STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RICHARD C. WHITE, ET AL., Charging Parties, v. SAN BERNARDINO PUBLIC EMPLOYEES ASSOCIATION, Respondent.	Case No. LA-CO-186-M PERB Decision No. 2572-M June 21, 2018

Appearances: Richard C. White, Representative, for Charging Parties; Hayes & Ortega by Dennis J. Hayes and Brian T. Bloodworth, Attorneys, for San Bernardino Public Employees Association.

Before Banks, Winslow, and Krantz, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on Charging Parties'[1] exceptions to a proposed decision (attached) by a PERB administrative law judge (ALJ). The complaint alleged that the San Bernardino Public Employees Association (SBPEA) violated the Meyers-Milias-Brown Act (MMBA)[2] by: (1) retaliating against Charging Party White for filing a PERB charge by threatening to initiate internal disciplinary proceedings; (2) interfering with Charging Parties' rights to refuse to

[1] "Charging Parties" hereafter refers to Richard White (White), Erin Johnson, Elva R. Medrano (Medrano), Juana Gamez (Gamez), Lisa E. Brenner (Brenner), Lya M. Glasgow, Pamela Keyes, Rachel Rocha, Roseanne Ulloa (Ulloa), Yesenia Olague (Olague), and Claudia Ramirez (Ramirez). Two additional charging parties were identified in the complaint: Kathleen Brennan (Brennan), Imran A. Syed (Syed). Brennan withdrew before the hearing. Syed withdrew on the first day of the hearing.

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

participate in the activities of SBPEA by stating that they could not resign their memberships; (3) failing to produce, upon White's request, SBPEA's 2013-2014 financial reports, as required by section 3502.5, subdivision (f); and (4) maintaining organizational security language in its memorandum of understanding (MOU) with the County of San Bernardino (County) which failed to inform employees of their right to resign their SBPEA membership.

The ALJ dismissed the first three allegations. He found that White did not suffer an adverse action, that the evidence at hearing was too vague to establish that agents of SBPEA made these statements, and that SBPEA provided all of the information required by MMBA section 3502.5, subdivision (f).

The ALJ did find, however, that the disputed MOU language violated the MMBA. As a remedy for this violation, he ordered SBPEA to cease and desist interfering with employee rights, request to renegotiate the unlawful MOU provision, refund any difference between SBPEA's membership dues and its agency fees, and post a notice to employees. The ALJ denied Charging Parties' request for an award of fees and costs.

Charging Parties except to the ALJ's dismissal of the allegations concerning retaliation and the failure to produce financial reports, as well as to various aspects of the remedy and to the denial of fees and costs. SBPEA filed no exceptions.

The Board itself has reviewed the administrative hearing record in its entirety and considered Charging Parties' exceptions and SBPEA's response thereto in light of applicable law. The record as a whole supports the ALJ's factual findings. The Board affirms the ALJ's findings of fact, and the ALJ's conclusions of law pertaining to Charging Parties' allegations of retaliation and failure to provide financial reports. The Board adopts only the aforementioned portions of the proposed decision as the decision of the Board itself, subject to

the discussion of Charging Parties' exceptions below. With respect to Charging Parties' claim that SBPEA negotiated allegedly unlawful MOU language, the Board reverses the proposed decision for the reasons explained below.

SUMMARY OF FACTS

This summary includes only the facts relevant to the issues presented by Charging Parties' exceptions.

Background

SBPEA is the exclusive representative of about 11,000 employees across several County bargaining units.[3] SBPEA's governing body is a Board of Directors, elected by the membership. The Directors in turn select an Executive Board, including the President, Vice President, and Treasurer. SBPEA maintains bylaws which include a process for removing Directors, Officers, or members. Generally speaking, SBPEA's Board of Directors may suspend or expel a union member after bringing union disciplinary charges against the member and proving those disciplinary charges at a hearing.

Each of the Charging Parties is employed by the County in a bargaining unit represented by SBPEA. Brenner, Gamez, Medrano, Olague, Ramirez, Ulloa, and White joined SBPEA when they were hired. Gamez, Ramirez, and White were subjected to union disciplinary proceedings in August 2014. Gamez was expelled from SBPEA. Ramirez's membership was suspended. White was found "not guilty" of charges brought against him. Brenner, Medrano, Olague, and Ulloa have remained members in good standing throughout

[3] Following the events at issue in this case, SBPEA affiliated with the International Brotherhood of Teamsters and became known as SBPEA Teamsters, Local 1932.

their employment. No evidence was presented regarding the membership status of the remaining Charging Parties.

The MOU's Organizational Security Provision

Since at least 1989, SBPEA's MOUs with the County have included some variation of the following article, titled "MODIFIED AGENCY SHOP"[4]:

> Current employees in these Units who are now SBPEA members shall remain SBPEA members for the period of this Agreement. Employees who are hired after this Agreement is approved by the [County] Board of Supervisors, and who are in a job classification within the representation unit of SBPEA covered by this Agreement, shall within the first pay period from the date of commencement of duties as an employee, become a member of SBPEA or pay to SBPEA a fee in an amount equal to SBPEA's biweekly dues; provided, however, that the Unit member may authorize payroll deduction for such fee.
>
> [¶ . . . ¶]
>
> The parties agree that the obligations herein are a condition of continued employment for Unit members. The parties further agree that the failure of any Unit member covered by the Article to remain a member in good standing of SBPEA or to pay the equivalent of SBPEA dues during the term of this Agreement shall constitute, generally, just and reasonable cause for termination.

In addition, the MOU contained a general provision providing that any conflict between the MOU and current and future applicable state and federal law shall be suspended and superseded by such applicable law.

In August and September 2014, White corresponded with SBPEA General Counsel Dennis Hayes (Hayes) regarding the MOU's organizational security provisions. White asserted that "SBPEA has illegally made membership in good standing a condition of

[4] The relevant MOU for this case took effect on June 24, 2014 and was set to expire in 2017.

continued employment." Hayes replied on September 4, 2014, stating, "there is no compulsory membership in SBPEA. You are free to resign from membership at any time without losing your employment." Hayes added that if White resigned as a member, he would be required to pay agency fees to SBPEA.

In winter of 2014, SBPEA included in its newsletter circulated to all represented employees a "Notice to Fair Share Fee Payers and SBPEA Members." The notice informed employees of their right to be fee payers, and "[a]ccording to law," their right "to become a 'Fee Payer' pursuant to the agency shop provisions of the contract governing your employment."

White's Information Request

On August 25, 2014, White requested various documents from SBPEA, including "All Annual Reports from 2008-2014." White requested that SBPEA provide the requested documents no later than September 12, 2014. On September 10, 2014, Hayes responded that SBPEA maintains multiple types of annual reports, and asked White to specify which type of report he was seeking. White responded that same day stating that he sought financial reports that members are entitled to receive.

On September 12, 2014, Hayes sent White a set of documents collectively entitled, "CONSOLIDATED FINANCIAL STATEMENTS WITH INDEPENDENT AUDITOR'S REPORT" for the fiscal year ending June 30, 2014.[5] These documents included: (1) an auditor's report from a private Certified Public Accountant (CPA); (2) a "Consolidated Statement of Financial Position," which specified SBPEA's total assets and liabilities as of June 30, 2014; and (3) a "Consolidated Statement of Activities and Changes in Net Assets

[5] SBPEA's fiscal year runs from July 1 to June 30 of every year.

(Deficit)" and a "Consolidated Statement of Cash Flows" describing, among other things, the level of deficit SBPEA carried at the beginning and end of the 2013-2014 fiscal year as well as the amount of cash on hand at the beginning and the end of the fiscal year. A stamp or watermark appears to have been digitally placed across each page of the documents, stating, in a large, dark font:

> Confidential
> Financial Records
> Provided to
> RICHARD C. WHITE
> Confidential

At the bottom of each document is stamped, in slightly smaller font:

> DO NOT COPY, DISCLOSE
> OR DISTRIBUTE
> CIVIL PENALTIES APPLY

The text of the stamp does not cover the text of the documents, but in some instances makes individual letters or numbers difficult to discern.

In a September 12, 2014 letter to Hayes, White described these documents as "a recently produced financial record that I did not request." In the same letter, and again on September 16 and 25, 2014, White reasserted his request for SBPEA's "Annual Reports" from 2008-2014. SBPEA provided no additional responsive documents.

White's Original Unfair Practice Charge and SBPEA's Response

On September 8, 2014, White filed the instant unfair practice charge, along with a request for injunctive relief.[6] Among other things, White alleged in the charge:

> I still have my "Welcome to SBPEA" packet from when I started working for the County, including the blank SBPEA membership application form I obviously didn't fill out and submit, yet

[6] This filing also included joinder applications from some of the other Charging Parties.

