review of these facts might lead one to conclude the inquiry is at an end, that there was no evidence of unlawful motive. However, OCEA's theory of the case is somewhat more complex. OCEA claims that once Claxton was reinstated, he only received menial job assignments that gave him no realistic opportunity to promote to Deputy II. According to OCEA, this was part of a

larger strategy to lay Claxton off eight months later, in January 2010. The County, on the other hand, maintains that all of Claxton's Improvement Plans and job assignments served two basic purposes: (1) to allow Claxton to demonstrate his trustworthiness, given the arbitrator's findings that he was dishonest about his computer usage and his Probation department badge; and (2) to train Claxton to promote to a Deputy II with an LPS caseload that did not involve real property issues. Accordingly, this proposed decision will examine whether Claxton's job assignments indicate that the County had an unlawful motive when selecting the Deputy I position for layoff.[8]

There is evidence in the record that some of Claxton's job assignments lacked a real training purpose. For instance, when Claxton was first reinstated, Beason issued him an Improvement Plan requiring that he "read and memorize" the County's policies on information technology and ethics. Barlow admitted that committing lengthy County policy statements to memory was not a reasonable training assignment, but she downplayed the significance of Beason's use of the word "memorize" as unintentional. However, Barlow did not write this Improvement Plan, she only "spoke with" Beason about it. Thus, her characterization of Beason's intent is speculative. Moreover, in the next line of the Improvement Plan, Beason directs Claxton merely to "read" other training documents. Beason's use of the term "read and memorize" in one sentence and "read" in the next suggests that his word choice was indeed intentional. By the County's own admission, this assignment was inconsistent with the County's stated purpose of training Claxton to promote to Deputy II. An employer's

[8] In conducting this examination, it must be stressed that it is beyond the scope of this proceeding to decide whether the assignment of these duties, in-and-of-themselves, constituted retaliation under the MMBA. That claim was not alleged in the PERB complaint, nor did OCEA seek leave to amend the complaint. Moreover, such a claim should not be addressed under PERB's unalleged violation doctrine because raising these claims for the first time now would be untimely. (See *County of Riverside* (2010) PERB Decision No. 2097-M.)

inconsistent explanations for its conduct could be evidence of an unlawful motive. (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S.)

In addition, there is evidence that the County intentionally kept Claxton isolated from other PA-PG staff. According to the County, this was to ensure continuity in Claxton's training, but this explanation is antithetical to the method used to train virtually every other Deputy. The overwhelming evidence on this issue showed that "shadowing" other Deputies was a significant aspect of new Deputies' training. Claxton did not have a single shadowing opportunity after his reinstatement. This is also inconsistent with the County's position that it was attempting to train Claxton.

Claxton's other assignments did have specific training purposes, but were nonetheless suspicious due to their duration. For example, multiple witnesses testified that reviewing and purging case files would train a Deputy to understand the contents of a file and why certain actions were taken in a case. In Claxton's case, purging also helped familiarize him with the LPS unit and with PA-PG's new filing system. However, purging was Claxton's primary assignment from July until November 2009. None of the other Deputies that testified said they were required to purge files for the length of time that Claxton had this assignment. The unusual length of this assignment suggests that the assignment was not purely for training purposes.

However, mere poor training and personnel practices is not sufficient to carry OCEA's burden in this case. (See *City of Santa Monica*, *supra*, PERB Decision No. 2211-M; *City of Alhambra* (2011) PERB Decision No. 2161-M.) OCEA must also show that the Claxton's assignments were part of a concerted effort to lay him off in January 2010. The uncontroverted evidence shows that no one involved in assigning Claxton work was aware of the need for layoffs until September 2009, after all of the above-referenced assignments and

other actions were already underway.[9] The timing of these facts, undisputed by OCEA, undermine OCEA's claim that job duties originally assigned to Claxton in June and July were part of an effort to not promote him and eventually lay him off. Thus, additional evidence of nexus is needed to establish a prima facie case.

