STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MERCED COUNTY SHERIFF'S EMPLOYEE ASSOCIATION, Charging Party, v. COUNTY OF MERCED, Respondent.	Case Nos. SA-CE-640-M SA-CE-690-M PERB Decision No. 2361-M March 25, 2014

Appearances: Weinberg, Roger & Rosenfeld by Leslie V. Freeman, Attorney, for Merced County Sheriff's Employee Association; Richard M. Flores, Assistant County Counsel, for County of Merced.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on an exception filed by the County of Merced (County) to the proposed decision (attached) of an administrative law judge (ALJ). The Merced County Sheriff's Employee Association (MCSEA or Association) alleged that the Merced County Sheriff's Department (Department): (1) threatened to discipline MCSEA President Frank Melo (Melo) unless he disclosed the identity of a bargaining unit member that informed the MCSEA Executive Board and its Attorney, Barry Bennett (Bennett), that a fight in the yard of the Merced County Main Jail Facility (Main Jail) had posed a safety issue for MCSEA bargaining unit members; (2) threatened to stop assigning MCSEA bargaining unit members desirable assignments unless the union withdrew a letter sent by Bennett to Sheriff Mark Pazin (Pazin); (3) initiated an internal investigation against MCSEA Board Member Tom Schiffler (Schiffler)

and MCSEA Spokesman Jeffrey Miller (Miller) in retaliation for the Bennett letter to Pazin; and (4) ordered Schiffler and Miller to return an internal affairs investigative file and questioned them regarding whether anyone else had copies of the file.

The ALJ determined that the County interfered with employee rights under the Meyer-Milias-Brown Act (MMBA)[1] when it threatened to discipline Melo unless he revealed the name of the Association member who reported a safety concern to the Association and when it threatened to stop assigning MCSEA members to desirable assignments unless the Association retracted the Bennett letter to Pazin. The ALJ also determined that the County did not violate the MMBA when it investigated Schiffler and Miller, nor when it ordered them to return an internal affairs file and reveal the names of anyone who had a copy of the file.

The County has taken only one exception, which was to the interference determination regarding Melo. MCSEA has not excepted to any of the ALJ's determinations.

We have reviewed the record, the proposed decision, the County's exception and MCSEA's response in light of the record and the relevant law. The ALJ's findings of fact are supported by the record and we adopt them as the findings of the Board itself. The ALJ's conclusions of law are well-reasoned and in accordance with applicable law. We therefore affirm and adopt the ALJ's conclusions as the conclusions of the Board itself, subject to our discussion below of the County's exception.

PROCEDURAL HISTORY

Case No. SA-CE-640-M

On December 7, 2009, MCSEA filed an unfair practice charge against the County. On December 21, 2009, the County filed its first position statement. On August 2, 2010, MCSEA

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

filed its first amended charge. On October 5, 2010, PERB's Office of the General Counsel issued a complaint alleging that the County violated MMBA sections 3503, 3506, and 3509(b) as well as PERB Regulation 32603(a)[2] when it threatened to discipline Melo unless he revealed the name of an Association member who reported a safety concern to the Association and when it threatened to stop assigning desirable work assignments to MCSEA bargaining unit members and begin assigning the work to non-bargaining unit members if MCSEA did not retract a letter written by Bennett to Pazin. On October 25, 2010, the County filed its answer denying any violation of the MMBA or PERB regulations. An informal conference was held on November 9, 2010, but the matter was not resolved. A formal hearing was scheduled for March 30 and 31, 2011, in Sacramento.

Case No. SA-CE-690-M

On November 23, 2010, MCSEA filed a second unfair practice charge against the County. The County filed its position statement to this charge on December 7, 2010. MCSEA filed a first amended charge on December 15, 2010, and the County filed its second position statement on December 23, 2010. On January 4, 2011, PERB's Office of the General Counsel issued a complaint alleging that the County violated MMBA sections 3503, 3506, and 3509(b) and PERB Regulation 32603(a) and (b) when it interrogated Schiffler and Miller and ordered them to return the County's internal investigation file. On January 20, 2011, the County answered the complaint denying any violation of the MMBA or PERB regulations.

Consolidation for Hearing

On February 4, 2011, MCSEA filed a motion to consolidate Case Nos. SA-CE-640-M and SA-CE-690-M. An informal conference regarding Case No. SA-CE-690-M was held on

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

February 7, 2011, but the dispute was not resolved. On February 10, 2011, PERB's ALJ denied the motion to consolidate the two cases and issued a notice of formal hearing in Case No. SA-CE-690-M for June 7 and 8, 2011, in Sacramento. On February 11, 2011, MCSEA filed a request for reconsideration of the ALJ's denial of its motion to consolidate. On February 15, 2011, based on support of both parties for this outcome, the ALJ granted the motion to consolidate. On March 25, 2011, the ALJ sent an amended notice of formal hearing, scheduling the consolidated complaints for June 6 and 7, 2011, in Sacramento.

Hearing and Appeal

The formal hearing was held on June 6 and 7, 2011. PERB received both parties' final briefs on August 29, 2011. On October 8, 2012, the ALJ issued his proposed decision.

On October 29, 2012, the County filed its exception to the ALJ's proposed decision. On November 19, 2012, PERB received MCSEA's response to the County's exception. On November 20, 2012, PERB's Appeals Assistant notified the parties that the appeal filings were complete.

FACTUAL SUMMARY

Since the County took exception to only one issue, we summarize only the facts pertinent to that issue. On or about August 8, 2009, the MCSEA Executive Board met with Bennett, to discuss several concerns which had arisen among MCSEA members regarding their employment with the Department. Among the issues raised at this meeting were the Department's increased use of "extra-help" employees and retired annuitants. In addition, at the meeting, an August 7, 2009, incident was discussed wherein several inmates at the Main Jail attacked another inmate in the Main Jail yard. According to the information about the incident provided to the MCSEA board, the assigned officers were not provided with non-

lethal weapons and, consequently, were unable to deter the inmates from continuing their assault. The safety of inmates and the officers was placed at risk.

On August 10, 2009, these concerns were memorialized in a letter written by Bennett and sent to Pazin. Sometime thereafter, Pazin provided Department Commander Joe Scott (Scott) with a copy of the letter. Scott oversees the Department's John Latorraca Correctional Facility, another County jail located outside the Merced city limits. Shortly after receiving the copy of the letter, Scott notified Commander Rick Thoreson (Thoreson), who oversees the Main Jail, of the letter. Subsequently, Thoreson issued a pepperball launcher—a forced compliance weapon that launches a projectile which breaks on impact and releases a chemical irritant—to an officer positioned in a tower/catwalk position above the Main Jail yard.

At some point prior to August 18, 2009, Scott obtained the video footage for the Main Jail for August 7, 2009. Scott did not see in the video the reported fight in the Main Jail yard on that date, although there was a fight that occurred in the doorway leading out to the yard from one of the Main Jail blocks. Scott testified that he did not believe a pepperball launcher would have been effective in stopping the fight he saw, as the pepperballs could not have been shot inside the Main Jail block.