> throughout my employment SBPEA dues have been deducted from my pay and SBPEA has treated me like a regular voting member.

On Friday, September 12, 2014, White received a letter from SBPEA President Paula Ready (Ready). The letter took issue with White's assertion that he had not completed and submitted the SBPEA membership card contained in his County orientation packet when hired. The letter stated that SBPEA has a record of White's signed membership application, dated July 23, 2008. The letter advised White of Ready's intent to file disciplinary charges against White with SBPEA's Board of Directors, which would result in a disciplinary hearing. The letter further stated: "Just for the record, the charges that I am filing with the Board [of Directors] are not in response to your filing [an unfair practice charge], which is your right, but are in response to your perjured and dishonest testimony. No one has the right to commit perjury."

White responded to Ready's letter by e-mail that day. He stated that he had the protected right to pursue an unfair practice charge with PERB and that he had intentionally worded the unfair practice charge carefully to avoid being inaccurate. At hearing, White acknowledged that he had signed the application card produced by SBPEA, but maintained that he had not signed the card included with his orientation packet. He testified that because he still possesses a blank card, he assumed he had never completed an application at all.

On Monday, September 15, 2014, Hayes sent White a letter, stating in relevant part:

> Please be advised that Paula Ready was unsuccessful in her bid for re-election to the Board of Directors. After tomorrow she will no longer be an SBPEA board member or officer. For these reasons, she has decided not to file charges against you with the Board of Directors.

No subsequent disciplinary action was taken or invoked against White by SBPEA.

DISCUSSION

I. Retaliation

Charging Parties except to the ALJ's dismissal of the complaint's retaliation allegation. The complaint alleged that SBPEA retaliated against White when Ready threatened to initiate internal union disciplinary action against him. The ALJ applied the Board's test for a prima facie case of retaliation, which requires evidence that: (1) the employee exercised protected rights; (2) the respondent had knowledge of the employee's exercise of those rights; (3) the respondent took adverse action against the employee; and (4) the respondent took action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 5-6.) The ALJ found that White engaged in protected activity by filing the original PERB charge, and that SBPEA had knowledge of that activity. But he concluded that Ready's threat to initiate disciplinary action was not an adverse action, citing *Service Employees International Union, Local 221 (Gutierrez)* (2012) PERB Decision No. 2277-M (*Gutierrez*).

In their exceptions, Charging Parties argue that *Gutierrez*, *supra*, PERB Decision No. 2277-M, is factually distinguishable from this case. We disagree. In *Gutierrez*, an employee claimed that the union retaliated against him by reporting to the employer that he had been conducting union business during work time. The employer investigated the matter, determined that the employee had been on jury duty at the time, and "dropped" the matter within two working days. The Board applied its longstanding test for determining an adverse action: "whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (*Id.* at p. 7, citing *Palo Verde Unified School District* (1988) PERB Decision No. 689.) It then concluded that a reasonable

person would not have considered the employer's brief investigation to have an adverse impact on the employee's employment. (*Id.* at pp. 7-8.)

The ALJ's conclusion that this case was analogous to *Gutierrez*, *supra*, PERB Decision No. 2277-M, rested on two facts: first, that White was informed within one working day that Ready would not pursue charges against him after all, and second, that White was not required to take any action to prompt this reversal.

Charging Parties attempt to distinguish *Gutierrez*, *supra*, PERB Decision No. 2277-M, based on the fact that White was only informed that Ready had decided not to pursue charges against him, not that, as the ALJ concluded, "no charges would be filed or pursued against him." (Proposed dec., pp. 25-26.) This distinction is unavailing. The claimed adverse action was Ready's letter to White stating that she would be filing disciplinary charges against him. That action terminated upon a clear statement by SBPEA's attorney that Ready would not be doing so. While it was possible that Ready's successor, or any other SBPEA member, would still initiate the disciplinary process, that mere possibility is insufficient to demonstrate that a reasonable person would view Ready's action as having an ongoing adverse effect on White's employment.

Charging Parties also argue that "White was forced to defend himself against respondent's charges for the better part of two years to prevent . . . negative employment consequences." However, we find no evidence of this in the portions of the record cited by Charging Parties.[7]

[7] Charging Parties cite their own Exhibit 7, an e-mail from White dated July 13, 2014. As it predates Ready's threat to file disciplinary charges, this e-mail provides no evidence that White faced continuing disciplinary action.

Having found no adverse action here, we reject Charging Parties' exception and affirm the ALJ's dismissal of the complaint's retaliation allegation.[8]

II. Failure to Produce Financial Reports

Charging Parties except to the ALJ's dismissal of the allegation that SBPEA failed to provide SBPEA's financial reports. The ALJ dismissed this allegation, determining that the documents provided to White on September 12, 2014 included everything required by MMBA section 3502.5, subdivision (f).[9]

Charging Parties also cite Exhibit 11, a series of communications from White to the SBPEA Board of Directors, and White's hearing testimony about these communications. None of these documents or testimony reflects that SBPEA was pursuing perjury charges against White after September 15, 2014.

Charging Parties also cite some of SBPEA's pre-hearing filings and its post-hearing brief, in which SBPEA reiterated its claim that White's UPC statements regarding his membership application were false. By making that claim, SBPEA was not pursuing disciplinary action against White, but defending Ready's original accusations. Doing so was not an adverse action.

[8] Charging Parties state in a footnote in their exceptions that "[i]t would also seem that the discussion and cases cited on page 26 of the proposed decision regarding SBPEA's other 'threats of reprisal' and speech that 'tends to coerce or interfere with the exercise of protected rights' would, if applied to White's retaliation claim, require a decision against respondent SBPEA."

A review of Charging Parties' post-hearing brief reveals that they did not ask the ALJ to apply the legal standards governing threats or interference to Ready's statements. We decline to consider this untimely raised argument. (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 12.)

[9] MMBA section 3502.5, subdivision (f) provides:

> A recognized employee organization that has agreed to an agency shop provision or is a party to an agency shop arrangement shall keep an adequate itemized record of its financial transactions and shall make available annually, to the public agency with which the agency shop provision was negotiated, and to the employees who are members of the organization, within 60 days after the

In their exceptions, Charging Parties do not dispute the ALJ's conclusion that the information was provided, but argue that: (1) the stamp or watermark on the documents rendered them "virtually unreadable"; and (2) the documents were not compliant with section 3502.5, subdivision (f), because White was prohibited from sharing or discussing them with other employees.

Regarding the first argument, we disagree that the records SBPEA provided were "virtually unreadable." Charging Parties cite no particular portion of the records that are illegible. From our general review of the records, we observe that a few individual letters and numbers are somewhat difficult to discern, but not illegible. Nothing is completely obscured by the stamps. Therefore, we reject this exception.

As for the argument that the documents did not comply with section 3502.5, subdivision (f), because White was prohibited from sharing them with other employees, this is a matter beyond the scope of the complaint. The violation of section 3502.5, subdivision (f), alleged in the complaint was that SBPEA "failed to produce the requested 2013-2014 financial report in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or corresponding principal officer, or by a certified public accountant." This allegation concerned whether the required information was provided to White and/or whether it was provided in the proper form and/or whether its accuracy was certified by the appropriate official or other person acting on behalf of SBPEA. It did not place SBPEA on

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> end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or corresponding principal officer, or by a certified public accountant. . . .

notice that its restrictions on White's disclosure of the financial report allegedly violated section 3502.5, subdivision (f).

We may consider theories of liability other than those alleged in the unfair practice complaint only if the criteria of the unalleged violation doctrine are met. (*City of Roseville* (2016) PERB Decision No. 2505-M, pp. 24-25.) Those criteria are:

> (1) adequate notice and opportunity to defend has been provided to 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 the issue.

(*Claremont Unified School District* (2015) PERB Decision No. 2459, p. 3.)

These criteria have not been met in this case. Most fundamentally, Charging Parties provided no notice that they intended to litigate the legitimacy of the restrictions on White's disclosure of the report. The issue is not raised in the original charge or any of the four amended charges filed in this case. Charging Parties declined to give an opening statement at hearing, opting instead to "adopt" their pre-hearing "motion for decision on the record" as its arguments. That motion summarized the relevant allegation in the complaint as being "that respondent also violated applicable law by refusing to produce required financial records on request." White briefly mentioned the stamps during his hearing testimony when Charging Parties introduced the financial records into evidence, but did not mention that he was unable to share the records with other employees.

The first direct statement about this issue came in Charging Parties' post-hearing brief. However, making an argument for the first time in a post-hearing brief is not sufficient notice of an unalleged violation. (*City of Clovis* (2009) PERB Decision No. 2074-M, p. 9.)

Because the unalleged violation test is not met, we reject Charging Parties' exception that SBPEA violated section 3502.5, subdivision (f), by placing restrictions on restricting White's use of the financial records. We therefore affirm the ALJ's dismissal of the allegation that SBPEA failed to comply with section 3502.5, subdivision (f).