OCEA's Other Asserted Evidence of Nexus

OCEA contends that the statements of County Counsel Leon Page present further evidence of an unlawful motive. Claxton's attorney testified at the hearing that Page told her that Claxton should expect to continue to be isolated from others and should not expect his job duties to change. However, there is insufficient information in the record to conclude that Page was acting as an agent for either the PA-PG or the County when he made those comments. "'Actual authority' is that which an employer intentionally confers upon the agent, or intentionally or negligently allows the agent to believe himself or herself to possess." (*Chula Vista Elementary School District* (2004) PERB Decision No. 1647, citing *Inglewood Teachers Assn. v. PERB* (1991) 227 Cal.App.3d 767.) Apparent authority, on the other hand, "may be found when the employer has knowledge of its employee's activities and fails to repudiate or disavow them or where the employer engages in additional acts in furtherance of the agent's conduct that signify that it has ratified the employee's conduct." (*West Contra Costa County Healthcare District* (2011) PERB Decision No. 2164-M, citing *Los Angeles Unified School District* (2004) PERB Decision No. 1657, *Compton Unified School District* (2003) PERB Decision No. 1518, *Antelope Valley Community College District* (1979) PERB Decision No. 97.)

[9] As explained above, no evidence was presented that the County CEO was aware of Claxton's protected activities, meaning there is insufficient information to conclude that the CEO's conduct was retaliatory. (See *Oakland Unified School District* (2009) PERB Decision No. 2061; *California State University (San Francisco)* (1986) PERB Decision No. 559-H.)

Here, very little was presented about Page's involvement in PA-PG or County operations. Aside from Barlow's brief comment that the County Counsel's office negotiated Claxton's reinstatement date, no evidence showed that either the PA-PG or the County in general intentionally conferred Page with any authority about Claxton's employment. Similarly, no evidence was presented that anyone in the PA-PG or the County was aware of Page's statements to Claxton's attorney. Thus, there was no opportunity for County representatives to ratify or otherwise take steps in furtherance of Page's comments. Accordingly, OCEA has not demonstrated that Page had either actual or apparent authority to bind either the PA-PG or the County.

Moreover, because Page did not testify, his comments are hearsay, which is insufficient to establish a matter of fact, unless that evidence would be admissible over the opposing party's objection. (PERB Regulation 32176; *County of Riverside, supra,* PERB Decision No. 2090-M.) Evidence Code section 1222 provides for an exception to the hearsay rule for statements made by a person authorized to speak on the subject matter at issue. However, this section has been interpreted to apply only to "'high-ranking organizational agents who have actual authority to speak on behalf of the organization.'" (*Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 169, quoting *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1203.) In that case, the court concluded that statements from an attorney investigator did not amount to an admission for purposes of Evidence Code 1222 because there was no indication that he occupied a high-ranking position in the county's hierarchy. (*Id.*) Likewise, in this case, no evidence was presented about any role Page has within the PA-PG hierarchy. Nor was evidence presented that he is a high-ranking official elsewhere in the County. Accordingly, OCEA has not proven that this, or any other hearsay exception applies to Page's

statements. For these reasons, Page's statements do not provide additional persuasive evidence of nexus.

OCEA also asserts that the County treated Claxton far differently from other PA-PG Deputies. An employer's disparate treatment may be evidence of an unlawful motive. (*Omnitrans* (2008) PERB Decision No. 1996-M.) For example, in *San Joaquin Delta Community College District* (1982) PERB Decision No. 261, the Board found that an employer's decision to reassign a campus police officer to its grounds crew was evidence of nexus in light of the severity of the change in responsibility and in comparison to other employees similarly situated to the employee in question.

In contrast, PERB declines to find evidence of nexus where the charging party fails to demonstrate that he was treated differently from other "similarly situated" employees. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129 (*Sacramento City USD*).) In *Sacramento City USD*, the Board found no basis for concluding an employee was treated disparately where no evidence was presented regarding other substitutes who had been guilty of similar misconduct (tardiness).