On August 18, 2009, Scott invited Thoreson and Melo to review the August 7, 2009 Main Jail footage. After viewing the footage, Thoreson remarked to Scott and Melo that there was not a fight in the yard as Bennett's letter had indicated. Scott asked Melo if he thought a pepperball launcher would have prevented the fight. Melo said that he did not know because he was not present during the fight. Thoreson asked Melo who had told him there had been a fight in the yard. Melo told him, "we discussed it among ourselves." Thoreson again asked Melo who had told him there was a fight in the yard. Melo asked Thoreson if he was ordering

him to reveal the name. Thoreson told him that he was. Melo told Scott and Thoreson that Miller had provided the information. Thoreson said, "that is your problem right there."

Melo testified that after the August 18, 2009, meeting with Scott and Thoreson, he no longer wanted to perform his duties as MCSEA president because he feared that he would be fired and did not want another confrontation with Scott and Thoreson. Melo testified that he asked another MCSEA member to perform Melo's representational duties, but that the MCSEA board convinced Melo not to resign as president before his term expired.

PROPOSED DECISION

The ALJ framed the question at issue thusly: "Did Thoreson interfere with employee rights under the MMBA by ordering Melo to divulge his source of information?" (Proposed Dec., at p. 17.) The ALJ applied the test set forth in *Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807 (*Tulare County*). Under *Tulare County*, in order to demonstrate that an employer has interfered with the rights of employees under the MMBA, the charging party must prove:

(1) that employees 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 the employer's conduct was not justified by a legitimate business reason.

In addition, the ALJ noted the elements of the test for interference violations under the Educational Employment Relations Act (EERA)[3] first set forth in *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*) and made applicable to the MMBA under *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M. (See also, *State of California (Department of Personnel Administration)* (2011) PERB Decision

[3] EERA is codified at Government Code section 3540 et seq.

No. 2106a-S, p. 14, fn. 12 ["the *Tulare County* standard, which applies in interference cases under the MMBA, is consistent with the *Carlsbad* interference standard"].)[4]

First, the ALJ determined that the MCSEA bargaining unit members engaged in protected activity under MMBA sections 3502 and 3503[5] by having their attorney raise concerns within the scope of representation in the letter to Pazin. This conclusion was not excepted to by the County.

Next, the ALJ determined that the County had interfered with employee rights when Thoreson repeatedly asked, then ordered, Melo to divulge the name of the employee who had informed him that there had been a fight in the yard of the Main Jail. In making this determination, the ALJ stated:

> Such inquiry creates at least slight harm to employee rights as it would tend to chill MCSEA representatives [sic] discussions with their legal representatives if they knew such discussions would later be the subject of immediate disclosure by a manager's order.

(Proposed Dec., at p. 19.)

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[4] Under the *Carlsbad* test, where the harm to employees' rights is slight and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced. Where the harm is inherently destructive of employees' rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available. *Carlsbad* thus provides the analytical tool for assessing the employer's proffered legitimate business reason.

[5] MMBA section 3502 states, 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.

MMBA section 3503 states, in pertinent part:

> Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies.

Finally, the ALJ determined that there was no legitimate business reason for ordering Melo to reveal the employee's name and that Thoreson wanted the name merely to disparage the employee. This conclusion was not excepted to by the County.

POSITIONS OF THE PARTIES

According to the County, Thoreson did not know, nor could he reasonably have known, that Melo obtained the information about the fight in the Main Jail yard during an MCSEA executive meeting. Thus, urges the County, the ALJ erred in finding that Thoreson's questioning of Melo on the identity of the informer tended to interfere with employee rights.

The County excepts to the proposed decision on the ground that there was no competent evidence presented that Melo first learned of the Main Jail yard fight at a meeting between MCSEA and Bennett. The County argues that if Miller had told Melo of the Main Jail yard fight prior to the meeting, that initial knowledge was not cloaked "with any degree of protected confidentiality" merely because it was subsequently discussed at an MCSEA Executive Board meeting. (*Id.* at p. 4.)

MCSEA replies that there is ample support in the record for the ALJ's determination. MCSEA cites several passages from the hearing transcript which indicate that Commanders Thoreson and Scott had received and reviewed the Bennett letter, that Melo was repeatedly questioned about the name of the Main Jail incident reporter by Thoreson, and that Melo only revealed the name when ordered to do so.

DISCUSSION

In reviewing an ALJ's findings of fact, "[w]hile the Board will afford deference to the ALJ's findings of fact which incorporate credibility determinations, the Board is required to consider the entire record, including the totality of testimony offered, and is free to draw its

own and perhaps contrary inferences from the evidence presented." (*County of Riverside* (2011) PERB Decision No. 2184-M; see also *County of Santa Clara* (2012) PERB Decision No. 2267-M ["The Board has determined that it will normally afford deference to administrative law judge's findings of fact involving credibility determinations unless they are unsupported by the record as a whole"].)

In relevant part, the County's sole exception, contends that:

> The hearing was devoid of any competent evidence indicating that Melo had been told of the alleged jail yard incident by Miller at an Executive Board meeting in which MCSEA's attorney was present . . . .
>
> The evidence in this matter clearly demonstrated that neither Thoreson nor Scott knew or reasonably should have known that Melo only knew of the alleged incident as a result of discussions held during a MCSEA executive board meeting . . . .
>
> Also, if Miller had told Melo of the alleged incident prior to any MCSEA executive board meeting, the fact that the matter was subsequently discussed in meeting [sic] does not cloak Melo's initial knowledge with any degree of protected confidentiality.

(County's Exceptions, p. 3.)

Although presented as a single exception, the County raises two issues: (1) was there enough competent evidence for the ALJ to determine that Thoreson and Scott knew or should have known that Melo learned about the alleged Main Jail yard fight at an Association meeting? And, (2) if Melo learned about the incident from Miller prior to the Association meeting, was that communication nonetheless protected? Since unlawful motivation is not an element of an interference claim, the employer's knowledge of whether or not it was interfering with employees' rights under the MMBA is of no relevance. (*Sacramento City Unified School District* (1985) PERB Decision No. 492 ["In an interference case, it is not necessary for the charging party to show that the respondent acted with an unlawful

motivation"].) Therefore, whether or not Thoreson and Scott knew, or should have known, that they were interfering with rights protected under the MMBA is of no consequence to our analysis.

Moreover, according to the ALJ:

> Melo's response to Thoreson's initial inquiry as to who stated the fight occurred on the yard was "we discussed it among ourselves," however, such response was coupled with the statements in Bennett's letter that he met with Association members to address these concerns. These two together establishes to a reasonable person that this discussion occurred among the MCSEA representatives. Therefore, when Thoreson ordered Melo to answer his question after his second inquiry, he was now inquiring into the internal discussions of MCSEA as they were meeting with their attorney. Such inquiry creates at least slight harm to employee rights as it would tend to chill MCSEA representatives discussions with their legal representatives if they knew such discussions would later be the subject of immediate disclosure by a manager's order.