III. MOU Language

The complaint alleged that SBPEA violated the MMBA by entering into an MOU with a maintenance of membership clause that failed to afford bargaining unit members a "window period" in which to revoke their membership. The ALJ concluded, relying principally on *Office & Professional Employees International Union, Local 29, AFL-CIO & CLC (Fowles)* (2012) PERB Decision No. 2236-M (*OPEIU*), that SBPEA violated the MMBA "by maintaining language in the 2014-2017 MOU containing misleading terms about employees' rights to opt out of membership and become agency fee payers." (Proposed dec., p. 35.) The ALJ ordered SBPEA to cease and desist failing to inform employees of their right to opt out of membership, renegotiate the MOU provision, and refund to Charging Parties any difference between SBPEA's membership dues and its agency fees, beginning with the 2014-2015 agency fee payer year, but denied Charging Parties' request for attorneys' fees and costs. Charging Parties except to aspects of the renegotiation and refund orders, and to the denial of fees and costs.[10]

[10] The ALJ rejected SBPEA's argument that the complaint allegation concerning the MOU language must be dismissed due to Charging Parties' failure to join the County as an indispensable party. SBPEA primarily relied on case law interpreting Code of Civil Procedure section 389. However, the ALJ noted that section 389 requires joinder under certain circumstances, and permits a court to decide whether to proceed with a suit if an indispensable party cannot be joined, while joinder under PERB Regulation 32164 is permissive, and has never been interpreted to permit (or require) dismissal of a complaint for failure to join an indispensable party. The ALJ also noted that SBPEA could have requested that the County be

In considering the appropriateness of the remedies ordered by the ALJ, we have determined that the ALJ erred in finding the MOU language unlawful. Although SBPEA did not except to the proposed decision on these grounds, the Board has discretion to review matters not excepted to, including when, as here, the correction is needed to "prevent an erroneously-decided issue from becoming Board precedent." (*United Teachers Los Angeles (Raines, et al)* (2016) PERB Decision No. 2475, p. 43; *State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H, pp. 6-7; accord PERB Reg. 32320, subd. (a)(2) [The Board may "[a]ffirm, modify or reverse the proposed decision, order the record reopened for the taking of further evidence, or take such other action as it considers proper"].) Our sua sponte review is particularly appropriate when the erroneously decided issue is closely intertwined with the exceptions before us. (See *J.R. Norton Co. v. Agricultural Labor Relations Bd.* (1987) 192 Cal.App.3d 874, 908.)

The ALJ erred in concluding that an MOU's organizational security provisions must give employees unambiguous notice of their rights to opt out of membership and become agency fee payers. We have never held, and we are not aware of precedent holding, that such notice must be provided within the MOU itself. At its crux, the proposed decision misreads *OPEIU*, *supra*, PERB Decision No. 2236-M, to mean that an MOU's union security language can be found unlawful if it does not adequately explain employees' rights. However, *OPEIU* does not govern MOU language.

In *OPEIU*, *supra*, PERB Decision No. 2236-M, the Board considered an appeal from the dismissal of an unfair practice charge, alleging that a union failed to give notice to a newly

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joined as a party, but did not do so. Since we conclude that the parties' MOU language was lawful, we need not decide whether the ALJ properly applied PERB Regulation 32164.

hired employee of her rights, under an agency shop provision, to pay an agency fee rather than become a member of the union. We adopted the rule of the National Labor Relations Board (NLRB) regarding a union's notice obligation under those circumstances. Specifically, we held that

> before a union may seek to obligate newly hired nonmember employees to pay dues and fees under a union-security clause, it must inform them of their right to be or remain nonmembers, that nonmembers have the right to object to paying for union activities unrelated to the union's duties as the bargaining representative and to obtain a reduction in dues and fees for such activities, and that the notice must be reasonably calculated to apprise nonmembers of their rights.

(*Id*. at p. 14.)[11]

Applying this rule to the factual allegations in the charge, *OPEIU*, *supra*, PERB Decision 2236-M, determined that the charge stated a prima facie case. However, in that procedural posture, there was no evidence before the Board as to what types of notices, if any, the respondent union had sent to the charging party. In the absence of a factual record developed during an evidentiary hearing, we assumed as true charging party's claims that she sought to resign her membership at a time and in a manner in which it was allowable to do so, that the union nonetheless refused this lawful request and affirmatively misrepresented that full

[11] Under the federal law governing the private sector, the one-time notice that a union must provide to newly-hired nonmember employees in an agency shop is commonly referred to as a *General Motors* notice, as it derives from *NLRB v. General Motors Corp.* (1963) 373 U.S. 734 (*General Motors*). This is distinct from the ongoing annual notice to agency fee payers required by *Chicago Teachers Union, Local No. 1 v. Hudson* (1986) 475 U.S. 292 (*Hudson*) [requiring unions that collect agency fees from public sector employees to provide "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending"] and *Communication Workers of America v. Beck* (1988) 487 U.S. 735 (Beck) [requiring similar notice by private sector unions]. PERB has codified the *Hudson* requirements for unions subject to PERB's jurisdiction. (PERB Regs. 32990-32997.)

union membership was a condition of employment, and that the union either did not send charging party any notice(s) regarding her rights, or, alternatively, did not send her adequate notice(s). But nothing in the conclusion that these allegations stated a prima facie case implied that the MOU itself must unambiguously supply notice of the right to remain or become a nonmember.

On this point, *Marquez v. Screen Actors Guild, Inc.* (1998) 525 U.S. 33 (*Marquez*) provides useful guidance. There, the Supreme Court rejected a challenge to a union security clause that required "membership in good standing" as a condition for employment. (*Id*. at p. 53.) In so doing, the Court noted that the clause tracked the language of section 8(a)(3) of the National Labor Relations Act (NLRA),[12] but did not explain that "membership" had been judicially interpreted to require less than full membership in the union. Rather, membership meant only the payment of fees and dues—i.e., membership "whittled down to its financial core" (*General Motors*, *supra*, 373 U.S. 734, 742), and even then, only those fees and dues that were expended on activities germane to collective bargaining, contract administration, and grievance handling (*Beck*, *supra*, 487 U.S. 735, 745.) The plaintiff in *Marquez* asserted that the collective bargaining agreement should have contained language informing her of her right under *General Motors* not to join the union and her right under *Beck* to pay only for representational activities.

The Supreme Court rejected this argument and concluded that it is reasonable for the union and the employer to use a term of art (as "membership" had become) in a contract. (*Marquez*, *supra*, 525 U.S. 33, 47.) This was true even though the union security clause potentially misled bargaining unit employees into believing they must be full union members.

[12] The NLRA is codified at 29 U.S.C. section 151 et seq.

(*Ibid*.) In reaching this conclusion, the Court found that in a union security clause, just like any other collectively bargained language, there is no duty to spell out intricacies, and it is entirely appropriate for a union and employer to use shorthand that may not be understandable to bargaining unit members. (*Id*. at p. 48.)

Turning to the instant case, the County and SBPEA agreed to widely-used union security language stating that a unit member must "remain a member in good standing of SBPEA or . . . pay the equivalent of SBPEA dues." Although parsing other portions of the MOU could lead one to infer that the MOU was unclear or misleading in not providing the details of how and when existing SBPEA members could adjust their status, this potential for misleading employees does not, per *Marquez, supra,* 325 U.S. 33, necessarily make the MOU's organizational security provision unlawful.

Moreover, there is no evidence that the MOU was applied to prohibit any employee from resigning union membership and becoming an agency fee payer. According to uncontradicted testimony, employees who wanted to resign their union membership were permitted to do so. SBPEA even informed White directly, before he filed the charge in this case, that he was not required to remain a union member as a condition of employment. SBPEA also provided a *Hudson* notice[13] via its newsletter to fee payers and SBPEA members,

[13] In relevant part, the *Hudson* notice explained:

> California law permits agreements between SBPEA and local public agencies that authorize your employer to deduct a fair share fee from the salary or wages of all SBPEA nonmembers of the bargaining units for which SBPEA is the exclusive representative. This is also known as "agency shop". The fair share fee is remitted to SBPEA and used to support the Association's work on behalf of all bargaining unit employees with regard to their employment relations with their employer.

stating that "you may elect to become a 'Fee Payer' pursuant to the agency shop provisions of the [MOU.]"[14]

In sum, the proposed decision erred in interpreting *OPEIU*, *supra*, PERB Decision No. 2236-M, to require unambiguous notice in the MOU of the right to become an agency fee payer. For these reasons, we reverse the proposed decision's conclusion that SBPEA violated the MMBA and PERB Regulations by entering into the organizational security provisions in the 2014-2017 MOU.