In this case, it is undisputed that the arbitration decision resulted in, essentially, a six-month suspension without pay for Claxton. No evidence was presented about assignments given to any other disciplined employees. Thus, there is no adequate basis for concluding whether Claxton was treated disparately when compared to similarly situated employees. Accordingly, this does not provide additional evidence of nexus.

OCEA also contends that Claxton's Improvement Plans did not provide him with the appropriate information and feedback, according to the PIP manual. An employer's failure to follow existing procedure may be evidence of nexus. (*Omnitrans*, *supra*, PERB Decision No. 1996-M.) However, in *State of California (Department of Corrections & Rehabilitation)*

(2010) PERB Decision No. 2136-S, the Board found there was no departure from an employer's probationary performance evaluation standards where the record showed that the policies for such evaluations were only followed sporadically.

In this case, Barlow testified that the PA-PG used the PIP manual only as a guideline and did not follow it strictly. The evidence presented supports this testimony. For example, under the terms of the PIP manual, because Claxton's appointment to Deputy I was considered a promotion, he was supposed to receive a mid-cycle review after three months. He did not have any performance evaluation. This was during the time that Claxton felt he was being considered for a promotion by Beason. Moreover, according to the PIP manual, it is the responsibility of the employee to make sure the timelines and other procedures in the PIP manual are being adhered to. According to the record, Claxton first raised his concerns about the Improvement Plans in December 2009, at which point Roberge agreed to modify his Improvement Plan. This appears generally consistent with the PIP manual. No evidence was presented about other how other Improvement Plans were administered. Under these circumstances, OCEA has not shown that the Improvement Plans departed significantly from existing procedure.

Based on these facts, there is insufficient evidence of a nexus between Claxton's assignments and the eventual decision to lay off the Deputy I position. OCEA has therefore not met its burden of proving a prima facie case for retaliation.

The County's Burden of Proof

Even if OCEA established a prima facie case, the County would have met its burden of proving that retaliation was not the true cause of Claxton's termination. If the charging party can establish all the elements of a prima facie case, then the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same course of action

even if the charging party did not engage in any protected activity. (*Trustees of the California State University* (2000) PERB Decision No. 1409-H, citing *Novato*, *supra*, PERB Decision No. 210, *Martori Bros. Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721.) In other words, the issue is whether the adverse action would have occurred "but for" the protected acts. (*County of Riverside*, *supra*, PERB Decision No. 2090-M.) However, the focus of this analysis "is not whether the employer had a lawful reason for the action but whether it took the action for an unlawful reason." (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, citing *McFarland Unified School Dist. v. PERB* (1991) 228 Cal.App.3d 166, 169.)

In *Riverside Unified School District* (1987) PERB Decision No. 639 (*Riverside USD*), the Board found that an employee's discipline was not because he participated in the grievance process, but because of his persistent failure to perform assigned tasks in a satisfactory manner. Likewise in *City of Santa Monica*, *supra*, PERB Decision No. 2211-M, the Board found that an employee's unacceptable performance record was sufficient to prove that he was not terminated for protected activity. In contrast, in *Baker Valley Unified School District*, *supra*, PERB Decision No. 1993, the Board found that an employer's non-renewal of a probationary teacher based on alleged performance problems was pretext for retaliation where there was no evidence of prior documented performance concerns.

In this case, it cannot be said that "but for" Claxton's protected activities, he would have been promoted and therefore protected from layoff. Claxton's supervisor, Roberge, testified she felt that Claxton was often careless with his work and did not appear to take his assignments seriously. For instance, Roberge often found mistakes in Claxton's work and she informed him of his errors both in meetings and in writing. Roberge found that Claxton continued to repeat the same mistakes. In addition, Claxton typically did not have questions

even when given a complex reading or other assignment. Once again, Roberge informed Claxton of her concerns, but Claxton's performance did not improve.