(Proposed Dec., pp. 18-19.) In making his determination, the ALJ credited the testimony of the County's witnesses (Scott and Thoreson) that Melo had told them the Main Jail yard incident was discussed among themselves.[6] Both commanders testified that they had received copies of Bennett's August 10, 2009 letter. Thus, even the County's version of what Melo told the commanders, together with the plain language of Bennett's letter, was sufficient for the ALJ to determine that a reasonable person would conclude that the Main Jail yard fight incident was the subject of an internal MCSEA discussion and the Department's repeated inquiry interfered with employee rights. We conclude with the ALJ there was competent

[6] Melo testified that he told the two commanders the Main Jail yard incident "had come up at with our meeting with our Attorney." (Hearing Transcript, Vol. I, at p. 78: 26-27.) However, since both commanders "denied that Melo said anything other than 'we discussed it among ourselves,'" the ALJ determined that MCSEA had not met its burden of proof of establishing Melo's testimony on this issue. (Proposed Dec., p. 7, fn. 5.)

evidence presented at hearing supporting the ALJ's conclusion and deny the first element of the exception.

The County's compound exception raises a second issue: would Miller's disclosure about the Main Jail yard fight have been protected if it had been disclosed to Melo before the meeting? Assuming arguendo that Miller did tell Melo about the Main Jail yard fight prior to the union meeting, that disclosure, contrary to the County's exception, would also be protected. Reporting safety concerns to an exclusive representative is protected activity. (See *Regents of the University of California* (1983) PERB Decision No. 319-H, p. 15.) Employer conduct which tends to chill that activity interferes with employee and union rights. (See *Los Angeles Unified School District* (1992) PERB Decision No. 957 [an employee engages in protected activity when he or she reports a work-related safety complaint].) Therefore, whether Miller told Melo, or any other Association representative, about his safety concerns prior to the MCSEA executive board meeting does not change our conclusion that Thoreson's dogged inquiry about the identity of the reporter interfered with protected rights in this case. The harm here is not simply seeking to learn what transpired at a union meeting and is not dependent on whether an attorney was present. The harm lies in the potential chilling effect the employer's conduct under the facts in this case has on employees' discussions with their union representative about matters protected under the MMBA.

CONCLUSION

We affirm the ALJ's conclusion that the County interfered with Melo's exercise of rights protected under the MMBA when its agent ordered Melo to reveal the name of the MCSEA bargaining unit member who informed the union of his safety concerns arising from

the Main Jail yard fight. We likewise affirm the ALJ's proposed remedy, including the cease and desist order and the posting order.[7]

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, the Public Employment Relations Board (PERB) finds in Case Nos. SA-CE-640-M and SA-CE-690-M, that the County of Merced (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503 and 3506 and PERB Regulation 32603(a) and (b) by interfering with employee rights when it ordered a union president to disclose the source of information obtained at a meeting between the union's executive board and its attorney and, also, when it threatened to withdraw desirable assignments if the union did not withdraw the August 10, 2009, letter sent by its attorney to the Merced County Sheriff Mark Pazin. All other allegations in these cases are dismissed.

The County, its governing board and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Interfering with the rights of employees guaranteed by the MMBA.

2. Denying Merced County Sheriff's Employee Association (MCSEA) its right to represent its bargaining unit members in their employment relations with the County.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICES OF THE MMBA:

1. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to employees in the County are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an

[7] In *City of Sacramento* (2013) PERB Decision No. 2351-M, PERB set forth a new rule which may require electronic posting of the notice to employees. We adopt the ALJ's proposed order subject to this new rule.

authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for at least thirty (30) consecutive workdays. The County, its governing board and its representatives shall take reasonable steps to ensure that the posted Notice is not reduced in size, defaced, altered or covered by any material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees in the MCSEA bargaining unit.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The County shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on MCSEA.

Chair Martinez and Member Winslow joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case Nos. SA-CE-640-M; SA-CE-690-M, *Merced County Sheriff's Employee Association v. County of Merced*, in which all parties had the right to participate, it has been found that the County of Merced (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by ordering a union activist to disclose the source of information obtained when union representatives were meeting with their attorney and by threatening to withdraw desirable assignments if the Merced County Sheriff's Employee Association (MCSEA) did not withdraw its August 10, 2009, letter to the Merced County Sheriff Mark Pazin.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Interfering with the rights of employees guaranteed by the MMBA.

2. Denying MCSEA its right to represent its bargaining unit members in their employment relations with the County.

Dated: _____ COUNTY OF MERCED

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MERCED COUNTY SHERIFF'S EMPLOYEE ASSOCIATION/TEAMSTERS LOCAL 856, Charging Party, v. COUNTY OF MERCED, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-640-M CASE NO. SA-CE-690-M PROPOSED DECISION (October 8, 2012)

Appearances: Weinberg, Roger & Rosenfeld by Leslie V. Freeman, Attorney, for Merced County Sheriff's Employee Association; Richard M. Flores, Assistant County Counsel, for the County of Merced.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges a public employer's ordering a union activist to report what occurred during a union meeting; urging the union to withdraw a letter to the employer or lose desirable assignments for its members; initiating an investigation against two union activists after the letter was sent to the employer; and interrogating union activists concerning their possession of an internal affairs investigative file. The public employer denies any violation of the Meyers-Milias-Brown Act (MMBA).[1]

On December 7, 2009, the Merced County Sheriff's Employee Association (MCSEA or Association) filed an unfair practice charge (charge) against the County of Merced (County). (PERB Case No. SA-CE-640-M.) On August 2, 2010, MCSEA filed an amended charge.

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

On October 5, 2010, the Office of General Counsel of the Public Employment Relations Board (PERB) issued a complaint alleging that the Merced County Sheriff's Department (Department) threatened to discipline MCSEA President Frank Melo (Melo) unless he disclosed what was said between MCSEA representatives; threatened to stop assigning members to desirable assignments unless union activists withdrew a letter to the Sheriff; and initiated an investigation against union activists for issuing the letter to the Sheriff. Such actions were alleged to have interfered with employee rights and discriminated against union activists for exercising protected activities in violation of MMBA sections 3503, 3506, and 3509(b) and PERB Regulation 32603(a) and (b).[2]

On October 25, 2010, the County filed its answer denying any violation of the MMBA or PERB Regulation. On November 9, 2010, an informal conference was held, but the dispute was not resolved.

On November 23, 2010, MCSEA filed a second charge against the County. (PERB Case No. SA-CE-690-M.) An amended charge was filed on December 15, 2010. On January 4, 2011, the PERB Office of the General Counsel issued a complaint alleging that the Department interrogated two MCSEA activists because of their possession of an internal affairs investigative file and directed them to turn over such file. Such actions were alleged to have interfered with employee rights and denied MCSEA the right to represent its members in violation of MMBA sections 3503, 3506, and 3509(b) and PERB Regulation 32603(a) and (b).

On January 20, 2011, the County filed its answer denying any violation of the MMBA or PERB Regulation. On February 7, 2011, an informal conference was held, but the dispute was not resolved.

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

On February 15, 2011, the Administrative Law Judge (ALJ) consolidated PERB Case Nos. SA-CE-640-M and SA-CE-690-M for hearing at the request of both parties. Formal hearing was held on June 6 and 7, 2011.

On June 6, 2011, MCSEA proposed to admit the internal affairs investigation that the County initiated against two union activists as a result of allegedly creating a hostile working environment for Correctional Officer A (Officer A.).[3] The investigation is admitted for the limited purpose of demonstrating: when the investigation was initiated and completed; the content of the allegations; the number of witnesses interviewed; the statements of the witnesses; the findings of the investigative sergeants; and the determinations by the assigned Commander and Undersheriff. Without any objection from either party, the document was sealed from public inspection to protect the privacy of the witnesses and parties of the investigation (the alleged victim and the accused). (Government Code section 11425.20, Penal Code section 832.7 and 832.8(e), and Evidence Code sections 1043 and 1045.)

