STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SANTA CLARA COUNTY CORRECTIONAL PEACE OFFICERS' ASSOCIATION, Charging Party, v. COUNTY OF SANTA CLARA, Respondent.	Case No. SF-CE-804-M PERB Decision No. 2539-M October 17, 2017

Appearances: Mastagni Holstedt, APC, by Jeffrey R. A. Edwards, Attorney, for Santa Clara County Correctional Peace Officers' Association; Cheryl A. Stevens, Deputy County Counsel, for County of Santa Clara.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

GREGERSEN, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Santa Clara County Correctional Peace Officers' Association (Association) to a proposed decision by an administrative law judge (ALJ). The complaint alleged that the County of Santa Clara (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by (1) retaliating against Association President Everett Fitzgerald (Fitzgerald) by prohibiting his ability to trade shifts because of his protected activities, and (2) failing or refusing to provide information to the Association regarding a proposed background evaluation process for incumbent correctional officers.[2] The complaint alleged that this conduct

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

[2] The complaint also included the allegation that the County unilaterally changed the work schedules of certain classifications, but the allegation was later withdrawn by the Association.

constituted a violation of MMBA sections 3503, 3505, 3506, 3509, subdivision (b), as well as PERB Regulation 32603, subdivisions (a), (b), and (c).[3]

The Board has reviewed the proposed decision and the record in light of the County's exceptions, the Association's response to the exceptions, and the relevant law. Based on this review, the Board reverses the proposed decision for the reasons discussed below.

BACKGROUND

The County's Division of Corrections is made up primarily of the Main Jail Complex (Main Jail) and the Elmwood Correctional Complex (Elmwood). In each complex, correctional officers (officers) are scheduled to work twelve-hour shifts[4] and split up into four teams (Teams A, B, C, and D). Team A works the day shift Sunday through Tuesday and every other Wednesday. Team B works the day shift Thursday through Saturday and the alternate Wednesday that Team A does not work. Team C works the night shift Sunday through Tuesday and every other Saturday. Team D works the night shift Wednesday through Friday and the alternate Saturday that Team C does not work. Each team is assigned a team sergeant.

Section 7.4 of the Memorandum of Understanding (MOU) between the parties allows officers to trade shifts. It states as follows:

> Personnel within a Department will be allowed to voluntarily exchange days off within a biweekly pay period provided the County does not incur any overtime or additional costs due to the voluntary exchanges. All such voluntary exchanges of days off must have prior administrative review and approval.

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

[4] Each shift is technically twelve hours and fifteen minutes long.

In general, the team sergeant is responsible for approving time off for officers on their designated team. When considering an officer's proposed shift trade, team sergeants are concerned with whether the officer has previously failed to pay back the shift trade and whether the shift trade involves a specialty position such as "visiting" or "control." Typically, when an officer fails to pay the shift trade back, the team performs its duties one officer short that day. An officer's failure to pay a shift trade back a second time generally results in the officer not being allowed to trade shifts. When a shift trade involves a specialty position, team sergeants typically prefer that the two trading officers have the same specialized qualifications.

Fitzgerald is a correctional officer and president of the Association. As the Association President, Fitzgerald testified that he would often trade shifts to gain access to union members on different shifts. During breaks or on lunch, Fitzgerald would talk with members about what was going on and listen to their concerns.

Fitzgerald is also one of the training officers in the specialized "control" unit at Elmwood and receives a salary augmentation for his training duty. Between January 2011 and May 2011, Fitzgerald was assigned to train Officer Grumbos (Grumbos) as a control officer.[5]

Between mid-April and September 2011, the Association and the County were negotiating a successor MOU. In preparation for negotiations, Fitzgerald, in his capacity as Association President, was off work on County/union release time for 240.25 hours from December 2010 to May 15, 2011. Elmwood Captain, Troy Beliveau (Beliveau), received copies of an e-mail authorizing Fitzgerald's use of County/union release time.

[5] According to Fitzgerald's testimony, Training Officer Cooper (Cooper) was also assigned to train Grumbos during this time. In addition, a third officer, Training Officer Hinkle (Hinkle), also performed some training duties.

On May 1, 2011, Fitzgerald requested to trade shifts with another officer, and his request was approved by the team sergeant and a lieutenant. As a result of the trade, Fitzgerald was scheduled to work May 12, 2011. On that day, Fitzgerald worked approximately four hours of his twelve hour shift and then left work for six and one-half hours on union release time. During the time Fitzgerald was on union release time, his team worked with one less officer on duty.

Soon thereafter, Elmwood Administrative Sergeant April McHugh (McHugh) and Assistant Division Lieutenant Kristine Pantiga (Pantiga) were notified that Fitzgerald had failed to complete his May 12, 2011 shift trade and brought the matter to Beliveau. Concerned that Fitzgerald's absences were negatively impacting his team because of his role as a training officer, Beliveau directed McHugh to conduct an audit of Fitzgerald's attendance over the previous six months.

The attendance audit revealed that over six months, Fitzgerald used approximately 140.75 hours of personal/vacation leave, 36.75 hours of sick leave, 18.25 hours of leave without pay, and engaged in 5.5 shift trades. During this same time period, Fitzgerald used approximately 240.75 hours of County/union release time. According to the County, the audit showed that Fitzgerald's total leave, excluding approved union release time, was more than the average officer took off work. As a result of the audit, on May 13, 2011, Beliveau sent an e-mail to the Elmwood sergeants and lieutenants that Fitzgerald would no longer be permitted to trade shifts. According to Beliveau's testimony, he took this prohibitory action against Fitzgerald because Fitzgerald was tasked with training Grumbos, and Grumbos had failed to complete his requisite training in control.

At the end of July 2011, Beliveau was transferred to the Main Jail and Captain Toby Wong (Wong) became the new Elmwood captain. After this change, Fitzgerald asked Pantiga if she would approach Wong about reinstating his ability to trade shifts. After consultation with Wong, Pantiga reinstated Fitzgerald's ability to trade shifts, but warned Fitzgerald that he could not "play games." Fitzgerald was also told he needed to pay back the full shift trade and that he could not intentionally use union release time to circumvent doing so.

THE ALJ'S PROPOSED DECISION

After a hearing on the merits, the ALJ found that Fitzgerald engaged in protected activities by holding his position as the Association President and negotiating a successor MOU on behalf of the Association, and that the County took adverse action against Fitzgerald by imposing a blanket ban on his ability to trade shifts. The ALJ further found it undisputed that Beliveau was aware that Fitzgerald was the Association President and a member of the Association's negotiating team.

Regarding the necessary connection or "nexus" between the adverse action and the protected conduct, the ALJ found that the Association met its burden in demonstrating that the County took adverse action against Fitzgerald because of his protected activity, but that the County did not violate the MMBA because it established that it would have imposed the adverse action even if Fitzgerald had not engaged in protected activity.

Accordingly, the ALJ concluded that the County did not retaliate against Fitzgerald because of his protected activities in violation of MMBA section 3506 and dismissed the complaint and underlying unfair practice charge.