IV. Fees and Costs

Charging Parties also except to the ALJ's denial of their request for fees and costs. In light of our dismissal of the entire complaint, we deny this exception.

ORDER

The unfair practice charge and complaint in Case No. LA-CO-186-M are hereby DISMISSED.

Members Banks and Krantz joined in this Decision.

[¶. . . ¶]

> According to law, you may elect to become a "Fee Payer" pursuant to the agency shop provisions of the contract governing your employment. As a Fee Payer, you are required to pay that portion of the service fee that is related to collective bargaining. This is referred to as the "chargeable portion" of your service fee, and is defined below.

[14] The ALJ found that this was not adequate notice to employees of their right to be non-members, because it referred back to the allegedly flawed MOU. Because we disagree that the MOU language was flawed, we also disagree that SBPEA's *Hudson* notice was insufficient.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

RICHARD C. WHITE, ET AL., Charging Party, v. SAN BERNARDINO PUBLIC EMPLOYEES ASSOCIATION, Respondent.	UNFAIR PRACTICE CASE NO. LA-CO-186-M PROPOSED DECISION (August 23, 2016)

Appearances: Richard C. White, Charging Party, and Melissa White, Representative, for all Charging Parties; Hayes & Ortega, LLP, by Gena B. Burns, Attorney, for Respondent.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

INTRODUCTION

In this case, multiple public employees accuse their exclusive representative of violating the Meyers-Milias-Brown Act (MMBA)[1] by interfering with their right to refuse to participate in the activities of their employee organization, retaliating against a public employee for filing a Public Employment Relations Board (PERB) unfair practice charge, maintaining unlawful organizational security contract language, and failing to produce requested financial reports. The exclusive representative denies any violation of the MMBA.

PROCEDURAL HISTORY

On September 8, 2014, Richard C. White (White) filed the instant unfair practice charge with PERB against the San Bernardino Public Employees Association (SBPEA) asserting multiple claims relating to unlawful organizational security contract language,

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

SBPEA's internal membership discipline process, and SBPEA's allegedly threatening and intimidating actions. White requested that PERB pursue injunctive relief based on these claims.[2] The unfair practice charge included applications by Kathleen Brennan, Lisa E. Brenner, Juana S. Gamez, Lya M. Glasgow, Erin Johnson, Pamela Keyes, Elva R. Medrano, Yesenia Olague, Rachel Rocha, Irman A. Syed, and Roseann Ulloa, to join as charging parties to the case. The Board denied Injunctive Relief Request No. 669 on or around September 18, 2014. On December 19, 2014, Claudia Ramirez filed an application to join as an additional charging party.

White amended his unfair practice charge multiple times during the course of the PERB Office of the General Counsel's investigation of his unfair practice charge. SBPEA filed a response after each filing. In February 2015, White filed 12 notices of appearance, indicating that he represented all 12 joinder applicants. Starting with his Third Amended Unfair Practice Charge, White began describing the "Charging Party" in the case as "Richard White, for himself and as representative for the twelve additional charging parties." On March 12, 2015, in an apparent ruling on the joinder applications, the PERB Office of the General Counsel amended the case caption in all of its correspondence to "Richard C. White et al. v. San Bernardino Public Employees Association." Subsequent communications from the General Counsel's office referred to the group of 13 as "Charging Parties." There was no record of any objection from SBPEA. Shortly afterwards, it began using the term "Charging Parties" in its own filings.

On September 12, 2015, Charging Parties requested to withdraw the claims that SBPEA initiated unlawful union disciplinary proceedings against Charging Parties, intimidated

[2] PERB assigned the request as Injunctive Relief Request No. 669.

Charging Parties by postings on its website, failed to inform Charging Parties on their respective hire dates that they did not have to join SBPEA, failed to send agency fee payer notices from 2010 through 2013, violated SBPEA's bylaws and the Corporations Code, and improperly tallied votes for a tentative agreement. Then, on September 14, 2015, Charging Parties filed their Fourth Amended Unfair Practice Charge, in support of the remaining claims. The PERB Office of the General Counsel granted the partial withdrawal request on September 14, 2015.

On November 4, 2015, the Office of the General Counsel issued a complaint alleging that SBPEA violated the MMBA and PERB Regulations by entering into a Memorandum of Understanding (MOU) containing language that interfered with Charging Parties' right to refuse to participate in union activities, threatening to suspend or expel Charging Party White from SBPEA membership because he filed the instant unfair practice charge, falsely informing Charging Parties that membership in SBPEA was required unless they had a "provable religious objection," and failing to produce a requested certified financial report for its 2013-2014 fiscal year. The parties participated in an informal settlement conference on November 19, 2015, but the case did not settle. Thereafter, the case was set for formal hearing. SBPEA filed its answer to the PERB complaint on November 24, 2015.

On January 14, 2016, Charging Parties filed a request to amend the PERB complaint with new allegations. On January 15, 2016, the assigned Administrative Law Judge (ALJ) denied the request, stating that Charging Parties retained the right to file a new unfair practice charge.

On January 20, 2016, Charging Parties filed a motion for the case to be decided on the record, pursuant to PERB Regulation 32207. SBPEA opposed. At the same time, SBPEA

filed a motion to dismiss the case contending that Charging Parties' employer is an indispensable party to the case and was not joined as a party. On February 11, 2016, the ALJ denied both motions. It gave the parties leave, until February 29, 2016, to join the County as a party, under PERB Regulation 32164, subdivision (d). Neither party made such a request.

On February 29, 2016, Brennan requested to withdraw as a Charging Party in the case. The ALJ granted the request. On March 7, 2016, SBPEA filed a motion in limine to limit evidence of any confidential communications between SBPEA's leadership and Dennis Hayes, its general counsel, asserting its attorney-client privilege.

The ALJ convened the formal hearing on March 14 and 15, 2016. On the first day of hearing, the Charging Parties Brenner, Gamez, Medrano, Olague, Ramirez, Ulloa, and (Richard) White submitted a notice of appearance form designating Melissa White as their representative. Charging Party Syed appeared and requested to be withdrawn as a Charging Party.[3] The ALJ granted the request. Regarding the motion in limine, the parties agreed to exclude any evidence of privileged communications. During Charging Parties' case-in-chief, Charging Parties raised the issue of amending the complaint to reinstate their withdrawn claim that certain Charging Parties were improperly expelled from membership. No motion was ultimately made during the hearing. The ALJ invited the parties to brief the issue of the appropriateness of the amendment, but neither did so. As such, such an amendment will not be considered.

The parties filed closing briefs on April 26, 2016. At that point, the record was closed and the matter was considered submitted for decision.

[3] At this point the Charging Parties in the case are Brenner, Gamez, Glasgow, Johnson, Keyes, Medrano, Olague, Ramirez, Rocha, Ulloa, and White.

FINDINGS OF FACT

The Parties

Charging Parties are all employed by the County of San Bernardino (County)[4] and are therefore public employees within the meaning of MMBA section 3501, subdivision (d). All Charging Parties are part of bargaining units represented by SBPEA, a recognized employee organization within the meaning of MMBA section 3501, subdivision (b), and an exclusive representative within the meaning of PERB Regulation 32016, subdivision (a). SBPEA represents multiple County bargaining units, totaling around 11,000 members. SBPEA has represented County employees for more than 20 years. Sometime after the events at issue in this case, SBPEA affiliated with the Teamsters and became known as SBPEA Teamsters, Local 1932.

The Structure of SBPEA

SBPEA's governing body is a Board of Directors, elected by the membership. The Directors, in turn select an Executive Board, including the President, Vice President, and Treasurer. SBPEA maintains bylaws for certain administrative procedures. Those procedures include the process for removing Directors, Officers, or members. Generally speaking, SBPEA's Board of Directors may suspend or expel a union member after bringing formal internal union disciplinary charges against the member and proving those disciplinary charges at an administrative hearing.

Charging Parties

[4] The County is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a).

Brenner has been employed by the County since 2003 as a social services practitioner. She has been an SBPEA member since she was hired.

Gamez has been employed by the County since 2006 as a social services aide, bilingual. Gamez became a member when she was hired. In or around August 2014, SBPEA expelled her from membership, pursuant to its internal member discipline process. She rejoined as a member after SBPEA affiliated with Teamsters.

Medrano was hired by the County in 1992, as an employment services specialist. She became a member when she was hired. She retired in 2015.

Olague has been employed by the County since 2005 as an employment services specialist. She became a member when she was hired.

Ramirez has been employed by the County since 1999. She became an SBPEA member when she was hired. In or around August 2014, SBPEA suspended Ramirez's membership privileges after an internal union discipline proceeding. It is unclear when the suspension was/will be lifted.

Ulloa has been employed by the County since 1995. She is an eligibility worker II. She became an SBPEA member when she was hired.