With the filing of post-hearing briefs on August 26, 2011, the matter was submitted for proposed decision.

FINDINGS OF FACT

Jurisdiction

The County is a "public agency" within the meaning of MMBA section 3501(c). MCSEA is an "employee organization" within the meaning of MMBA section 3501(a) and an "exclusive representative" within the meaning of PERB Regulation 32016(b) of the County's Correctional Officers (Unit 2), and Security Systems Operators and Dispatchers (Unit 12).

[3] The ALJ has chosen to refer to the complainant in the internal affairs investigative file as Officer A.

Background

Merced County Sheriff Mark Pazin (Sheriff Pazin or Sheriff) has been the elected Sheriff for all times pertinent. Bill Blake (Blake) was the County's Undersheriff up to December 2009 and Mark Cavallero (Cavallero) has been the Undersheriff since December 22, 2009. The Department consists of the Operations, Corrections, Civil, Court Security, and Coroner's Divisions. The Corrections Division primarily consists of the "Main Jail" facility (Main Jail) located within the city limits of Merced and the John Latorraca Correctional Facility (Latorraca facility) located outside of city limits.

A commander oversees the day-to-day operations of each correctional facility. Commander Rick Thoreson (Commander Thoreson or Thoreson) oversees the Main Jail and Commander Joe Scott (Scott) oversees the Latorraca facility. Approximately 30 Correctional Officers (CO's or officers) are employed at the Main Jail and 40 CO's are employed at the Latorraca facility. Approximately seven Security Systems Operators (SSO's) are employed within the Department. Additionally, part-time employees and extra-help employees, such as Security Attendants (SA's) are employed to assist the CO's provide security. Part-time/extra-help employees are non-represented.

In December 2008, the MCSEA membership elected an almost entirely new Board of Directors which included CO Frank Melo (Melo) as president and SSO Tom Schiffler (Schiffler) as a board member. Melo wanted to establish a working relationship with the Sheriff's command whereas Schiffler wanted to focus on a more aggressive representation of the membership, especially at investigatory interviews and disciplinary proceedings. CO Jeffrey Miller (Miller), while not a board member, became the MCSEA spokesman.

MCSEA eventually appointed Schiffler to explore the possibility of having the Teamsters represent MCSEA. Eventually, MCSEA associated with the Teamsters on

August 8, 2009. Barry Bennett (Bennett), Esq. represented MCSEA on legal issues and negotiations.

At the first MCSEA Board meeting in 2009, Commanders Thoreson and Scott were invited to attend an MCSEA Board meeting to inform the board as to the future of the Corrections Division. Both attended. After they gave their report, they were asked to leave. Melo and Schiffler believed that Thoreson and Scott expected to stay. Thoreson and Scott did not recount ever taking offense at having to leave.

On August 10, 2009, Bennett sent Sheriff Pazin a letter on behalf of MCSEA with a copy to Melo, which provided in pertinent part:

> This office, as you know, is counsel to Merced County Sheriff's Employee Association, which represents the employees at the County Correctional Facilities. Several concerns have arisen among the membership of the Association, and I met with the Association Board on Saturday, August 8, 2009, to address those concerns. Several of those concerns appear to suggest that the Department is either violating local ordinance, or neglecting safety issues which are pertinent to the Unit employees' ability to perform the duties of their position.
>
> As you may be aware, the County Human Resources Rules and Regulations, at section 2(AA), provide that extra help employees may be engaged for "temporary, emergency, or seasonal help." Notwithstanding that limitation, it appears that the Sheriff's Department has dramatically increased the number of part-time, extra help employees, to the detriment of regular full-time employees. While various rationales have been advanced by department administration for the use of these extra help employees, their numbers have been increasing, and slots on the schedule have actually been made available to them, which regular full-time employees could and should have occupied. I am writing to you in an effort to have the department cease that practice, and to create a scheduling system that returns shift selection ability to full-time employees before extra help employees are used. If we cannot agree on such an arrangement, then the Association has authorized me to take legal recourse. . . .
>
> In similar fashion, the Department appears to be resorting more and more to the use of retired annuitants, on a "960 hour" basis,

to fill full-time positions. There are now three or four such individuals working within the corrections division, to the detriment of full-time officers, and their promotional opportunities. Once again, these individuals should be considered extra help employees, and are not to be used other than for purposes stated in County ordinance. While the Association has tolerated the retention of such individuals in the past, in part out of personal regard which many Association employees have for these individuals, the Department's increasing use of such persons is creating a problem, particularly given the increasing numbers of other part-time employees.

Finally, an incident occurred on or about August 7, involving inmates who were attempting to assault another inmate who had been suspected of being a snitch. As a result of the Sheriff's Department policy to disarm employees in the tower, even removing less-lethal weapons from them, the inmates were able to act with impunity, jeopardizing the safety of the fellow inmate as well as assigned officers. The "white shirt"[4] in the tower had been trained in the use of less-lethal weapons, but having no weapon at his disposal, could take no action to deter the inmates in question. While the Association recognizes that the Department has the discretion to determine whether or not particular posts will be staffed by armed individuals, it is our belief that discretion that has its limits, particularly where the safety of officers and inmates is at stake. In this case, that appears to be the case, and the Association has requested our office to determine whether or not in fact a violation of Labor Code section 6300, and analogous regulations, is created by the absence of any armed personnel at various locations within the facility. Once again, dialog with the Association would have been helpful in this regard, but your administrative officers chose not to follow that route.

I would appreciate your attention to all of these matters. The Association believes that it has been exceedingly cooperative with your administration to date, but will not put itself in a position where the work opportunities, and safety, of its members are subordinated to the interests of "getting along." We would appreciate a prompt response from you and your commanders regarding these issues.

(Emphasis added.)

[4] A "white shirt" is the common name given to an extra-help SA.

August 18, 2010 Meeting Between Commanders Scott and Thoreson, and Melo

The Sheriff's secretary placed Bennett's August 10, 2009 letter in Commander Scott's mailbox. Scott also notified Thoreson of the letter. The day after receiving the letter Thoreson had a pepper ball gun issued to the SA position in the tower/catwalk position over the yard. Scott and Thoreson wondered why MCSEA did not approach them and simply ask to restore the pepper ball gun to the position, rather than to elevate the matter with a formal letter to the Sheriff.

Scott obtained copies of the video footage for August 7, 2009 for the Main Jail to review if there was a fight on the yard and what occurred. After reviewing the footage, Scott saw that there wasn't a fight on the yard, but he noticed a fight which occurred right inside the door which led out to the yard from Three Block. Scott did not believe the SA could have stopped the incident with a pepper ball gun as he could not have shot the pepper ball inside Three Block when the fight was occurring.