THE ASSOCIATION'S EXCEPTIONS AND RESPONSE

On appeal, the Association raises two issues.[6] First, the Association excepts to the ALJ's determination that the County met its burden to show it would have imposed the adverse action even if Fitzgerald had not engaged in protected activity. According to the Association, the County failed to prove that the reason it issued the blanket ban on Fitzgerald's ability to trade shifts was to conserve his time as a training officer. Second, the Association argues that the ALJ failed to analyze the relevant facts under both a theory of interference as well as retaliation thereby improperly limiting the issue to retaliation only.

DISCUSSION

To demonstrate that an employer discriminated or retaliated against an employee in violation of MMBA section 3506 and PERB Regulation 32603, subdivision (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*).)

1. Protected Activity and Employer Knowledge

MMBA section 3502.1 states in pertinent part:

> No public employee shall be subject to punitive action or denied promotion, or threatened with any such treatment, for the exercise of lawful action as an elected, appointed, or recognized representative of any employee bargaining unit.

[6] The Association does not except to the ALJ's dismissal of the allegation that the County also violated the MMBA by failing or refusing to provide information to the Association. The Board, therefore, affirms this conclusion by the ALJ.

Fitzgerald was the Association President. Pursuant to MMBA section 3502.1, he engaged in protected activity when he lawfully acted in this capacity. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, pp. 16-30.) Fitzgerald was also a member of the Association's negotiation team and actively engaged in negotiations for a successor MOU. Such conduct likewise constituted protected activity. (*Healdsburg Union High School District* (1997) PERB Decision No. 1185, p. 47.)

In addition, Beliveau testified that he was aware that Fitzgerald was the Association President and a member of the Association's negotiating team, a fact the County has not disputed. Therefore, the County had knowledge of Fitzgerald's protected activities.

2. Adverse Action

In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an *adverse impact on the employee's employment*.

(*Newark Unified School District* (1991) PERB Decision No. 864 pp. 11-12, emphasis added, fn. omitted.)

On May 13, 2011, Captain Beliveau sent an e-mail to all sergeants and lieutenants at Elmwood prohibiting Fitzgerald from participating in shift trades. Beliveau's e-mail references no end date and therefore amounts to a blanket ban on Fitzgerald's ability to trade shifts. This restricts an employee from having flexibility in his or her schedule to take time off

if needed by trading with another officer. For an employee with little to no leave credits, the ability to trade shifts becomes the sole method in which that employee can enjoy such flexibility in his or her schedule. In addition, Fitzgerald was arguably denied the benefit secured by section 7.4 of the MOU. As a result, we agree with the ALJ and find that the County took adverse action against Fitzgerald by imposing a blanket ban on his ability to trade shifts.[7]

3. Nexus Between Protected Activity and Adverse Action

"Unlawful motive is the specific nexus required in the establishment of a prima facie case. . . . Unlawful motive can be established by circumstantial evidence and inferred from the record as a whole." (*Trustees of Cal. State Univ. v. Public Employment Relations Bd.* (1992) 6 Cal.App.4th 1107, 1124.) To guide its examination of circumstantial evidence of unlawful motive, PERB has developed a set of "nexus" factors that may be used to establish a prima facie case. Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary 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

[7] Our concurring colleague would find that the County's investigation into Fitzgerald's attendance constituted an adverse action distinct from its decision to prohibit him from engaging in shift trades. While it is correct that PERB has recognized that an employer's investigation of alleged wrongdoing may constitute an adverse action (*State of California (California Department of Youth Authority)* (2000) PERB Decision No. 1403-S; *City of Torrance* (2008) PERB Decision No. 1971-M, p. 16), this issue is not raised by the Association's exceptions and is therefore not properly before us. (PERB Reg. 32300, subd. (c).) Even if this issue were before us, the investigation is not alleged in the complaint as an adverse action, the Association gave no notice to the County that it intended to litigate it as a separate unfair practice, and the parties have not litigated whether the investigation itself was motivated by Fitzgerald's protected activity. As a result, this allegation would not satisfy the unalleged violation test. (See *Fresno County Superior Court* (2008) PERB Decision No. 1942-C.)

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*, *supra*, 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).

Timing

In the instant case, the ban on Fitzgerald's shift trades was issued on May 13, 2011, one day after he had failed to completely "re-pay" a traded shift because he took union release time for part of that shift. Fitzgerald was the Association's President between 2003 and June 2011. At the time the shift trade ban issued, Fitzgerald was actively participating in the parties' negotiations for a successor MOU and serving as Association President. Because Fitzgerald was actively participating in protected activity at the time of the County's adverse action, we find that the timing factor has been met.

Departure from Established Procedures

Additional factors that support a finding of nexus in this case include the County's departure from established procedures and standards when addressing Fitzgerald's failure to complete his shift trade. Customarily, when an employee fails to complete a shift trade, the officer is verbally counseled. Fitzgerald, however, was not provided that opportunity. Instead, he was prohibited from engaging in any shift trade activity indefinitely. Therefore, we conclude that the Association has established an unlawful motive for the County's ban on Fitzgerald's ability to trade shifts.

Affirmative Defense

Once a prima facie case is established, the employer bears the burden of proving it would have taken the adverse action even if the employee had not engaged in protected activity. (*Novato, supra,* PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730 (*Martori Brothers*); *Wright Line, A Div. of Wright Line, Inc.* (1980) 251 NLRB 1083.) Having concluded that the Association met its burden of establishing a prima facie case, it was incumbent on the County to show that it would have issued the shift trade ban on Fitzgerald regardless of his participation in protected activity.

The County identifies three justifications for its decision to ban Fitzgerald's shift trading ability: (1) Fitzgerald's absences were creating a problem with his ability to fulfill his duties as a training officer; (2) Fitzgerald was allegedly abusing the shift trade policy; and (3) Fitzgerald was taking excessive sick leave and personal leave. We address each justification below.

The County first claims that Fitzgerald's absences were interfering with his role as training officer to Grumbos, thereby necessitating Beliveau's ban on Fitzgerald's ability to shift trade. Fitzgerald was the assigned training officer to Grumbos in the Elmwood control unit between January 2011 and May 2011. Fitzgerald, however, was not the only training officer assigned to and/or available to train Grumbos in the control unit. In addition to Fitzgerald, Cooper and Hinkle were also available and, in fact, did participate in the training of Grumbos. Because we find that Fitzgerald was not solely responsible for the training of Grumbos, the evidence does not sufficiently establish how Fitzgerald's absences interfered with Grumbos' training necessitating the ban on Fitzgerald's shift trading ability.

The County also claims that Fitzgerald was abusing the shift trade policy thereby necessitating its ban Fitzgerald's ability to shift trade. However, between the months of December 2010 and May 2011, Fitzgerald only made five shift trades. Of those five shift trades, only one was not paid back in full. Moreover, the County provided nothing in the record to show how five shift trades over a six-month period equates to shift trade abuse. We therefore find no merit to the County's contention that Fitzgerald was abusing the County's shift trade policy justifying the County's blanket ban on Fitzgerald's ability to shift trade.