White has been employed by the County since 2008. He is a System Support Analyst III. He became an SBPEA member on or around July 23, 2008. White was subject to an internal union discipline proceeding, but was found "not guilty" of any of the disciplinary charges brought by the Board of Directors. As such, he has remained an SBPEA member in good standing consistently throughout his employment with the County.

No evidence was presented at hearing about the hire date or membership status of Charging Parties Glasgow, Johnson, Keyes, or Rocha. None of them testified and no witnesses testified specifically about them.

SBPEA's Spring 2014 Informational Meetings

In or around Spring 2014, SBPEA and the County reached a tentative agreement (TA) for what would eventually become the 2014-2017 MOU. Thereafter, SBPEA began hosting informational meetings at its headquarters building to discuss the TA with represented employees. After hearing a colleague describe the TA as "terrible," White decided to attend one of the informational meetings. He had not been active in SBPEA affairs up until that point. White said that he attended almost every meeting since then. Attendance at the meetings was high, and it was not unusual for the SBPEA meeting hall to be filled to capacity with others congregating outside in the parking lot. There were up to 100 people in the outside area at times. Some of those attending were supporters and organizers from a pending effort to decertify SBPEA.

According to SBPEA General Manager Deidre Rodriguez, SBPEA scheduled the meetings to discuss the TA, and made members of the negotiating team available to answer members' questions about negotiations, in advance of a planned TA ratification vote. Members of the Board of Directors also attended. Rodriguez said that she remained inside the meeting hall at all times and there was no evidence that other SBPEA representatives addressed the attendees outside the hall. Rodriguez testified that some attendees raised questions that she considered unrelated to the TA. She said some audience members asked "how do we get out of membership." Others asked about the decertification. According to Rodriguez, SBPEA representatives tried not to field those types of questions, trying instead to

limit the inquiries to the TA itself, stating words to the effect of "that's not why we're here." But Rodriguez admitted that "we didn't do the best job" at handling those inquiries. She described the meetings as "very disruptive, very hostile."

White testified that attendees stated that they "wanted their dues to go to charity or they wanted to resign membership or asked 'how could I get out of SBPEA?'" According to White, SBPEA representatives responded to the various questions posed by the attendees by stating, "it's governed by the MOU. The only thing you have to get out is the religious objection and that's not what we're here to talk about." White did not identify any of the speakers he heard. Nor was White specific about which response was made to which of the questions.

Brenner also attended SBPEA meetings where attendees had questions about how "they could get out of membership." She said that attendees were told that the only way out of membership was to claim a religious exemption. She could not recall who made that statement and later acknowledged that she heard it while outside the meeting hall. Brenner herself did not ask about membership during the meetings. Olague also attended similar meetings and did ask about "not wanting to be part of the Association." Olague was told that it was "not in [her] benefit and was told that there was no way out." Like Brenner, Olague could not recall who made the statement. Ramirez said that she did not recall any SBPEA representative ever telling her that the only way out of membership was to assert a religious objection. Instead, she said that other members told her that, outside the union meeting hall.

Gamez said that she asked SBPEA business representative Natalie Harts about opting out of membership and was told that she could pay "maybe a little less than the regular dues," but that she would lose voting rights and other privileges afforded to members. According to Gamez, Harts also said that unit members had the further option of having their mandatory

dues or fees be designated to a non-profit or religious group instead of SBPEA. It was unclear when or where this conversation occurred. Harts did not testify. Ulloa did not testify about attending any SBPEA meetings, but she said around a year before her March 2016 testimony, she called SBPEA's office and asked about becoming a fee payer. According to Ulloa, the unidentified person who answered the telephone said that she could opt out of membership and become a fee payer, but it would reduce the amount she owed to SBPEA by very little.

Medrano also did not testify specifically about attending any meetings over the TA. She did say that, sometime after the TA was ratified, she called SBPEA and spoke with either Rodriguez or Harts, who told her "as a part of the MOU, you cannot ask not to be a member." Rodriguez disputes this.

Brennan testified that she attended a meeting sometime in Spring 2014, and heard then-SBPEA president Paula Ready say that "the only way to get out was for a religious objection." According to Brennan, Rodriguez affirmed Ready's comment. Rodriguez disputes that either she or Ready said anything about the religious objection exception. Ready did not testify.

The Memorandum of Understanding

SBPEA's members eventually ratified the 2014 TA and the 2014-2017 MOU became effective on June 24, 2014. That MOU contains a "MODIFIED AGENCY SHOP" article, stating:

> Current employees in these Units who are now SBPEA members shall remain SBPEA members for the period of this Agreement. Employees who are hired after this Agreement is approved by the [County] Board of Supervisors, and who are in a job classification within the representation unit of SBPEA covered by this Agreement, shall within the first pay period from the date of commencement of duties as an employee, become a member of SBPEA or pay to SBPEA a fee in an amount equal to SBPEA's biweekly dues; provided however, that the unit member may authorize payroll deduction for such fee.

[¶ . . . ¶]

> The parties agree that the obligations herein are a condition of continued employment for unit members. The parties further agree that the failure of any unit member covered by the Article to remain a member in good standing of SBPEA or to pay the equivalent of SBPEA dues during the term of this Agreement shall constitute, generally, just and reasonable cause for termination.

Some version of this "MODIFIED AGENCY SHOP," with minor, technical variations, is present in all of SBPEA's MOUs with the County, dating back to at least the 1989-1991 MOU.

The article also includes an exception from being a union member or a fee payer if "the unit member is an actual verified member of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting employee organizations[.]" In those instances, the employees' fees are donated to a charitable fund.

Finally, the article includes an "indemnity and liability obligation" clause, stating in relevant part:

> SBPEA shall defend, indemnify and hold harmless the County of San Bernardino and its Officers and employees from any claim, loss, liability, cause of action or administrative proceeding arising out of the operation of this Article.

The 2014-2017 MOU also contains a "PROVISIONS OF LAW" article, stating:

> It is understood and agreed that this Agreement is subject to all current and future applicable Federal and State laws and regulations and the current provisions of the Charter of the County of San Bernardino. If any part or provision of this Agreement is in conflict with such applicable provisions of those Federal, State, or County enactments or is otherwise held to be invalid or unenforceable by any court of competent jurisdiction, such part or provision shall be suspended and superseded by such applicable law or regulations, and the remainder of this Agreement shall not be affected thereby. If any part or provision

> of this Agreement is suspended or superseded, the parties agree to reopen negotiations regarding the suspended or superseded part or provision with the understanding that total compensation to employees under this Agreement shall not be reduced or increased as a result of this Article. The parties hereto agree to refrain from initiating any legal action or taking individual or collective action that would invalidate the Articles of this Agreement.

White's Correspondence Concerning Compulsory Union Membership

On or around August 21, 2014, White directly accused SBPEA's Board of Directors of, among other things, having a "compulsory" union membership. Hayes replied to White's letter, stating generally that "[a]lthough employees cannot be required to join a union, employees can be required to pay an agency fee that is equal to the amount of dues paid by members." White responded, stating that "SBPEA has illegally made membership in good standing a condition of continued employment." Hayes replied on September 4, 2014, stating "Mr. White, there is no compulsory membership in SBPEA. You are free to resign your membership at any time without losing your employment." Hayes further states that, if White resigns as a member, then he will be required to pay agency fees to SBPEA.

White's Information Request

On August 25, 2014, White requested various documents from SBPEA including, as relevant to this case, "All Annual Reports from 2008-2014." White requested that SBPEA provide the requested documents no later than September 12, 2014. On September 10, 2014, Hayes, responded, stating that SBPEA maintains multiple types of annual reports and that it was unsure which type of report White was seeking. White responded that same day stating that he sought financial reports that members are entitled to receive.

On September 12, 2014, Hayes, sent White a set of documents collectively entitled, "Consolidated Financial Statements With Independent Auditor's Report" for the fiscal year

ending June 30, 2014.[5] Hayes's response included an auditor's report from a private Certified Public Accountant (CPA), along with other documents. At hearing, Rodriguez confirmed that SBPEA hired the CPA to audit its financial records and attest to their accuracy. She said that the report was the result of that audit.

Included in the attachments was a "Consolidated Statement of Financial Position," which specified SBPEA's total assets and liabilities on hand as of June 30, 2014. The documents also included a "Consolidated Statement of Activities and Changes in Net Assets (Deficit)" and a "Consolidated Statement of Cash Flows" describing, among other things, the level of deficit SBPEA carried at the beginning and the end of the 2013-2014 fiscal year as well as the amount in cash on hand and the beginning and the end of the fiscal year. None of the provided documents were signed.[6] White reasserted his request for SBPEA's "Annual Reports" on September 12, 16, and 25, 2014, but SBPEA provided no additional responsive documents.