On August 18, 2009, Scott decided to invite Thoreson and MCSEA President Melo to view the footage. After showing Melo the footage, Thoreson told Melo that there wasn't a fight on the yard as the letter stated. Scott asked Melo whether the pepper ball gun would have prevented the fight. Melo responded that he could not say one way or another as he was not present during the fight. Thoreson asked Melo to tell him who said the fight happened on the yard. Melo responded, "We discussed it among ourselves."[5] Again, Thoreson asked Melo who said the fight occurred on the yard. Melo asked whether Thoreson was giving him an

[5] Melo stated that he had told Thoreson that it came up in their discussions with the attorney rather than "we discussed it among ourselves." Both Scott and Thoreson denied that Melo said anything other than "we discussed it among ourselves." As the burden of proof is on MCSEA, MCSEA has not met its burden of establishing Melo's testimony on this matter.

order. Thoreson replied that he was. Melo stated that it came from Miller. Thoreson responded, "that is your problem right there," as Thoreson believes Miller tends to exaggerate.

After Melo disclosed Miller's name to Thoreson and Scott, he was devastated. He telephoned Schiffler and explained how he had been ordered to provide the source of his information. Schiffler provided Melo with Bennett's phone number and Melo contacted Bennett. Eventually Melo contacted Miller to inform him what he did.

After this incident, Melo did not want to perform his duties as MCSEA President and passed off his representational duties to MCSEA activist Chris Navarro (Navarro). Melo was afraid he would get fired and did not want to confront Thoreson or Scott. He decided to focus on only doing his job with the Department. Because of the MCSEA Board's recommendation, he decided not to resign from his position as president before his term expired.

August 25, 2009 Statements by Commander Scott in Classroom

On August 25, 2009, during a lunch break at a classroom in the Latorraca facility, Commander Scott came into the classroom and stated to Sgt. Bobrowski that the Sheriff was upset about a letter he received from Bennett about the Sheriff's use of part-time and extra-help employees. Scott further stated that the Sheriff said if the union did not retract the letter, he would be removing certain desirable assignments from CO's in the Corrections Division, such as transportation and backgrounds, and assign them to the deputy sheriffs.
CO Shambaugh was only five to six feet away from Scott and noticed that Scott looked directly at him when he said this.

Scott admits that he said something about the Corrections Division needing to be careful how they conducted themselves, but he did not intend it to be threatening. Rather, he was being "protective" of the Corrections Division.

August 21, 2009 Officer A.'s Petition

On August 21, 2009, Officer A. wrote a petition to be submitted to Sheriff Pazin, which provided in part:

> I am writing this in regards to a recent letter that was given to Sheriff Pazin from Barry Bennett on behalf of MCSEA. This letter is to the entire Correctional Division. I believe this effects [sic]not only the MCSEA members, but also the Correctional Officers, the extra help employees, the [Facilities Admissions Clerks], the [SSO's], the Sergeants, and this department as a whole.
>
> I personally would like the Sheriff to know that we do not all agree with this letter and the threat against the [C]ounty to take "legal recourse" as stated in Barry Bennett's letter on behalf of MCSEA.
>
> I would also like to inform our extra help employees of what could be in their near future. I understand it may seem as though this letter from Barry Bennett on behalf of MCSEA is "looking out" for your best interest, but here are some things to keep in mind. First of all, there is a strong possibility that your hours will now be cut down to only thirty-two hours a week. You are no longer allowed to work any overtime, whether it be mandatory hold over or signing up to work overtime. I believe for most people this will cause financial strain, and make it difficult to support your family, pay for your home, your cars, and the living arrangement that you have become accustomed to. . . . ¶
>
> As a full time employee of this department I would like to express my concerns regarding this matter. Due to the extra help employees being unable to work overtime, this will cause myself and even more senior officers than me to have to work mandatory overtime. I recall when I had only been here for a short period of time all of our employees were so exhausted from being forced to work so much mandatory overtime. It came to a point that everyone started calling in sick so they could rest, causing even more overtime. It was an ongoing problem, and we went to our Sheriff and requested help. We requested more staff to assist in covering the overtime. The Sheriff responded by giving us extra help employees to assist with our staffing issues. We now have more employees in the Correctional Division that we have ever had before. The Sheriff and our Commanders have fought to make this a safer environment for all of the Correctional Division. In return we thank him by having our attorney write

> him a letter with complaints regarding our extra help employees and threaten to take legal recourse. What will it take for MCSEA to be satisfied? ¶ . . . ¶
>
> I am certain that by writing this, it may cause controversy and turmoil between myself, my fellow officers and the MCSEA board. I feel as though my rights to express my opinion on this matter were taken from me and from me and from my fellow MCSEA members by not allowing us to vote on this letter being sent to the Sheriff. . . .
>
> If you would like to let MCSEA, our fellow officers, [Facilities Admissions Clerks], [SSO's], Sergeants, Commanders, and our Sheriff know that we do not all support this letter written by Barry Bennett on behalf of MCSEA please print and sign your name on the attached list.
>
> Thank you for your time and consideration regarding this matter. My hope is that in the future MCSEA and its members can work with Administration to give Corrections a brighter future.

Officer A. presented her petition to Sheriff Pazin. Sheriff Pazin accepted the petition and replied that he understood there was a difference of opinion. In early September 2009, Officer A.'s MCSEA membership was revoked.

Allegations Leading to the Investigation of Miller and Schiffler

The Department has a discipline policy which mandates that it investigate all allegations of misconduct regardless of the source of that information. However, if the allegation is a violation of the County's Anti-Harassment and Discrimination Policy, the Undersheriff has the discretion to initiate an investigation or refer the matter to the County Human Resources Department for investigation.[6] Regardless of these policies, the Department will not initiate an investigation if the matter has been resolved at a lower level between the parties.

[6] The Undersheriff has the authority to initiate an investigation in the Department.

Between November 11 and 13, 2009, Officer A. approached Thoreson to discuss a number of incidents of harassment from Miller/Schiffler. At that time, Officer A. had not reduced them to writing, but just wanted Thoreson to listen to her. She did not request an investigation. Thoreson brought these issues to Undersheriff Blake's attention who then authorized that an investigation be initiated.

Officer A. then handwrote a two-page document which included portions of the four incidents[7] which were eventually investigated. Those incidents can be summarized as:

1) In August 2009, Schiffler used the control room speakerbox to listen in on a conversation that Officer A. was having with the Deputy Sheriff's Association President where Officer A. was complaining about MCSEA.

2) On November 4, 2009, while Officer A. was in the breakroom with another officer, Miller told her that her "Uncle Ricci" (Thoreson) and Blake were going to be retiring and she was not going to have the protection from her "daddy's good ole boys"[8] as they would be gone in three to four years and she better stop burning her bridges. Miller also stated that he had a favorable relationship with the likely appointment to Undersheriff position, Cavallero.

3) On November 9, 2009, Schiffler prematurely closed an electronically-operated door in front of Officer A., and when Schiffler re-opened the door stated, "that didn't take long" and laughed.

4) On November 11, 2009, at work, Navarro was explaining a MCSEA bylaws provision to Officer A. about being required to appear at her membership revocation appeals hearing, when Schiffler told Officer A. to get a "fucking" attorney and challenge Navarro's interpretation if she did not like it.

[7] A fifth incident was written down by Officer A., but was not investigated. Specifically, Officer A. complained that Miller threatened that if she turned in her petition to the Sheriff, she would not be considered a member in "good standing," and therefore would not have legal representation for one year.

[8] Officer A.'s father was a former Commander of the Corrections Division and well-respected.