The County's last claim is that Fitzgerald was taking, on the whole, too much sick leave and personal leave. Over a seven month period, Fitzgerald utilized sick leave three times. In that same period of time, Fitzgerald utilized personal leave nine times, vacation twice and took one-and-a-half days of leave without pay. The County provided no evidence to show that this amount of sick and personal leave used by Fitzgerald was excessive or objected to by County management. During the same time period, Fitzgerald had over twenty instances of union and/or County release time. Beliveau's claim that he did not consider Fitzgerald's use of either type of protected release time when deciding to ban Fitzgerald's shift trading ability is belied by the fact

that a considerable amount of Fitzgerald's time away from work was due to his use of County/union release time, the County cannot then rely solely on Fitzgerald's other time away as justification for its action.

Thus, the record does not support the County's claim that it banned Fitzgerald from engaging in shift trading because his absences were prohibiting him from training Grumbos, or that he was abusing the County's shift trade policy, or that he was taking excessive sick and personal leave. As a result, the County failed to meet its burden in establishing it would have restricted Fitzgerald's shift trading ability notwithstanding his participation in protected activity. We therefore find that the County banned Fitzgerald from participating in shift trading in retaliation for his protected activities, in violation of MMBA section 3506 and PERB Regulation 32603, subdivision (a).

In addition, Fitzgerald's protected activities were in his capacity as an officer of the Association. It is well-settled that retaliating against employees for their conduct as union officers or activists also denies the employee organization its rights to represent employees (*County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M, adopting proposed decision at p. 30; *Newark Unified School District*, *supra*, PERB Decision No. 864, p. 18), although the Board's terminology has varied. Some decisions have described this type of violation as "derivative"[8] or "concurrent,"[9] while others have used

[8] *Yolo County Superintendent of Schools* (1990) PERB Decision No. 838, p. 12; *McFarland Unified School District*, *supra*, PERB Decision No. 786, proposed decision at p. 43; *North Sacramento School District*, *supra*, PERB Decision No. 264, p. 10.

[9] *Oakland Unified School District* (2007) PERB Decision No. 1880, p. 19; *State of California (Department of Transportation)*, *supra*, PERB Decision No. 459-S, proposed decision at p. 52; *San Joaquin Delta Community College District* (1982) PERB Decision No. 261, p. 9; *Santa Monica Unified School District* (1980) PERB Decision No. 147, p. 2.

neither term.[10] Many have found such a violation without any analysis or citation.[11] Regardless of vocabulary, however, these cases recognize (either explicitly or implicitly) that such retaliatory conduct undermines the employee organization's rights just as surely as it does the employee's.

We note that a few Board decisions have held that retaliation against a union officer or activist is not a violation of the union's rights unless there is a showing of impact on the union. For instance, in *Novato Unified School District*, *supra,* PERB Decision No. 210, the Board rejected the proposition that "reprisals against an employee acting as a grievance representative inherently, and therefore concurrently, deny an employee organization the right to represent its members." (*Id.* at p. 21.) Similar conclusions were reached in *Alisal Union Elementary School District* (2000) PERB Decision No. 1412, *Pleasant Valley School District* (1988) PERB Decision No. 708, and *State of California (Department of Parks and Recreation), supra,* PERB Decision No. 328-S. We believe these cases take too narrow a view of the employee

[10] *Empire Union School District* (2004) PERB Decision No. 1650, proposed decision at p. 57; *Regents of the University of California* (1998) PERB Decision No. 1263-H, adopting proposed decision at p. 73; *Livingston Union School District* (1992) PERB Decision No. 965, proposed decision at p. 37; *El Dorado Union High School District* (1986) PERB Decision No. 564, p. 31.

[11] *Palo Verde Unified School District* (2013) PERB Decision No. 2337, adopting proposed decision at p. 22; *Escondido Union Elementary School District* (2009) PERB Decision No. 2019, p. 31; *Baker Valley Unified School District* (2008) PERB Decision No. 1993, p. 16; *City of Torrance*, *supra,* PERB Decision No. 1971-M, p. 30; *Jurupa Community Services District*, *supra*, PERB Decision No. 1920-M, adopting proposed decision at p. 21; *Simi Valley Unified School District* (2004) PERB Decision No. 1714, p. 18; *State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S, adopting proposed decision at p. 48; *Mountain Empire Unified School District* (1998) PERB Decision No. 1298, adopting proposed decision at p. 36; *The Regents of the University of California* (1997) PERB Decision No. 1188-H, p. 29; *Trustees of the California State University* (1990) PERB Decision No. 805-H, p. 29; *Rancho Santiago Community College District* (1986) PERB Decision No. 602, pp. 14-15; *Santa Paula School District* (1985) PERB Decision No. 505, proposed decision at p. 54.

organization's rights to act through its officers and members, and we hereby disapprove of them on this point as contrary to the overwhelming weight of PERB case law on this issue.

Therefore, we find that the County's retaliatory conduct for Fitzgerald's protected activities also denies the Association its rights under MMBA section 3503 and violates PERB Regulation 32603, subdivision (b).[12]

Interference with Access to Employees

The Association also asks the Board to find that the County additionally violated the MMBA by interfering with the Association's access to members before shifts and on break periods by banning Fitzgerald from trading shifts. The Association states that this allegation was contained in paragraph 18[13] of the relevant complaint, which alleges that the County interfered with the union's right to represent its members in violation of MMBA section 3503 and is an unfair practice under section 3509, subdivision (b), and PERB Regulation 32603, subdivision (b). According to the Association paragraph 18 constitutes a separate and independent unfair practice that the ALJ was required to address. We disagree. "A respondent is entitled to notice of the issues in dispute, so that it can preserve documents and secure witnesses, or expect repose as to those unfair practice allegations that are dismissed, withdrawn, abandoned or otherwise disposed of during the Office of the General Counsel's investigation." (*City of Roseville* (2016) PERB Decision No. 2505-M, p. 15.) "Identifying the

[12] It is not necessary to resolve in this case whether such violations are properly viewed as "concurrent" or "derivative." In either event, we do not view this violation as "lesser included." It is dependent on an underlying finding of retaliation, but this does not mean that the harm to the employee organization's rights is less important than the harm to employee rights.

[13] In its statement of exceptions, the Association references paragraph 19 of the complaint. Since no paragraph 19 exists, we assume the Association intended to instead reference paragraph 18.

essential factual allegations and the theories of liability in a complaint is necessary to provide adequate notice and ensure a full and fair adjudication of the issues, including an opportunity for the respondent to raise any affirmative defenses specific to each theory of liability." (*Id.* at pp. 15-16.)

We conclude that the complaint did not place the County on notice of an allegation that it interfered with the Association's rights to communicate with its members. Paragraph 17 of the complaint alleges that the County took the adverse action of directing that Fitzgerald no longer be approved for requests to trade shifts with other employees "because of [Fitzgerald's protected activities], and thus violated [MMBA] section 3506 and committed an unfair practice under MMBA section 3509[, subdivision] (b) and PERB Regulation 32603[, subdivision] (a)." Paragraph 18 of the complaint alleges: "This conduct also interfered with Charging Party's right to represent employees in violation of Government Code section 3503 and is an unfair practice under Government Code section 3509[, subdivision] (b) and PERB Regulation 32603[, subdivision] (b)." Because "[t]his conduct" logically refers back to the retaliation allegation in paragraph 17, and because there are no additional allegations regarding the Association's right to communicate with its members, we do not view paragraph 18 as setting forth an independent interference allegation. Rather, it is the type of allegation—sometimes referred to as "derivative," sometimes as "concurrent," sometimes as neither—that is commonly found when an employer has retaliated against a union officer or activist, as we have done above.