Claxton denies meeting with Roberge face-to-face more than once, but does not deny receiving feedback from Roberge in some fashion. More importantly, Claxton does not deny Roberge's critique of his work performance. Claxton's own testimony is also consistent with Roberge's impressions. For example, Claxton described his assignment to examine and purge LPS case files as simply removing everything before a certain date. This description ignores the training component of the assignment. Multiple PA-PG staff testified that purging case files helps Deputies become familiar with different types of documents and furthermore familiar with the new system for maintaining files. Claxton admitted to being unfamiliar with "quite a few" of the documents contained in LPS case files.

Likewise, Claxton described his assignment for scanning benefits cards simply as "alphabetiz[ing] and fil[ing] documents." Once again, this description ignores the training purpose of the assignment, which was to learn where different case files were located. The undisputed evidence shows that Claxton, in fact, was unable to locate certain files and therefore sometimes failed to complete his scanning assignments properly.

Claxton also described his training assignments. For instance, he characterized a mandatory PA-PG training about safety protocol flippantly as "just . . . the office training."

On the whole, my own impression of Claxton during the hearing is consistent with Roberge's assessment. I believe that that he did not perform his work in earnest and felt entitled to be promoted to Deputy II. An employee's failure to perform job duties adequately is sufficient to rebut the prima facie case for retaliation. (*Riverside USD*, *supra*, PERB Decision No. 639; *City of Santa Monica*, *supra*, PERB Decision No. 2211-M.) Moreover, Claxton's poor attitude towards his work and his apparent failure to grasp or appreciate his

training provides a reasonable explanation for both the relatively long duration of each assignment and the County's decision to not promote him. Based on these circumstances, OCEA's assertion that Claxton would have been promoted absent the County's retaliation remains speculative.

OCEA may believe that Claxton's poor performance was justified under the circumstances due to the menial nature of his work. In *County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M (*San Joaquin*), the Board found that an employer was not justified in disciplining an employee for acting inappropriately during an investigation of his work performance when the circumstances surrounding the employer's investigation itself was unprecedented and appeared unjustified. The Board concluded that an employer may not provoke an employee to the point that he or she commits some kind of professional indiscretion and then discipline the employee for that conduct. (*Id.*, citing *Trustees of Boston University v. NLRB* (1977) 548 F.2d 391, 393.)

The present case, however, arises under different circumstances. Unlike in *San Joaquin*, *supra*, PERB Decision No. 1524-M, Claxton was found to have actually committed serious misconduct by both a PA-PG investigation and by an independent arbitrator. The arbitrator expressly concluded that some kind of remedial performance plan was needed. Thus, OCEA cannot contend that Claxton was provoked by unjustified County action. In addition, as explained above, PERB has consistently found that an employee's sub-standard performance constitutes a legitimate, non-discriminatory reason for termination. (*Riverside USD*, *supra*, PERB Decision No. 639; *City of Santa Monica*, *supra*, PERB Decision No. 2211-M.) Under these facts, Claxton cannot cure his own undisputed performance deficiencies

by claiming that the assignments themselves were too basic.[10] Therefore, this argument is not persuasive.

PROPOSED ORDER

Orange County Employees Association has not established that the County of Orange retaliated against John Claxton for engaging in protected activities. Therefore, the Public Employment Relations Board complaint and underlying unfair practice charge in LA-CE-667-M are hereby DISMISSED.

Right to Appeal

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
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 during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code,

[10] Furthermore, applying the holding in in *San Joaquin*, *supra*, PERB Decision No. 1524-M to the instant case would contravene the recognized labor relations principle of "obey now, grieve later." (See *Specialized Distribution Management* (1995) 318 NLRB 158, 161 [holding that employees were not entitled to disregard directives from their employer, even if they felt the employer was unjustified].) No grievance was filed over Claxton's job assignments.

§ 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (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).)