On November 13, 2009, Miller and Schiffler were both notified that they were the subject of an internal affairs investigation.[9] Miller was also notified that he was being transferred to the Latorraca facility, but he would keep his same days off and shift. Schiffler was notified that he was being transferred to the Work Release Division. The transfers were justified by Miller/Schiffler allegedly creating a hostile working environment for Officer A. When Miller received the notice from Thoreson, Miller stated that Thoreson said, "it is all her, man."

During the evening of November 13, 2009, Miller telephoned Thoreson about another work-related matter. At the end of the conversation, Thoreson asked Miller how Schiffler was doing. Miller explained that he wasn't doing well. Miller told Thoreson that he would never do what he was accused of doing. Thoreson replied that he knew there was nothing to the charges, but since Miller and Schiffler were the leaders they were going to have to "take it." Thoreson denied making such a comment.

Schiffler was originally assigned to the Work Release Division for approximately three weeks, but was allowed to return to his position at the Main Jail control room as Officer A. was placed on extended leave from the end of November 2009 until January 11, 2010, when Officer A. returned from her leave and Schiffler was reassigned to the control room at the Latorraca facility. Schiffler became ill from the ventilation system in the Latorraca facility control room, and reported his unhealthy environment to Sgt. Salacup. When the matter was brought to Scott's attention, Scott directed Sgt. Salacup to move Schiffler to the front desk, but the redirection did not take place. On February 27, 2010, Schiffler was hospitalized for flu-like symptoms. Although he was released that day, he did not return to work until

[9] These allegations in the notices included violating the County's Anti-Harassment and Discrimination Policy.

March 2, 2010. Schiffler refused to return to the Latorraca control room and remained in the Sergeant's office.

Investigation of Miller and Schiffler

Sgts. Bobrowski and Blodgett were assigned to conduct the investigation of Miller and Schiffler. They conducted approximately 26 different interviews of 17 witnesses between November 17, 2009 and January 14, 2010.[10] Other than the eavesdropping incident, which Schiffler admitted occurred after he heard Officer A. use "motherfucker" before his name,[11] the investigation revealed a conflict between Officer A.'s interview statements and Miller/Schiffler's interview statements. Miller denied threatening Officer A. in any way in the breakroom and did not recall making statements Officer A. attributed to him. The third officer who was present only partially corroborated Officer A.'s statement.[12] Schiffler denied intentionally closing the electronically-operated door prematurely or making any comments after that. He also denied using the word "fucking" before "attorney." Other supposed witnesses to the events were not helpful.

[10] Most of interviews were conducted between November 17 and 24, 2009. Schiffler and Miller and other supplemental interviews were conducted on January 14, 2010. Thoreson, as the Commander of the Main Jail, would have reviewed the investigative reports, but he retired in December 2009. Sgt. Bobrowski purposely delayed some of the interviews until after Thoreson had retired as he believed that Thoreson would have recommended a greater level of discipline than was needed.

[11] After the eavesdropping incident, at the request of Sgt. Johann, Schiffler apologized to Officer A. and Officer A. accepted the apology. The incident seemed resolved. Officer A. denied using the word "motherfucker" in reference to Schiffler.

[12] The other female officer in the breakroom stated that Miller told Officer A. not to "burn her bridges" and that Thoreson was retiring soon, but she did not mention any threat from Miller to Officer A.

During the interviews of Miller and Schiffler, they both stated that they believed Officer A. created a hostile working environment for them[13] and that she was resentful that the MCSEA Board decided to enlist the help of the Teamsters and disagreed with them on other union issues. Both of them decided not to file a complaint or complain about Officer A. out of respect for her father.

Sgts. Bobrowski and Blodgett prepared a report which sustained almost all of the allegations against Miller and Schiffler. The report was forwarded to Commander B.J. Jones (Commander Jones or Jones) as Commander Scott thought it best to remove himself from such review after being named in the first unfair practice charge. After Commander Jones reviewed the matter, he disagreed with the investigators and communicated his disagreement with Undersheriff Cavallero who agreed with Jones. Ultimately, Undersheriff Cavallero did not think the evidence supported the findings and did not sustain the allegations against Miller and/or Schiffler. Additionally, Undersheriff Cavallero used his discretion to decide not to conduct any further investigation into this matter, including any investigation about Officer A. harassing Miller and Schiffler. Undersheriff Cavallero did not discuss his determination(s) with Sheriff Pazin.

On March 12, 2010, Commander Jones provided written notices to both Miller and Schiffler stating that Undersheriff Cavallero and he determined the allegations against him were not sustained. Both Miller and Schiffler returned to their prior positions at the Main Jail. Miller and Schiffler also went to speak with Commander Scott. Both Miller and Schiffler questioned Scott as to the Department conducting an investigation on Officer A. creating a hostile working environment for them. Scott responded that Miller and Schiffler could file a

[13] Officer A. admitted in her interview that she told Miller and Navarro that they were a "bunch of Nazi's" because none of the members were allowed to express their own opinions on union issues.

complaint with the human resources department, but the Department was closing its investigation.

Demand to Return Internal Affairs Investigative File

On March 29, 2010, Bennett wrote a letter to Sheriff Pazin requesting that, pursuant to the California Public Records Act (Government Code section 6250, et seq.), the Department produce the entire internal affairs investigative file of the Miller/Schiffler investigation to him. The matter was referred to the County Counsel's office.

On July 6, 2010, Bennett was present with Navarro at a meet and confer meeting with the County's Human Resources Director Robert Morris. After the meeting, Bennett picked up the investigative file from the County Counsel's office. Bennett made copies of the file and gave a copy to Navarro who gave it to Schiffler. Schiffler reviewed the file that day.

On July 8, 2010, Schiffler and Miller were reviewing the investigative file at Schiffler's residence. Schiffler did not understand how to view the videotapes provided with the file and telephoned Sgt. Bobrowski to inquire how to do so. Sgt. Bobrowski provided the needed information. Later, Miller asked to speak to Sgt. Bobrowski and placed him on the speakerphone so both Miller and Schiffler could hear the conversation. Miller asked Sgt. Bobrowski why he did not investigate Officer A. for filing false charges against them and why he investigated union business. Sgt. Bobrowski admitted to being under a lot of pressure[14] and he would love to tell Miller about it, but could not. He admitted that he was waiting for Commander Thoreson to retire.

Before Miller and Schiffler came to work that day, the County Counsel's Office requested the Department to retrieve the investigative file from Miller and Schiffler as the

[14] Sgt. Bobrowski clarified that no one "pressured" him to come up with sustained findings against Miller and Schiffler.

County Counsel was not supposed to release the investigative file to them. Scott was charged with the duty of retrieving the documents and enlisted the help of Commander Jones to assist him.

When Miller and Schiffler arrived at work at 3:00 p.m., Scott had Miller report to his office. Scott informed Miller that the County Counsel's office erroneously released a copy of the investigative file and he would like him to return the file. Miller stated that the file was his personal property given to him by Navarro who received it from their union attorney. Scott again asked for the file and Miller responded that he did not have it. Scott ordered Miller to return the file. Miller replied that the file was not in his possession as he was at Schiffler's house when he reviewed it. Miller would not answer whether Schiffler had the file. Scott told Miller to have Schiffler come to his office.