The concurrence expresses concern that this conclusion creates obstacles for the Board to consider an allegation the Office of the General Counsel "has determined should be litigated." (Concurrence, p. 38.) We disagree. Paragraph 18 alleges a violation of the Association's rights that is predicated solely on a finding that the County retaliated against

Fitzgerald for protected activity. Paragraph 18 does *not* allege a violation predicated on the fact that Fitzgerald used shift trades to communicate with Association members on behalf of the Association. That fact was not alleged in the Association's charge or its amended charge. It was first raised at the formal hearing before the ALJ. For this reason, we do not see how the Office of the General Counsel could possibly have determined that such an allegation should be litigated in this case.

Because we find nothing else in the complaint alleging interference with the Association's right to communicate with members as a result of the County's actions against Fitzgerald, we may consider this allegation only if it satisfies the unalleged violation test. This test is met when: "(1) adequate notice and opportunity to defend has been provided [to] the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on this issue." (*Fresno County Superior Court*, *supra*, PERB Decision No. 1942-C.) The alleged violation also must have occurred within the applicable statute of limitations period. (*Ibid*.) For the following reasons, we find that the Board may consider the unalleged interference violation in this case.

Though the complaint did not allege a separate allegation that the County interfered with the Association's ability to communicate with its members, the County had adequate notice and opportunity to defend an interference allegation. In addition to simultaneously-filed post-hearing briefs, the parties were afforded the opportunity to file reply briefs to the ALJ. In both the Association's post-hearing brief and reply brief, the Association argued that denying Fitzgerald's shift trades independently interfered with the Association's ability to communicate with its members. In its reply brief, the County did not argue to the ALJ that this was an

unalleged violation, but instead responded to the merits of the Association's interference argument. Accordingly, the County had adequate notice and opportunity to defend against a separate interference allegation.

As for the remainder of the unalleged violation test, the independent interference allegation involves the same conduct that gave rise to the retaliation allegation in the complaint. Both parties provided testimony regarding the purpose of Fitzgerald's shift trading: the Association presented testimony regarding the benefit of Fitzgerald being able to communicate with other bargaining unit members on other teams, and the County cross-examined Fitzgerald on whether communicating with members was the main reason for Fitzgerald's shift trades, or merely a side benefit. Finally, because both the retaliation and interference allegations arise from the same set of facts, and the retaliation allegation was timely, the interference allegation is also timely.

Interference

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 results from the conduct. 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 Assn. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807.)

The MMBA grants a recognized employee organization a right of access to a public agency's facilities for the purpose of communicating with employees subject to reasonable

regulation by the public agency. (*Omnitrans* (2009) PERB Decision No. 2030-M.) Likewise, employees have a protected right to engage in union activity in non-work areas during non-working time. (*State of California (Employment Development Department)* (1999) PERB Decision No. 1365-S.) According to testimony, shift trades were an opportunity for Fitzgerald, in his capacity as Association President, to contact union members he did not interact with on a regular basis. During breaks or on lunch, Fitzgerald would talk to bargaining unit members about union business. Therefore, the Association, through its President, Fitzgerald, and the officers with whom he spoke when he traded shifts, had a protected right to discuss union matters during non-working time. (*Omnitrans, supra, at p. 22.)* By prohibiting Fitzgerald from trading shifts, the County impeded both his and the Association's ability to communicate with employees working on other shifts. This resulted in at least "slight harm" to employee and Association rights for the purposes of the interference analysis.

If the harm to protected rights is slight and the employer offers justification based on operational necessity, the competing interests are balanced. (*Carlsbad Unified School District* (1979) PERB Decision No. 89.) However, no such balancing is required in this instance. Consistent with our earlier discussion and rejection of the County's affirmative defense to the retaliation charge, the County has provided no justification for its decision to ban Fitzgerald from trading shifts. As a result, the County's conduct in denying Fitzgerald's ability to trade shifts interfered with, or tended to interfere with, both the Association's and employees' rights under the MMBA.

We therefore find that the County's conduct in denying Fitzgerald's ability to trade shifts independently interfered with employee rights in violation of MMBA section 3506 and PERB Regulation 32603, subdivision (a). By the same conduct, the County denied the

Association the right to represent its members in violation of MMBA section 3503 and PERB Regulation 32603, subdivision (b).

ORDER

Upon the findings of fact and conclusions of law herein, and the entire record in the case, it is found that the County of Santa Clara (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3509, subdivision (b), and 3506 and Public Employment Relations Board (PERB) Regulation 32603, subdivisions (a) and (b) (Cal. Code Regs., tit. 8, § 31001 et seq.), by retaliating against Officer Everett Fitzgerald (Fitzgerald) for engaging in protected activity by interfering with his protected employee rights under the MMBA, and by denying the Santa Clara County Correctional Peace Officers' Association (Association) its right to represent its member in their employment relations with the County.

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

A. CEASE AND DESIST FROM:

1. Retaliating against employees in retaliation for their engagement in protected activity.

2. Interfering with employee rights.

3. Denying recognized employee organizations the right to represent their members.

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

1. Rescind the May 13, 2011, e-mail prohibiting Fitzgerald's ability to trade shifts, and remove all copies of the e-mail from Fitzgerald's personnel file.

2. 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 are customarily 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. 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 bargaining unit represented by the Association. (*City of Sacramento* (2013) PERB Decision No. 2351-M.) Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. 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. 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 the Association.

Member Winslow joined in this Decision.

Member Banks' concurrence begins on page 21.

BANKS, Member, concurring: I agree with the majority that the County of Santa Clara (County) violated the Meyers-Milias-Brown Act (MMBA) by discriminating in terms and conditions of employment against Correctional Officer Everett Fitzgerald (Fitzgerald) because of his protected activity as President of the Santa Clara County Correctional Peace Officers' Association (Association). The County subjected Fitzgerald to closer scrutiny and launched an investigation into his attendance, including the number of times he traded shifts with other employees, an established practice and contractual right among employees in Fitzgerald's unit, because of Fitzgerald's contemporaneous use of union released time to fulfil his duties as the Association's President. Additionally, the record demonstrates that the County, by its agent Captain Troy Beliveau (Beliveau), restricted Fitzgerald's ability to trade shifts with other employees because of his protected activity on behalf of the Association.[1]

Although I agree with the majority that this conduct also violated MMBA section 3503 and PERB Regulations by interfering with the Association's right to represent employees, I would conclude that, by denying Fitzgerald, *in his capacity as the Association President*, the opportunity to trade shifts to communicate the Association's message with employees on other shifts, the County *concurrently* interfered with organizational and employee rights guaranteed