Ready's September 12, 2014 Letter to White

On the afternoon of Friday, September 12, 2014, White received a letter from Ready about claims in the instant unfair practice charge. The letter took issue with White's assertion that he did not fill out and submit the SBPEA membership card contained in his County orientation packet when he was first hired.[7] The letter states that SBPEA has a record of

[5] SBPEA's fiscal year runs from July 1 to June 30 of every year.

[6] At hearing, SBPEA submitted as Respondent's Exhibit 17, a report substantially similar to what was enclosed with Hayes's September 12, 2014 letter, with the exceptions that the documents contained no watermark and appeared to have been signed by the accounting firm. There is no evidence that the signed version of the documents were ever given to White.

[7] The letter is referring to paragraph 16 of White's original charge stating in relevant part:

White's signed membership application dated July 23, 2008. The letter further states that Ready intended to pursue disciplinary charges against White with SBPEA's Board of Directors, and would request that the Directors conduct a disciplinary hearing. The letter further states: "Just for the record, the charges that I am filing with the Board [of Directors] are not in response to your filing [an unfair practice charge], which is your right, but are in response to your perjured and dishonest testimony. No one has the right to commit perjury."

White responded to Ready's letter by e-mail that day. He stated that he had the protected right to pursue an unfair practice charge with PERB and that he intentionally worded the unfair practice charge carefully to avoid being inaccurate. At hearing, White acknowledged that he signed the application card produced by SBPEA, but maintained that he did not sign the card included with his orientation packet. He testified that because he still possesses a blank card, he assumed that he never filled out an application at all.

On Monday, September 15, 2014, Hayes sent White a letter, stating in relevant part:

> Please be advised that Paula Ready was unsuccessful in her bid for re-election to the Board of Directors. After tomorrow she will no longer be an SBPEA board member or officer. For these reasons, she has decided not to file charges against you with the Board of Directors.

No subsequent disciplinary action was taken or invoked against White by SBPEA.

SBPEA's Annual Notice About its Agency Shop

> I still have my "Welcome to SBPEA" packet from when I started working for the County, including the blank SBPEA membership application form I obviously didn't fill out and submit, yet throughout my employment SBPEA dues have been deducted from my pay and SBPEA has treated me like a voting member.

SBPEA has a policy of producing and distributing a newsletter to represented employees called "The Voice." One part of that publication is a notice about its agency shop that is designed to comply with the notice requirements established under *Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292 (*Hudson*) and, presumably, PERB Regulation 32992.[8] SBPEA acknowledges that it did not send out this notice consistently every year. Hayes testified that no notice went out in the 2010-2011 and 2011-2012 Fiscal Years because it had not performed the required audit and could not produce the required financial report. Hayes said that its failure to send out the notice in the past coincided with SBPEA's investigation into of its former general managers for financial misconduct. SBPEA's current general manager, Rodriguez, generally corroborated this testimony, but said that it was possible that notices were not issued for more than two years.

The Winter 2014 issue of the Voice contained SBPEA's notice for the 2014-2015 fiscal year. The notice was entitled "Notice to Fair Share Fee Payers and SBPEA Members." The notice states that employees have the right to be fee payers, but that SBPEA has set its agency fee amount to be equal to its regular membership dues, effective November 1, 2014. The notice also states that "According to law, you may elect to become a 'Fee Payer' pursuant to the agency shop provisions of the contract governing your employment."

[8] Both the *Hudson* decision and PERB Regulation 32992, require unions to notify non-members subject to an agency fee requirement annually about the amount in member dues and agency fees, the procedure for objecting to and challenging the calculation of fees. The notice must also include a financial report specifying how the agency fee amount was calculated.

ISSUES

1. Does the MODIFIED AGENCY SHOP article in the 2014-2017 MOU interfere with Charging Parties' rights under MMBA section 3502?

2. Did SBPEA unlawfully retaliate against White for his filing unfair practice charge(s)?

3. Did SBPEA interfere with Charging Parties' rights under MMBA section 3502 by informing them that the only way out of union membership was to assert a valid religious objection?

4. Did SBPEA violate MMBA section 3502.5, subdivision (f), by failing to provide White required financial reports?

CONCLUSIONS OF LAW

1. MOU Language Claim

The PERB complaint alleges that SBPEA violated the MMBA by maintaining MOU language that interferes with Charging Parties' right to refuse to join and/or participate in the activities of employee organizations. SBPEA initially asserts that this claim is subject to dismissal for failure to join the County as an indispensable party.[9]

a. Failure to Join an Indispensable Party

SBPEA contends that any claim that SBPEA, through the MOU, violated the MMBA should be dismissed due to Charging Parties' failure to join the County as an indispensable

[9] SBPEA actually contends that the complaint in its entirety should be dismissed for failing to join the County, but it asserts no colorable arguments as to how the County is an indispensable party to White's retaliation claim against SBPEA, Charging Parties' claims of unlawful statements made by SBPEA representatives during union meetings, or White's claim that SBPEA failed to produce required financial reports. SBPEA's assertion that the County's absence as a party requires these claims to be dismissed is rejected as lacking any basis.

party. In support, SBPEA relies primarily on *Deltakeeper, et al. v. Oakdale Irrigation District, et al*. (2001) 94 Cal.App.4th 1092, decided under Code of Civil Procedure section 389. Subdivision (a) of that section requires joinder of a person subject to the court's jurisdiction if the person's presence is required to give the parties complete relief, or if the person's absence would harm his or her ability to protect interests related to the case or would create the substantial risk of incurring multiple or inconsistent obligations. Subdivision (b) gives courts the discretion to either proceed with the litigation or dismiss the action without prejudice if the person fitting the description in subdivision (a) cannot be made a party.

PERB's own joinder rules for unfair practice hearings are contained in PERB Regulation 32164. Subdivision (d) is similar to Code of Civil Procedure section 389, subdivision (a), with the notable exception that joinder of the person (referred to as an employer, employee organization, or individual in PERB's Regulations), is *permissive*, not *required*. There is no analog in PERB's regulations for dismissal procedures in Code of Civil Procedure section 389, subdivision (b). SBPEA cites no authority suggesting that PERB has ever adopted those dismissal procedures or has ever dismissed an unfair practice charge for failing to join a party. In the absence of such authority, SBPEA's dismissal argument is rejected.

Even if Code of Civil Procedure section 389, subdivision (b), did apply here, dismissal would not be appropriate for at least two reasons. First, the County is not an entity who could not have been made a party in this case. To the contrary, by all accounts, the County is a public agency within the meaning of MMBA section 3501, subdivision (c), and is accordingly subject to PERB's jurisdiction. Both parties had the opportunity to pursue joinder and neither of the parties took action. Second, equitable reasons militate against dismissal here. Code of

Civil Procedure section 389, subdivision (b), identifies four factors courts should consider when exercising their discretion to dismiss a case. Those factors are to what extent a judgment in the case in the person's absence would prejudice the parties or non-joined person, to what extent the court could mitigate that prejudice, to what extent a judgment in the case would be adequate without the non-joined person, and whether the plaintiff will have an adequate remedy without the non-joined person.

These factors do no support dismissal. SBPEA is correct that the County is a signatory to the MOU whose language is at issue in one of the claims in this case. However, the Board has previously described the employer's role in a negotiated organizational security provisions as merely "peripheral." (See *San Ramon Valley Unified School District* (1989) PERB Decision No. 751, pp. 11-12.)[10] There is no evidence here that the MODIFIED AGENCY SHOP article was designed to or does in practice address a significant County interest. Moreover, the County's role in this litigation is substantially mitigated by the fact that SBPEA has agreed to indemnify the County from any liability arising out the agency shop provision. Thus, even if agreeing to the MODIFIED AGENCY SHOP article in the MOU exposes the County to any liability, SBPEA has a duty to defend the County against those claims. In addition, the PROVISIONS OF LAW article allows for the remainder of the MOU to continue in legal effect even if one of its provisions was found to be invalid. It also provides that SBPEA and the County will reopen negotiations over any MOU provision suspended or superseded by law. These provisions, working together, adequately protect any limited interest that the County has

[10] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, p. 616; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M (*Santa Clara VWD*), p. 13, fn. 4.)

in the MODIFIED AGENCY SHOP article. Charging Parties have not asked for a remedy that can only be granted with the County's participation. SBPEA has not asserted or demonstrated that relief in this case is not possible without the County. For all these reasons, dismissal is not appropriate.

b. Interference Claim

MMBA section 3506, makes it unlawful for either a public agency or an employee organization to interfere with employees in their exercise of protected rights. The test for whether a respondent has interfered with employee rights under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. (*City & County of San Francisco* (2011) PERB Decision No. 2206-M, warning letter, p. 3.) The courts have described the standard as follows:

> (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. of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797 (*Tulare County*), p. 807; *Carmichael Recreation & Park District* (2008) PERB Decision No. 1953-M, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89, other citations omitted.)