Miller retrieved Schiffler. When Schiffler came in, Miller asked if he could come in as Schiffler's representative. Scott consented. Scott again told Schiffler that the file shouldn't have been released to him and asked for the file to be returned. Scott asked Schiffler if he had a copy. Schiffler admitted that he did, but it was at his home, locked in a safe. Miller asserted himself and stated the file was our property and Schiffler got the file from Navarro who got it from Bennett. Finally, Scott ordered Schiffler to return the file. Miller replied they would comply with the order. Scott asked when he would return the file. Schiffler responded that he would deliver it to Scott at the beginning of shift the next day. Scott also asked who was at the meeting when Bennett received the file. As both Miller and Schiffler were not there, they could not answer. Scott asked who also had copies of the investigative file and Miller stated that Bennett and the Teamsters had copies.

On July 9, 2010, at approximately 3:00 p.m. Schiffler returned the file to Scott.

ISSUES

1. Did Thoreson interfere with employee rights under the MMBA by ordering Melo to divulge his source of information?

2. Did Scott interfere with employee rights under the MMBA by stating that MCSEA should retract the letter?

3. Did the Department retaliate against Miller and Schiffler for their exercise of protected activities by initiating an investigation against them?

4. Did Scott interfere with Miller's and Schiffler's rights under the MMBA by ordering them to return the internal affairs investigative file and asking them who had copies of the file?

CONCLUSIONS OF LAW

Interference as to Thoreson Ordering Melo and Scott's Statement About Retracting the Letter

The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights result from the conduct. If harm to employee rights is slight and the employer offers justification based on operational necessity, the competing interests are balanced. If the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was caused by circumstances beyond its control and no alternative course of action was available. The courts have described the standard as follows:

> All [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 Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807.)

A violation may only be found if the MMBA provides the claimed rights which were interfered with. (*City & County of San Francisco* (2011) PERB Decision No. 2206-M.) In *Clovis Unified School District* (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

(1) Employees Engaged in Protected Activities

MMBA section 3502 provides in part that, ". . . public 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." Additionally, MMBA section 3503 provides in part that, "Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies." When Bennett sent a letter to the Sheriff expressing officer safety and removal of bargaining unit work concerns, employees engaged in protected activities by having their attorney raise concerns within the scope of presentation to the Sheriff. (*Rialto Unified School District* (1982) PERB Decision No. 209; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 620.) MCSEA has satisfied this element for establishing an interference violation.

(2) Conduct Tends to Interfere with Employee Rights.

(a) Inquiry of Melo.

Melo's response to Thoreson's initial inquiry as to who stated the fight occurred on the yard was "we discussed it among ourselves," however, such response was coupled with the statements in Bennett's letter that he met with Association members to address these concerns. These two together establishes to a reasonable person that this discussion occurred among the MCSEA representatives. Therefore, when Thoreson ordered Melo to answer his question after

his second inquiry, he was now inquiring into the internal discussions of MCSEA as they were meeting with their attorney. Such inquiry creates at least slight harm to employee rights as it would tend to chill MCSEA representatives discussions with their legal representatives if they knew such discussions would later be the subject of immediate disclosure by a manager's order. MCSEA has satisfied the element of showing that the order tends to interfere with employees in the exercise of employee rights.

(b) Scott's Comments in front of Shambaugh.

As summarized in *County of Riverside* (2010) PERB Decision No. 2119-M, p. 17:

> Employer speech causes no cognizable harm to employee rights unless it contains "threats of reprisal or force or promise of a benefit." (*Chula Vista City School District* (1990) PERB Decision No. 834.) Whether the employer's speech is protected or constitutes a proscribed threat or promise is determined by applying an objective rather than a subjective standard. (*California State University* (1989) PERB Decision No. 777-H.) Thus, "the charging party must show that the employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights." (*Regents of the University of California* (1983) PERB Decision No. 366-H.) Further, statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning. (*Los Angeles Unified School District* (1988) PERB Decision No. 659.)

Scott's comment clearly communicates that if the letter is not retracted, desirable assignments will be removed. While Scott may have believed his intent to be "protective" of the Corrections Division, the comment on its face is threatening and coercive. The comment communicates that MCSEA is forbidden to express its concerns through an attorney to the Department's elected executive in order to resolve union issues. Such conduct creates at least slight harm and clearly interferes with MCSEA and its employees rights.

(3) Justification of Interference.

Both Thoreson's order to Melo and Scott's comment in front of Shambaugh were not justified by legitimate business reasons. Thoreson's question to find out the source of the information was only to discredit the source. Thoreson had already returned the pepper ball gun to the SA position on the tower/catwalk and was persuaded from the videotape that a fight did not occur on the yard. His question and the subsequent answer would not further resolving any safety concern, but only go to impugn the credibility of an MCSEA representative.[15]

Scott's excuse of being "protective" of the Corrective Division's resources does not establish a legitimate business justification. On its face, the threatening comment was issued to get the letter retracted and have no further letters written in the future.

MCSEA has established that Thoreson's order and Scott's comment interfered with employee rights in violation of MMBA sections 3503 and 3505 and PERB Regulation 32603(a) and (b).

Retaliation for Protected Activities

To demonstrate a prima facie case that the County retaliated against Miller and Schiffler in violation of section 3506, MCSEA must show that: (1) Miller/Schiffler exercised rights under the MMBA; (2) the County had knowledge of the exercise of those rights; (3) the County took adverse action against Miller/Schiffler; and (4) the County took the adverse action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*) and *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S.) Once MCSEA has established a prima facie case of retaliation,

[15] The ALJ may have reached a different conclusion if the Commanders were investigating an incident in order to determine whether misconduct occurred, especially if more than one person was speaking to the union attorney and an attorney/client relationship was not established.

the burden shifts to the County to show that it would have taken the adverse action even in the absence of their protected activities. (*Novato*; *Wright Line, Inc.* (1980) 251 NLRB 1083.)

(1) Protected Activities and Knowledge of Protected Activities

Schiffler was an MCSEA board member and Miller was the board's official spokesperson. Both Thoreson and Scott were aware of their protected activities as they attended an MCSEA Board meeting. Additionally, Melo communicated that Miller was the source of information in the Bennett letter concerning the August 7 incident. MCSEA has established the first two elements of a prima facie case.

(2) Adverse Action

The initiation of an investigation into alleged misconduct constitutes an adverse action against investigated employee(s) (*State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S), even if the investigation does not ultimately result in discipline. (*California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S.) MCSEA has satisfied the element that the Department took an adverse action against Miller and Schiffler.

(3) Nexus Between Initiation of Investigation and Protected Activities

As stated in *Trustees of California State University v. Public Employment Relations Board* (1992) 6 Cal.App.4th 1107, 1127:

> Unlawful motive is the specific nexus required in the establishment of a prima facie case. Direct proof of motivation is rarely possible since motivation is a state of mind which may be known only to the actor. Unlawful motive can be established by circumstantial evidence and inferred from the record as a whole.

To guide its examination of circumstantial evidence of unlawful motive, PERB has developed a set of "nexus" factors that may be used to establish a prima facie case. Although the timing of the employer's adverse action in close temporal proximity to the employee's

protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104; (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

(a) Disparate Treatment of Employees.