[1] While the majority decision does not clearly distinguish between the County's *investigation* into Fitzgerald's attendance, and its subsequent *denial* on his use of so-called shift trades, our case law recognizes *both* forms of conduct as adverse actions. For investigation cases, see, e.g., *Regents of the University of California (Irvine)* (2016) PERB Decision No. 2493-H, pages 36-37 (investigation into alleged wrongdoing constitutes adverse action, even when no discipline results) and *City of Torrance* (2008) PERB Decision No. 1971-M, page 16 (same). For cases involving the denial of a leave request or eliminating flexibility in employee schedules, see *City of Davis* (2016) PERB Decision No. 2494-M, pp. 35-36; *City of Oakland* (2014) PERB Decision No. 2387-M, p. 37; and, *Regents of the University of California* (1984) PERB Decision No. 403-H; see also *Omnitrans* (2010) PERB Decision No. 2121-M, p. 10 (discipline resulting from employee's use of union released time). Thus, while I agree with the majority that the County unlawfully discriminated against Fitzgerald, unlike the majority, I believe the record supports *two* separate instances of employer discrimination in this case.

by the MMBA. Additionally, because the organizational right of access logically and necessarily includes a protected right of the employee organization to communicate with its members in the workplace, the County's unjustified restriction on Fitzgerald's ability to use shift trades to communicate with bargaining-unit employees on behalf of the Association concurrently interfered with the Association's right to access and communicate with employees. (MMBA, §§ 3503, 3506.5, subd. (b).)

I do not agree with the majority's characterization of this interference violation as "derivative" of the discrimination allegation involving Fitzgerald as an employee. While the same set of facts may constitute more than one unfair labor practice, there is no reason to assume that one violation is "derivative" of the other, when the two allegations involve separate statutory provisions and/or are analyzed under different tests, as is the case here. As pointed out by the Association's statement of exceptions, because PERB typically analyzes interference allegations under a different standard than that used for employer discrimination, the County's liability for interference with protected rights does not depend on the outcome of the discrimination allegation, as the majority seems to conclude. In short, different does not necessarily mean lesser included or "derivative."

Nor do I agree with the majority's discussion of an unalleged violation, also involving interference with organizational rights, which, I believe, stems from the majority's misreading of the Association's exceptions. There is one interference allegation at issue in this case. Because it is expressly set forth in paragraph 18 of the complaint, there is no need to resort to PERB's unalleged violations doctrine.

I write separately to explain why this seemingly arcane procedural debate nonetheless raises significant issues affecting access to the Board's administrative process to resolve unfair labor practice allegations. As explained below, I believe the majority's resort to the unalleged

violations doctrine in the present circumstances is contrary to the language and purpose of the MMBA and other PERB-administered statutes, which recognize an independent statutory right of employee organizations to represent employees, and which do not regard these organizational rights as derivative of employee rights.

FACTUAL AND PROCEDURAL BACKGROUND

Paragraph 14 of the PERB complaint alleges that Fitzgerald is a public employee within the meaning of the MMBA and within PERB's jurisdiction. Paragraph 15 alleges that Fitzgerald exercised rights guaranteed by the MMBA by serving as President, a position whose duties included meeting and conferring with the employer on behalf of the Association. Paragraph 16 alleges that on or about May 16, 2011, the County, through its agent, Beliveau, took adverse action against Fitzgerald by directing that Fitzgerald's requests to trade shifts with other employees (day trades) no longer be approved. Paragraph 17 alleges that the County "took the actions described in paragraph 16 because of the employee's activities described in paragraph 15," and thus violated MMBA sections 3506 and 3509, subdivision (b), and PERB Regulation 32603, subdivision (a).

Paragraph 18 alleges that the County's conduct, as described above, also interfered with the Association's right to represent employees, in violation of MMBA section 3503 and PERB Regulation 32603, subdivision (b). Thus, on its face, the complaint alleges that the County interfered with the Association's right to represent employees. The word "derivative" does not appear in paragraph 18, nor anywhere else in the complaint, and there is no other language suggesting that paragraph 18's interference with organizational rights allegation in any way depends on finding that the County also discriminated against Fitzgerald in his capacity as an employee, as is alleged in paragraph 17.

After concluding that the County had met its burden of showing that it would have taken adverse action against Fitzgerald, regardless of his protected activity, the proposed decision dismissed the discrimination allegation. The administrative law judge (ALJ) also dismissed the interference allegation without, however, identifying or analyzing the relevant facts for this allegation under the test for interference announced in *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*) and later applied to alleged violations of organizational rights. (See, e.g., *County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, p. 37; *County of Riverside* (2010) PERB Decision No. 2119-M, pp. 16-23.)

The Association filed a statement of exceptions and supporting brief with the Board. In relevant part, the Association argues that the ALJ erred by dismissing the interference allegation without analysis or explanation. The Association does not contend that, by discriminating in terms and conditions of employment against Fitzgerald, in his capacity as an employee, the County necessarily or "derivatively" interfered with organizational rights. Rather, the Association argues that, because PERB uses different standards for analyzing interference and discrimination allegations, the Association "does not need to win the retaliation issue to prevail on the interference issue," regardless of whether the two allegations arise from the same nucleus of facts. That is, if the County's conduct unjustifiably tended to interfere with, restrain or coerce Fitzgerald in the exercise of his rights as the Association President, then it separately violated the MMBA's prohibition against interfering with organizational rights, regardless of whether this same conduct constituted discrimination against Fitzgerald, in his capacity as an employee of the County.

DISCUSSION

According to the complaint, the discrimination and interference allegations in paragraphs 17 and 18 arise from the same employer conduct. The majority reasons that the

interference allegation must therefore be "derivative" of the discrimination allegation. I find this reasoning unpersuasive and its implications troubling for several reasons.

Organizational Rights are Separate and Independent, and Not Derivative of Employee Rights

First, the majority's characterization of paragraph 18 as "derivative" is contrary to the statutory language and the Legislature's deliberate policy choice to guarantee certain rights to employee organizations. The PERB-administered statutes "contain express reference to access rights [of employee organizations] and express a common legislative purpose to promote communications and improve employer-employee relations between public employers and their employees through recognition of the employees' right to join *and be represented by employee organizations*." (*Regents of the University of California* (2012) PERB Decision No. 2300-H (*Regents*), pp. 18-19, fn. 6; *County of Riverside* (2012) PERB Decision No. 2233-M, pp. 7-8.) Even where a statute contains no explicit reference to organizational access rights, the Board has concluded that, "The right of employees to join and participate in an employee organization of their choice necessarily implies that organizations have the right to communicate with employees and members at their work site, where they are generally most accessible." (*State of California (California Department of Corrections)* (1980) PERB Decision No. 127-S, p. 5.) Moreover, "[a]ccess to employees to facilitate an exchange of information is clearly a threshold concern not only in an organizing campaign but during the course of the ongoing relationship between the employee organization and its members." (*Ibid*.; see also *State of California (Department of Parks and Recreation)* (1993) PERB Decision No. 1026-S, p. 5; *Regents, supra*, PERB Decision No. 2300-H, p. 19; *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, pp. 44-45, and numerous authorities cited therein.) Given the significance the Legislature has assigned to the rights of employee organizations to represent employees, including the rights to access and communicate

with employees in the workplace, the majority's treatment of these rights as "derivative" of Fitzgerald's right, as an employee, to be free from employer discrimination seems questionable at best.