If the charging party establishes that the employer's conduct interferes or tends to interfere with the exercise of protected rights, then the burden shifts to the employer to produce a legitimate reason for its conduct. (*Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M, p. 22.) PERB applies these same standards to claims of alleged interference by employee organizations. (*Service Employees International Union, Local 221*

(Kroopkin) (2009) PERB Decision No. 2006-M, dismissal ltr., p. 5, citing *Tulare County, supra*, 167 Cal.App.3d 797, p. 807; see also *West Contra Costa Healthcare District* (2010) PERB Decision No. 2145-M, p. 23.)

A violation under these standards may be found only where the claimed rights are protected under the MMBA. (*County of Merced* (2014) PERB Decision No. 2361-M, adopted proposed decision, p. 18.) MMBA section 3502 states:

> Except as otherwise provided by the Legislature, 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. *Public employees also shall have the right to refuse to join or participate in the activities of employee organizations* and shall have the right to represent themselves individually in their employment relations with the public agency.

(Emphasis supplied.)

Additionally, MMBA section 3502.5, subdivision (a), allows exclusive representatives and employers to agree to an "agency shop" which requires employees, "as a condition of continued employment, either to join the recognized employee organization or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization." The Board has found that the language in section 3502.5, allows for a modified agency shop, in which only future hires are compelled to either join the union or pay agency fees. (*Orange County Water District* (2015) PERB Decision No. 2454-M, pp. 14-15.)[11]

[11] At the time this proposed decision issued, *Orange County Water District*, was subject to judicial review pursuant to MMBA section 3509.5. Nevertheless, the decision remains the best discussion of the lawfulness of modified agency shop provisions under MMBA section 3502.5. (See *Orange County Water Dist. v. PERB* (G052725, app. pending).)

A negotiated maintenance of membership provision is a similar, but not identical, organizational security mechanism, which obligates employees who have already elected to join an employee organization to maintain their membership for the duration of the union's contract with the employer. (See e.g., *Kern High School District* (1999) PERB Decision No. 1319, pp. 4-5; *El Camino Hospital District* (2009) PERB Decision No. 2033-M (*El Camino Hospital*), pp. 24-25.) Collective bargaining statutes that codify the practice of negotiated maintenance of membership provisions also include a window period from which members may exercise their protected right to terminate their union membership. (See Gov. Code, §§ 3513, subd. (i), 3540.1, subd. (i)(1).)[12] The MMBA does not expressly allow or disallow a negotiated maintenance of membership provision. Nor has the Board squarely addressed the lawfulness of such a provision under the MMBA. However, in *El Camino Hospital*, *supra*, PERB Decision No. 2033-M, the Board found that a union's negotiated maintenance of membership provision (with an opt-out window period) was not incompatible with the union's goal of pursuing an agency fee election under MMBA, section 3502.5, subdivision (b). (*Id*. at p. 25.)

A third type of organizational security is the "union shop," which makes union membership a requirement for continued employment. (Developing Labor Law (6th Ed. 2012) Ch. 26.I.C.) Union shops are prohibited under MMBA section 3502 because they violate employees' right to refuse to join or participate in the activities of employee organizations. (*City of Hayward v. United Public Employees, Local 390* (1976) 54 Cal.App.3d 761 (*City of*

[12] Government Code section 3513, subdivision (i) is part of the Ralph C. Dills Act, codified at Government Code, section 3512 et seq. Government Code section 3540.1, subdivision (i)(1), is part of the Educational Employment Relations Act (EERA), codified at Government Code 3540, et seq.

Hayward), p. 764; *Office & Professional Employees International Union, Local 29, AFL-CIO & CLC (Fowles)* (2012) PERB Decision No. 2236-M, p. 10 (*OPEIU*).)[13]

In *OPEIU*, *supra*, PERB Decision No. 2236-M, the respondent union was alleged to have sent the charging party one letter stating that she was required to be "a member in good standing," and another letter stating that she had to be a "member/fee payer in good standing." (*Id*. at p. 5.) The Board found that unions who enter into an agency shop arrangement must provide potential fee payers with enough information to make an intelligent objection before collecting any agency fees. (*Id*. at p. 13, citing *San Ramon Valley Education Association, CTA/NEA (Abbot and Cameron)* (1990) PERB Decision No. 802.) Then, taking guidance from federal precedent, the Board further held that unions must also communicate to represented employees that they have the right to be non-members and that non-members may object to paying any fees not associated with the union's duty as a bargaining representative. (*Id*. at p. 14, citing *Lamons Gasket Co*. (2011) 357 NLRB 739; *California Saw and Knife Works* (1995) 320 NLRB 224, *Leland Stanford Junior University* (1977) 232 NLRB 326.)

In this case, the first sentence of the "MODIFIED AGENCY SHOP" article in the 2014-2017 MOU has the appearances of a maintenance of membership requirement, stating that current dues paying SBPEA members "shall remain SBPEA members for the period of this Agreement." The MOU contains no opt-out period. SBPEA seems to acknowledge this, but states in its closing brief, "the maintenance of membership language is not, nor has it ever been operative." (Closing Brief, § IV(A)(ii), p. 9.) SBPEA General Manager Rodriguez and General Counsel Hayes testified that, in practice, SBPEA maintains an agency shop where all

[13] *City of Hayward*, was decided before the MMBA was amended to expressly allow agency shop arrangements. (*OPEIU*, p. 10.)

Charging Parties have the option of being dues paying members or agency fee payers. In response to letters from White accusing SBPEA of compulsory union membership, SBPEA General Counsel Hayes informed White that he could resign his membership at any time and become a fee payer. Ulloa also testified that, in or around March 2015, someone from SBPEA informed her that she could opt out of membership and be a fee payer. Gamez similarly testified that SBPEA business representative Harts told her that she could "pay maybe a little less than the regular dues," but that she would lose certain member privileges such as voting rights.

SBPEA does not violate employees MMBA section 3502 rights merely by declining to enforce the maintenance of membership provision in the 2014-2017 MOU. However, by retaining that provision in the MOU without clearly informing represented employees that the language is not operative, SBPEA, in effect, misled employees into thinking that continued membership is required. SBPEA argues that it informs employees of right to be non-members through its annual *Hudson* notice. But that notice only points members back to the same problematic language in the MOU, stating that the right to be non-members is dictated by "the agency shop provisions in the contract governing your employment." Rather, it is only when the members themselves, such as Gamez, Ulloa, and White, inquired that SBPEA stated that there was a right to opt out. Even then, no one from SBPEA explained that it was not enforcing the maintenance of membership language in the MOU, leaving employees conflicted over whether to believe representations from SBPEA representatives or the plain terms of the MOU. In addition, SBPEA representatives intentionally avoided answering questions about membership requirements/obligations during informational meetings regarding the 2014-2017 MOU. As in *OPEIU, supra*, PERB Decision No. 2236-M, SBPEA in this case failed to

adequately inform represented employees, including Charging Parties, of their right to withdraw their membership.

Regarding SBPEA's agency fee requirements, SBPEA and the County established a modified agency shop in the 1989-1991 MOU. Employees hired after that agreement took effect have the option of being members or agency fee payers. The 2014-2017 MOU contains similar language stating that "[e]mployees hired after this Agreement is approved by the [County's] Board of Supervisors," may become fee payers. However, nothing in the current MOU informs employees that the right to be a fee payer extends to all employees hired after the 1989-1991 MOU took effect. On its face, the language in the 2014-2017 MOU indicates that only those hired after the current MOU's effective date (June 23, 2014) may elect to be fee payers. This problem is, of course, exacerbated by the fact that the 2014-2017 MOU also contains maintenance of membership language, suggesting that continued membership is required for all others.

SBPEA contends that it is clear from the bargaining history of the MODIFIED AGENCY SHOP article that Charging Parties have the right to be fee payers. But, SBPEA did not produce any actual evidence of the bargaining history behind this article. None of the negotiators for the 1989-1991 MOU testified and none of the subsequent negotiators who did testify had any discussions about the MODIFIED AGENCY SHOP article. Moreover, unit members can hardly be expected to extrapolate their rights under more than 20 years of bargaining history without any guidance from their union. Altogether, SBPEA's conduct by both commission and omission, acted inconsistently with *OPEIU, supra*, PERB Decision No. 2236-M. Its failure to inform represented employees of their right to opt out of membership and become fee payers, while maintaining MOU language that suggests that no

such right exists, harmed Charging Parties' rights under MMBA section 3502. SBPEA offers no justification for failing to more clearly explain employees' rights under the MOU. Accordingly, SBPEA's conduct violated MMBA section 3506 and PERB Regulation 32604, subdivision (b).