While the Department was willing to investigate Miller and Schiffler for creating a hostile work environment for Officer A., it was not willing to conduct an investigation of Officer A. for creating a hostile work environment for Miller and Schiffler. This disparity is

further highlighted by the fact that Officer A. took positions with the union membership which were more favorable to the Department's current hiring policies.

(b) Departure from Establish Procedures and Standards.

Officer A. never requested Thoreson to conduct an investigation, but Thoreson, on his own initiative, went to Undersheriff Blake who authorized the investigation and charged Miller and Schiffler with violating the County's Anti-Harassment and Discrimination Policy. With this policy violation, the Department need not be the one that initiates the investigation. Additionally, the eavesdropping allegation had been previously resolved by an apology arranged by Sgt. Johann, yet the Department still pursued it, which was contrary to its own policy.

Based upon these nexus factors, MCSEA has established a nexus between Miller and Schiffler's protected activities and the initiation of the investigation and has demonstrated a prima facie case of prohibited retaliation.

(4) The Department Would Have Initiated the Investigation but for their Protected Activities.

The most compelling allegation demanding an investigation was Miller's comment to Officer A. that her father's "good ole boys" were all going to be gone in three to four years and she would no longer be protected. Such a comment standing alone infers that in a short period of time Officer A. was going to be an open target. This is an allegation that needed to be investigated, regardless of the overlapping issues of internal union disputes, because the intent of such a comment was to put the employee in fear. The other charges involved set forth the stage that retribution was coming, a retribution that wasn't limited to the revocation of union

membership, but which overlapped into the workplace.[16] The investigation, however, revealed that the allegation came down to Officer A.'s word against Miller and Schiffler's word. Undersheriff Cavallero would not sustain these allegations based on this evidence.

Miller and Schiffler also complained of Officer A. creating a hostile working environment for them. Miller and Schiffler stated that Officer A. disagreed with the elected MCSEA representatives concerning enlisting the Teamsters and other union issues and called Miller and Navarro a "bunch of Nazis" because other members were not allowed to express their own opinions. It is not surprising that Undersheriff Cavallero denied investigating this matter further as these issues again focused more on internal union disputes than a threat which could overlap into the workplace. The County demonstrated that it would have initiated the investigation regardless of MCSEA's protected activities.

Interference by Ordering the Return of the Investigative File.

As previously stated in this proposed decision, it has been establish that both Miller and Schiffler engaged in protected activities. The remaining questions, however, are whether the Department's ordering the return of the investigative files interfered with employees in their exercise of MMBA rights, and whether the Department's actions were justified by legitimate business reasons.

Penal Code section 832.7(a) provides:

> Peace officer or custodial officer[17] personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and

[16] It should be noted that the departmental investigation did not investigate the purely internal union dispute that if Officer A. turned in her petition to the Sheriff, her union membership would be revoked.

[17] Penal Code section 831.5(a) defines "custodial officer" to include a person designated as a correctional officer.

> shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code.

(Emphasis added.)

Penal Code section 832.8 provides:

> As used in Section 832.7, "personnel records" means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:
>
> (e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.

Evidence Code sections 1043 and 1045 provide the method in which such "personnel records" are to be disclosed. Evidence Code sections 1043 and 1045 provide in pertinent part:

> 1043. (a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. . . .
>
> 1045. (a) Nothing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of those investigations, concerning an event or transaction in which the peace officer or custodial officer, as defined in Section 831.5 of the Penal Code, participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties, provided that information is relevant to the subject matter involved in the pending litigation.
>
> (e) The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law.

(Emphasis added.)

The California Public Records Acts (CPRA) (Government Code section 6250, et seq.) provides a process where a member of the public can request to inspect or obtain a copy of a public record. Government Code section 6254, however, provides numerous exemptions from disclosure, including Government Code section 6254(k), which provides:

> Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:
>
> (k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

As Penal Code section 832.7 deems custodial officers personnel records as "confidential," they are exempt from disclosure under the CPRA. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284-1286.) It cannot be used for any other proceeding unless ordered to be disclosed pursuant to Evidence Code section 1043 and 1045. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033.)

Ordinarily, the chief guardians of a custodial officer's personnel file is the custodial officer and the law enforcement agency holding the personnel file. However, when the file is not kept in the custodial officer's personnel file because the charge was not sustained, the chief guardian of the investigative file is the law enforcement agency. In this case, the Department had a right to secure the outstanding copies of the investigative file which were not obtained pursuant to a lawful court order, especially from those which were departmental employees. Additionally, Scott's questions as to who else had copies went to promote its duty to secure these files as confidential, as those individuals also did not obtain the files pursuant to a lawful court order. No interference can be found where Miller and Schiffler did not obtain the investigative file by a lawful court order and the Department had every legitimate business

justification to recover the documents and find out others who also had them. This charge of interference is dismissed.

REMEDY

Section 3541.5(c) of the Educational Employment Relations Act (EERA),[18] incorporated within MMBA section 3509(a) and (b),[19] authorizes PERB:

> to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

It has been found that the County violated MMBA sections 3503 and 3506, and PERB Regulation 32603(a) and (b) by ordering a union activist to disclose the source of information obtained when union representatives were meeting with their attorney and by threatening to withdraw desirable assignments if MCSEA did not withdraw its August 10, 2009 letter to the Sheriff. It is appropriate to order the County to cease and desist from such unlawful conduct. (*Rio Hondo Community College District* (1983) PERB Decision No. 292.)

It is also appropriate that the County be ordered to post a notice incorporating the terms of the order at all locations in the County where notices to public employees are customarily posted for employees represented by MCSEA. Posting such a notice, signed by the authorized agent of the County, will provide employees with notice that the County has acted in an unlawful manner, is being required to cease and desist from such activity, and will comply with the order. It effectuates the purposes of the MMBA that employees be informed of the

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

[19] Section 3509(a) provides that the powers and duties of PERB described in EERA section 3541.3 shall also apply to the MMBA. Section 3509(b) describes the unfair practice jurisdiction of PERB. EERA section 3541.3(i) empowers PERB to investigate unfair practice charges, and to take any action and make determinations as PERB deems necessary to effectuate the policies of this chapter.

resolution of this controversy and the County's readiness to comply with the ordered remedy. (*Placerville Union School District* (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the County of Merced (County) violated the Meyers-Milias-Brown Act (MMBA or Act), Government Code sections 3503 and 3506, and Public Employment Relations Board (PERB) Regulation 32603(a) and (b) (Cal. Code Regs., tit. 8, sec. 31001 et seq.), by interfering with employee rights by ordering a union activist to disclose the source of information obtained when union representatives were meeting with their attorney and by threatening to withdraw desirable assignments if the Merced County Sheriff's Employee Association (MCSEA) did not withdraw its August 10, 2009 letter to the Sheriff. All other allegations are dismissed.

Pursuant to section 3509, subdivision (b) of the Government Code, it hereby is ORDERED that the County, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with employee rights under the MMBA.

2. Denying MCSEA its right to represent bargaining unit members in their employment relations with the County.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the County customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order.

Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on MCSEA.

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, § 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 California Code of Regulations, title 8, section 32135,

subdivision (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).)

Shawn P. Cloughesy
Chief Administrative Law Judge