In fact, the term *derivative violation* appears nowhere in any of the PERB-administered statutes, nor in our Regulations, and apparently stems from federal practice and procedure before the National Labor Relations Board (NLRB) and the federal courts. Section 8(a)(1) of the National Labor Relations Act (NLRA)[2] makes it an unfair labor practice for an employer to "interfere with, restrain or coerce" employees in the exercise of protected rights. Since its earliest days, the NLRB has treated section 8(a)(1) violations as either independent or derivative, depending upon whether the conduct at issue violates only section 8(a)(1), or whether it also violates one of the other employer unfair labor practice provisions found in section 8(a)(2), (3), (4) or (5). (Higgins, *Developing Labor Law*, Sixth Ed. Ch. 6.I.C.1 and 2.)[3]

In this respect, federal law treats *every* employer unfair labor practice as a section 8(a)(1) violation, either as an independent violation, or as something akin to a "lesser included" offense in criminal law. (*Ibid*.; see also *Placerville Union School District* (1978) PERB Decision No. 69 (*Placerville*), p. 10, fn. 9, overruled by *San Francisco Community College District* (1979) PERB Decision No. 105 (*San Francisco*); and, LEGAL-ELEMENTS TEST, Black's Law Dictionary (10th ed. 2014).) As suggested by the term *derivative*, unless employer conduct

[2] The NLRA is codified at 29 U.S.C. section 151.

[3] NLRA section 8(a)(2) makes it unlawful for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it," subject to certain exceptions. Section 8(a)(3) prohibits employer discrimination "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(4) makes it unlawful for an employer "to discharge or otherwise discriminate against an employee" for participation in the NLRB's administrative process. Section 8(a)(5) makes it unlawful for an employer to "refuse to bargain collectively with the representatives of [its] employees."

constitutes an independent interference, restraint or coercion violation, as determined by decisional law, the section 8(a)(1) violation derives from or depends on finding a violation of one of the other employer unfair labor practice provisions in section 8(a) of the NLRA.

Although the California Legislature drew much of its inspiration from the federal statute when drafting the MMBA and other PERB-administered statutes, our cases have repeatedly emphasized that the access, released time and organizational right to represent employees in their employment relations guaranteed by the PERB-administered statutes, have no analog in the federal statute. (*County of Riverside, supra,* PERB Decision No. 2233-M, pp. 7-8; see also *Regents of the University of California, supra,* PERB Decision No. 2300-H, pp. 18-19, fn. 6, and cases cited therein.) To the extent such organizational rights are recognized under federal law, it is generally because the decisional law of the NLRB and the federal courts have determined that such rights are implied by and derive from the employee rights expressly guaranteed by section 7 of the NLRA.[4]

Unlike the NLRA, however, which makes every employer unfair labor practice a violation of section 8(a)(1) (interference, restraint or coercion in the exercise of employee rights) and potentially a derivative violation of other employer unfair labor practice provisions, when drafting the PERB-administered statutes, the California Legislature chose to include language

[4] Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

protecting *organizational* rights by making interference with such rights separate and independent unfair labor practices. As we noted in *Capistrano Unified School District* (2015) PERB Decision No. 2440, federal law is illustrative but not exhaustive of the representational rights of employees under California law and federal authorities offer no guidance whatsoever regarding the separate statutory right of employee organizations to represent employees, which has no counterpart in the NLRA. (*Id*. at p. 29, fn. 15.)

MMBA section 3503 expressly guarantees an *independent*, statutory right of employee organizations to represent employees, and when read in conjunction with MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivision (b), the MMBA makes employer interference with this right an unfair labor practice, regardless of whether other rights were also violated. Thus, the majority's characterization of the Association's right to represent employees as "derivative" of other allegations in the complaint appears to rely on a statutory scheme under federal labor law, but one which the California Legislature has expressly and repeatedly rejected.[5] Other than its observation that the discrimination and interference allegations in paragraphs 17 and 18 rely on the same conduct, the majority offers no explanation for its characterization of the interference allegation as "derivative," nor any attempt to reconcile this conclusion with the language and purpose of the independent organizational rights guaranteed by the MMBA and other PERB-administered statutes.

[5] In addition to MMBA 3506.5, subd. (b), see also section 3543.1 (organizational rights under EERA); sections 3568, 3569 (access and released time provisions under HEERA); section 3515 (organizational rights under Dills Act); section 71815 (organizational rights under the Trial Court Interpreter Act); section 71633 (recognized employee organization's right to represent under the Trial Court Act). (Respectively, these Acts are codified as follows: the Educational Employment Relations Act (EERA), § 3540 et seq.; the Higher Education Employer-Employee Relations Act (HEERA), § 3560 et seq.; the Ralph C. Dills Act (Dills Act), § 3512; the Trial Court Interpreter Employment and Labor Relations Act (Trial Court Interpreter Act), § 71800; and the Trial Court Employment Protection and Governance Act (Trial Court Act), § 71600.)

The Complaint Does Not Support the Majority's View that Interference with the Association's Rights is Derivative of the County's Discrimination against Fitzgerald

Second, the complaint does not use the word "derivative" or otherwise designate paragraph 18's interference allegation as different in any respect from any other allegation in the complaint. In the absence of such designation, the majority should explain how it has determined that the interference allegation in paragraph 18 is derivative, since that is the sole justification offered by the majority for requiring the Association to meet the more stringent requirements of the unalleged violations doctrine, simply to have this allegation considered. The fact that the interference and discrimination allegations may rely on the same nucleus of factual allegations does not make the interference allegation derivative, since, based on the language of the complaint, one might just as easily ask why the violation of employee rights in paragraph 17 is not derivative of the County's interference with organizational rights, since the "'natural and foreseeable consequence' of permitting an employer to discriminate against employee representatives is an inevitable chilling effect upon the rights of *all* employees." (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, pp. 17, 23, italics in original.) Or, better still, why either allegation should depend on the outcome of the other, since they rely on different rights guaranteed by separate provisions of the statute.

Although the underlying policy concern in discrimination or reprisal cases is to protect statutory rights, by ensuring that employees will not suffer a loss of pay, benefits or other objectively adverse working conditions because of their exercise of protected rights (see, e.g., *California State University, Hayward* (1982) PERB Decision No. 231-H, adopting proposed decision as modified at p. 19), the immediate focus in a *Novato* analysis is on the objective harm done to employment conditions, such as an employee's pay, benefits, working conditions, etc. (*Palo Verde Unified School District* (1988) PERB Decision No. 689

(*Palo Verde*), p. 12; *Newark Unified School District* (1991) PERB Decision No. 864 (*Newark*), pp. 11-12.) In this case, the adverse action was to investigate and then deny Fitzgerald a negotiated benefit, the opportunity to trade shifts with other employees.

By contrast, the focus of an interference allegation is on the actual or reasonably likely harm done *to statutory rights*, which may be either the rights of employees, or an employee organization, or both. (*Carlsbad, supra*, PERB Decision No. 89, p. 10 [employer conduct that tends to or does result in some harm to employee rights]; *County of San Bernardino (Office of the Public Defender), supra*, PERB Decision No. 2423-M, p. 55 [policy prohibiting exclusive representative from representing employees in investigative meetings inherently destructive of organizational rights]; *County of Riverside, supra*, PERB Decision No. 2119-M, pp. 20-21, 23 [same test applicable for interference with employee or organizational rights].)

In this case, the harm alleged in paragraph 18 is that of an employee organization's access to and ability to communicate with its members in the workplace. Without explanation, the majority concludes that, in addition to discriminating against Fitzgerald as an employee, "[b]y the same conduct, the County denied the Association the right to represent its members, in violation of MMBA section 3503 and PERB Regulation 32603, subdivision (b)." However, it then inexplicably concludes that the plain language of paragraph 18 does *not* encompass the County's act of preventing Fitzgerald, in his capacity as the Association's representative, from speaking with employees on other shifts about union matters. I am at a loss, however, to understand how the County's interference with these rights logically derives from its discrimination against Fitzgerald, in his capacity as an employee and, I fear, that the matter will likewise cause confusion among the parties, PERB staff and, our constituency.

Suppose, for example, that the Association had failed to prove one or more elements of the prima facie discrimination case, or that the County had prevailed on its affirmative defense

that it would have investigated Fitzgerald's leave usage and prohibited him from trading shifts with other employees regardless of any protected activity. Under the majority's reasoning, the allegation in paragraph 18 must necessarily fail as well, because without the discrimination violation, there can be no "derivative" interference with the Association's rights to access and communicate with bargaining-unit employees. Clearly, that is not the law. In cases of alleged interference, a violation will be found when the employer's conduct interferes with the exercise of protected rights, and the employer is unable to justify its actions by proving operational necessity. (*Carlsbad, supra*, PERB Decision No. 89, p. 10; *State of California (Department of Parks and Recreation), supra,* PERB Decision No. 1026-S, p. 4.)[6] This is true, regardless of whether there are any "independent facts" supporting the interference violation or whether it relies on the same conduct constituting another employer unfair labor practice in the same matter. (*Sonoma County Superior Court* (2017) PERB Decision No. 2532-C, pp. 33-34.)

As the Association correctly points out, because the tests for discrimination and interference are different, the Association "does not need to win the retaliation issue to prevail on the interference issue." In any event the elements of interference and discrimination allegations, as developed under PERB's case law, are sufficiently different such that one is not logically or necessarily derivative of the other, and certainly there is nothing in the language of the complaint to indicate as much.

[6] Although earlier Board decisions suggested that the standard for evaluating harm to protected rights may be more stringent for organizational as opposed to employee rights (*State of California (Franchise Tax Board)* (1992) PERB Decision No. 954-S, p. 4 ["actual" harm required]), the Board has since repudiated that view and the test is now the same, regardless of whether the protected rights at issue are those of employees, employee organizations or both. (*County of Riverside, supra,* PERB Decision No. 2119-M, pp. 20-21, 23; *County of Sacramento* (2014) PERB Decision No. 2393-M, p. 33.)

PERB Does Not Automatically Treat Employer Interference as Derivative of Other Violations

Third, the majority's characterization of the interference allegation in paragraph 18 as *derivative* is contrary to Board precedent. In *San Francisco. supra,* PERB Decision No. 105, the Board concluded that the employer had violated section 3543.5, subdivision (c), of EERA by failing to meet and negotiate with the exclusive representative before making changes affecting negotiable subjects. The Board also held that this conduct "*concurrently* violated section 3543.5(b) by denying the Federation its statutory right as an exclusive representative to represent unit members in their employment relations with the District." (*Id*. at p. 19, emphasis added.)

Use of the word "concurrently" was a deliberate choice. The Board explained that, in holding that the employer "concurrently" violated separate provisions of the statute, it disapproved of the logic expressed in *Placerville, supra,* PERB Decision No. 69, in which the Board had found it unnecessary to find a section 3543.5, subdivision (b), violation in addition to a section 3543.5, subdivision (c), violation because such a finding would, according to the *Placerville* Board, not afford the charging party additional relief from PERB. In rejecting this reasoning, the *San Francisco* Board explained that, "Separate cease and desist orders are separate remedies, even when each is directed at the same employer conduct." (*Id*. at p. 19.)

After discussing the *concurrent* violation of organizational rights, the *San Francisco* decision then concluded that *the same employer conduct* also interfered with employees' rights under *Carlsbad, supra,* PERB Decision No. 89. The Board's discussion of this point is also instructive for the present case, as it noted that the employer's conduct constituted "at least slight harm" to the employees' right to bargain collectively with the employer through their designated representative, and that the employer had failed to offer a legitimate business purpose for its conduct. The Board's application of each step of the *Carlsbad* test indicates

that, even if interference with employee rights was a necessary consequence of a unilateral change, the Board did not regard the subdivision (a) (interference with employee rights) violation as merely derivative of the bargaining violation. (*Id*. at pp. 19-20.) That is, if the subdivision (a) violation were simply a derivative or a lesser-included allegation, then there would have been no need for the Board to discuss and apply the specific elements of the *Carlsbad* test. If there were any doubt remaining on the point, the Board concluded its discussion of the concurrent violations of subdivisions (b) and (a) by observing: "Where the same employer conduct concurrently violates more than one unfair practice provision, it is the duty of the Board to find more than one violation." (*Id*. at p. 19.) This same language from *San Francisco* was later quoted, with approval, in *State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S at page 15.

The majority agrees with me that PERB has not always been consistent in its treatment of what is a concurrent or derivative violation. However, it neglects to mention *County of Sacramento, supra*, PERB Decision No. 2393-M, the most recent discussion of this issue, where the Board concluded that an employer's rule prohibiting employees from wearing a union logo on buttons or clothing in the workplace constituted *concurrent* violations of subdivisions (a) and (b) of the MMBA. The Board reasoned that this restriction both interfered with employees' right to self-organization and communication with one another in the workplace, and with the exclusive representative's presumptive right of access and need to communicate with the employees it represents. (*Id.* at p. 33.) The Board explained that the union had "just as much an interest in having its logo worn as the bargaining unit employees have in wearing it" and, consequently, that "[t]he harm to employees' protected rights and the harm to employee organizations' protected rights are inseparable in this factual setting." (*Ibid*.) It also noted that, in other facts and circumstances, the Board would have to determine, rather than assume, the

proper relationship between an (a) and (b) violation, based on the relative harm to employee and organizational interests. (*Id*. at p. 33, fn. 36.)

County of Sacramento also rejected older cases, such as *State of California (Franchise Tax Board), supra,* PERB Decision No. 954-S, which had held that no violation of organizational rights would be sustained without proof of actual harm, as opposed to the *Carlsbad* standard, i.e., reasonably likely harm that could result from the employer's conduct. (*Id*. at p. 33; see also *County of Riverside*, *supra,* PERB Decision No. 2119-M [applying same standard for interference with employee and organizational rights].) Thus, *County of Sacramento* includes two holdings which, when read together, seem contrary to the reasoning and conclusions of the majority opinion. First, the same operative set of facts may constitute separate and independent, i.e., *concurrent,* violations of the protected rights of employees and employee organizations. Second, whether one violation is independent or derivative of another is not subject to a one-size-fits-all rule, but must be determined on the facts of each case, including whether the harm or likely harm stemming from the employer's conduct affects employee rights or organizational rights predominantly, or both in relatively equal degree.

In light of *County of Sacramento,* I am not convinced by the majority's assertion that the subdivision (b) allegation included in paragraph 18 of the complaint is necessarily derivative of the allegation encompassed by paragraph 17, since the same operative set of facts may establish *both* discrimination and interference (either with employee or organizational rights). (*Id*. at p. 33; see also *State of California (Dept. of Corrections & Rehabilitation), supra,* PERB Decision No. 2282-S, p. 15.) In particular, the majority does not address *County of Sacramento*, the controlling authority on the subject, or attempt to distinguish it and other cases, such as *San Francisco,* from the facts of this case.

The Record Does Not Indicate that the County's Interference with Organizational Rights was Derivative of its Discrimination Against Fitzgerald

Fourth, the majority's reasoning is undermined by the record in this case. To assert, without further explanation or discussion, that the County's interference with the Association's rights of access to and to communicate with its members in the workplace is derivative of its discriminatory denial of Fitzgerald's right, as an employee, to trade shifts with other employees seems to miss the point. According to the undisputed evidence, Fitzgerald's purpose in trading shifts was not to satisfy his personal desire for a change of scenery, but to serve as the Association's representative and to interact with members with whom he did not have contact with on a regular basis. I do not wish to diminish in any way the harm suffered by Fitzgerald, as an employee, through the loss of a contractual right, and, as I've indicated, I agree with the majority's conclusion that the County discriminated against him, as an employee, by taking actions that were objectively adverse to his working conditions because of his protected activity.

However, in the grand scheme of things, the County's discrimination against Fitzgerald's working conditions seems to me to pale in comparison to the harm to organizational rights and to the rights of other employees caused by the County denying Fitzgerald, in his capacity as Association President, the ability to contact unit members and spread the Association's message. Applying the logic of *County of Sacramento*, I would conclude that the harm done here to organizational rights was at least equal to, if not greater than, the harm done to Fitzgerald's rights as an employee, and that it is not only contrary to the statute, and decisional law but also the record evidence to conclude that the subdivision (b) violation alleged in the complaint is "derivative" of the County's discrimination violation.

The Majority's Reasoning Unnecessarily Limits Parties' Access to the Board's Processes

Finally, in addition to its confusing and unsupported characterization of paragraph 18's interference allegation as derivative, I disagree with the majority's resort to PERB's unalleged violations doctrine to address what appears to me to be the same allegation asserted in the Association's statement of exceptions. My disagreement with the majority over this procedural issue may, at first blush, appear academic, particularly where the majority goes on to find a violation of the "unalleged" matter. However, I am concerned that the majority's reasoning will be applied to future cases, thereby impeding the ability of the Board and its agents to consider allegations that, like the Association's interference allegation, are clearly encompassed by the plain language of a PERB complaint.

The Board and its agents determine the legal issues to be considered in unfair practice proceedings. (*Barstow Unified School District* (1996) PERB Decision No. 1138, p. 10.) Issuance of a complaint by the Office of the General Counsel signifies that the dispute is not only one that the charging party wishes to pursue, but also one that the agency has determined should be pursued. (*County of Fresno* (2014) PERB Decision No. 2352-M, p. 4.)

Unlike matters alleged in a complaint, Board consideration of unalleged matters requires the charging party to show that the respondent had notice and opportunity to examine witnesses on the subject, that the conduct at issue is intimately related to the subject matter of the complaint and part of the same course of conduct, that the issues were fully litigated, and that the allegation is timely. (*City of Roseville* (2016) PERB Decision No. 2505-M, p. 25.) As we recently affirmed, "the more elaborate test for considering unalleged violations presumes prejudice," and, while the Board and its agents have a duty to consider allegations included in a complaint, PERB has no obligation to consider unalleged matters, "unless the charging party can show otherwise" by meeting the more difficult requirements outlined above. (*City of*

Roseville, at p. 22, fn. 15, emphasis omitted; see also *City of Montebello* (2016) PERB Decision No. 2491-M, p. 7.)

However, as its name suggests, the unalleged violations doctrine is only necessary, when an allegation is not already fairly encompassed by the language of the complaint. I am unaware of any PERB decision or any other authority, and the majority cites to none, which holds that a matter alleged by the plain language of the complaint must nonetheless meet the criteria of PERB's unalleged violations doctrine, in order for the Board to consider it.

Although not explicitly stated, it appears from the majority's discussion, that to avoid the unalleged violations doctrine, the Association should have moved to amend the complaint to allege interference with organizational rights twice: once in its current form as a so-called "derivative" allegation and once more as an independent allegation. If so, the majority should offer some guidance on how the language should be amended to indicate that one allegation is derivative and another independent, when the Office of the General Counsel itself chose not to use such designations when drafting the complaint. After all, if the Board is going to impose a higher standard before allowing the Charging party in this case to litigate an allegation already encompassed by the plain language of the complaint, then I think it owes the Association, our constituency and PERB staff something more than the conclusory assertion that an allegation is "derivative" of other allegations in the complaint.

Consistent with its role in determining what charge allegations are sufficient and should be pursued, if the Office of the General Counsel considers an allegation derivative of another allegation, it can indicate as much in the complaint. (*County of Fresno*, *supra*, PERB Decision No. 2352-M, p. 4) Because here, the plain language of the complaint clearly alleges interference with organizational rights, but makes no reference to it as a derivative violation, the majority's resort to the unalleged violations doctrine seems unwarranted and contrary to the pleading

standards under our Regulations and decisional law. (PERB Reg. 32615, subd. (a)(5); *City of Roseville*, *supra*, PERB Decision No. 2505-M, pp. 12-13.) In particular, it imposes on the charging party a more stringent standard for consideration of an issue for which the complaint already gave adequate notice, and it creates additional obstacles for Board consideration of an allegation that, by virtue of its inclusion in the complaint, the Office of the General Counsel has determined should be litigated. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 20; *County of Fresno*, *supra*, PERB Decision No. 2352-M, p. 4.) In this regard, the majority's resort to PERB's unalleged violations doctrine is also contrary to public policy, inasmuch as it arbitrarily limits parties' access to the Board's administrative process to resolve unfair labor practice allegations.

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 No. SF-CE-804-M, *Santa Clara County Correctional Peace Officers' Association v. County of Santa Clara*, in which all parties had the right to participate, it has been found that the County of Santa Clara (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3509, subdivision (b), and 3506, and PERB Regulation 32603, subdivisions (a) and (b) (Cal. Code Regs., tit. 8, § 31001 et seq.), by retaliating against Officer Everett Fitzgerald (Fitzgerald) for engaging in protected activity by interfering with his protected employee rights under the MMBA, and by denying the Santa Clara County Correctional Peace Officers' Association (Association) its right to represent its member in their employment relations with the County.

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

A. CEASE AND DESIST FROM:

1. Retaliating against employees in retaliation for their engagement in protected activity.

2. Interfering with employee rights.

3. Denying recognized employee organizations the right to represent their members.

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

Rescind the May 13, 2011, e-mail prohibiting Fitzgerald's ability to trade shifts, and remove all copies of the e-mail from Fitzgerald's personnel file.

Dated: _____ COUNTY OF SANTA CLARA

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.