2. White's Retaliation Claim

The traditional test for establishing a prima facie case of discrimination or retaliation for protected activities by an employer is found in *Novato Unified School District* (1982) PERB Decision No. 210, pp. 5-6. To state a prima facie case, a charging party must establish: (1) the employee exercised protected rights; (2) the respondent had knowledge of the employee's exercise of those rights; (3) the respondent took adverse action against the employee; and (4) the respondent took action because of the exercise of those rights. (*Id*. at pp. 5-6.) The Board applies the same test for claims that an employee organization retaliated or discriminated against an employee. (*Inlandboatmen's Union of the Pacific (O'Keefe)* (2011) PERB Decision No. 2199-M. warning ltr., pp. 3-4; *AFT Part-Time Faculty United, Local 6286 (Peavy)* (2011) PERB Decision No. 2194, pp. 12-13.)

In this case, SBPEA does not dispute that White's filing of the instant unfair practice charge is protected under the MMBA. (See *Golden Gate Bridge Highway & Transportation District* (2011) PERB Decision No. 2209-M, warning ltr., pp. 1, 5.) Nor does SBPEA refute that it was aware of White's filing of unfair practice charge(s). The primary issues in dispute here are whether Ready's September 12, 2014 letter to White constitutes an adverse employment action and, if so, whether Ready sent the letter because of White's filing of unfair practice charge(s).

Regarding the adverse action element, respondents are only liable where a reasonable person under the same circumstances would find that the action adversely affects the employee's employment. (*County of Contra Costa* (2011) PERB Decision No. 2174-M, p. 6, citing *Newark Unified School District* (1991) PERB Decision No. 864.) In *Service Employees International Union, Local 221 (Gutierrez)* (2012) PERB Decision No. 2277-M (*SEIU Local 221*), the Board emphasized that the adverse nature of an action is measured by using objective criteria and that an employee's subjective apprehension about possible future adverse actions do not qualify. (*Id*. at p. 7, citing *State of California (Department of Health Services)* (1999) PERB Decision No. 1357-S.) The charging party in that case was a steward for the respondent union. After he began encouraging fellow employees to withdraw their membership and become agency fee payers, a union official informed the employer that the charging party was performing union work while on duty. An employer representative called the charging party about those claims. The entire inquiry was dropped the following day after the charging party showed that he was on jury duty during the times he was accused of misconduct. (*Id*. at pp. 3-4.) The Board declined to find that the charging party suffered an adverse action, noting that the entire situation was resolved within two working days with no negative consequences. The Board rejected the notion that the charging party's subjective fears about receiving a call from his employer were objectively adverse to employment. (*Id*. at pp. 7-8.)

Here, White received Ready's letter on the afternoon of Friday, September 12, 2014, accusing him of making false statements in his unfair practice charge documents. According to the letter, Ready planned to request that SBPEA's Board of Directors pursue internal disciplinary charges against White for intentional dishonesty. By the next business day, Monday, September 15, 2014, Hayes informed White that no charges would be filed or

pursued against him. As in *SEIU Local 221*, *supra*, PERB Decision No. 2277-M, there was no showing that the accusation had even a minimal impact on White's employment. White was not required to take any action to cause SBPEA to abandon any plans to pursue charges. Under the circumstances, Ready's September 12, 2014 letter was not an adverse employment action. This claim is accordingly dismissed for failing to state a prima facie case.

3. Statements about Withdrawing as Members

The PERB complaint alleges that agents of SBPEA interfered with Charging Parties' rights under the MMBA by stating in a Spring 2014 union meeting that "membership in [San Bernardino Public Employees' Association] was required and the only way out was for a provable religious objection." (Bracketed text in original.) Generally speaking, the PERB has found that a respondent's 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, p. 10 (*Chula Vista CSD*).) The charging party bears the burden of proving that the speech in question tends to coerce or interfere with the exercise of protected rights. (*Ibid*.) PERB analyzes the respondent's speech objectively and in light of its overall context. (*Los Angeles Unified School District* (2005) PERB Decision No. 1791, warning ltr., pp. 4-5, citations omitted (*LAUSD*).)

The Board also considers the accuracy of the content of the speech in determining whether the communication constitutes an unfair labor practice. (*LAUSD*, *supra*, PERB Decision No. 1791, warning ltr., p. 5; *Muroc Unified School District* (1978) PERB Decision No. 80.) Thus, where the speech accurately describes an event, and does not on its face carry the threat of reprisal or force, or promise of benefit, PERB will not find the speech unlawful. (*Chula Vista CSD*, *supra*, PERB Decision No. 834, p. 10.)

In addition, a respondent is only liable for the conduct of its agents. (*AFT Local 1521 (Paige)* (2005) PERB Decision No. 1769, dismissal ltr., p. 1.) Agency is established by demonstrating that an individual was acting with the actual or apparent authority of the principal entity. Actual authority "is that which an employer intentionally confers upon the agent, or intentionally or negligently allows the agent to believe himself or herself to possess." (*Chula Vista Elementary School District* (2004) PERB Decision No. 1647, p. 7, citing *Inglewood Teachers Assn. v. PERB* (1991) 227 Cal.App.3d 767.) Employers may also confer apparent or ostensible authority upon individuals "where an employer reasonably allows employees to perceive that it has authorized the agent to engage in the conduct in question." (*Id*. at p. 8.) PERB applies the same agency rules to employee organizations. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249-M, p. 14 (*NUHW*), citing *Certain-Teed Products Corp. v. NLRB* (1977) 562 F.2d 500; *Aladdin Hotel* (1977) 229 NLRB 499; see also *Mount Diablo Unified School District, et al.* (1977) EERB Decision No. 44, p. 12.)

In this case, Charging Parties' claims suffer from a lack of specificity. At the outset, no evidence was presented about whether Charging Parties Gamez, Glasgow, Johnson, Keyes, Medrano, Rocha, ever attended any SBPEA meetings. Thus, any claim that SBPEA interfered with those Charging Parties' protected rights by statements made during SBPEA meetings is dismissed for lack of proof. (See *County of Riverside* (2010) PERB Decision No. 2119-M, p. 19 [dismissing claim that an employer's statements interfered with employees' rights where there was no evidence that employees heard the offending statements].) Charging Parties Brenner, Olague, Ramirez, and White all testified about hearing some kind of statements about union membership and/or the religious objection exception during SBPEA meetings, but none

of them identified who made those statements. In addition, these Charging Parties gave only vague descriptions of which meetings they attended.

To establish agency, PERB does not necessarily require a charging party to identify the name of the purported agent. However, it must be clear that the individual in question satisfies one of the two agency tests articulated above. (*NUHW*, *supra*, PERB Decision No. 2249-M, pp. 14-15 [holding that unidentified persons wearing the respondent union's garb and identification badges, describing themselves as union agents, and making statements to promote the union could reasonably be found to be agents of the union].) Here, Brenner recalled someone saying that the only way to "get out" of SBPEA membership was to claim a "religious exemption," but does not remember who said it. When pressed on cross-examination, Brenner acknowledged hearing that statement while outside SBPEA's building. Brenner also said that she heard the comment after the July 2014 membership expulsion hearings. Ramirez testified that she attended SBPEA meetings during the April-May 2014 TA ratification process, and that she heard from other members that the only way to withdraw membership from the union was to have a religious objection. There was no evidence that any SBPEA representatives were present or addressed attendees outside of the meeting hall. The parking lot outside was populated by around 100 people, including supporters and organizers for the ongoing decertification effort. Rank-and-file union members are not considered agents of the union. (*Los Angeles Community College District* (1982) PERB Decision No. 252, p. 17.) Under these facts, there is insufficient evidence to attribute the comments heard by Brenner or Ramirez to SBPEA. Accordingly, the claim that SBPEA interfered with the rights of Brenner or Ramirez by comments it made during union meetings they attended is dismissed for lack of proof.

Olague testified that someone said that "there was no way out" of SBPEA membership, but also could not recall who made that statement. Again, without greater specifics, Charging Parties do not establish that an actual or apparent SBPEA agent made the statements. The record shows that a variety of people not affiliated with SBPEA's leadership attended SBPEA meetings, including those in active opposition to SBPEA. This claim is therefore dismissed for lack of proof.

White testified that he attended SBPEA informational meetings and heard attendees asking questions such as how to "get out" of SBPEA, how union dues could be submitted to charity, and how to resign membership. White said that he heard different responses, including that SBPEA was not there to discuss those issues, that the issues were governed by the MOU, and that unit members could withdraw membership by asserting a religious objection. As with Brenner and Olague, White did not identify any of the speakers. However, unlike with Brenner and Olague, it was reasonably clear from his testimony that White was present inside the meeting hall. It is undisputed that the SBPEA representatives speaking at the meeting were either Directors or negotiating team members, all of whom carry at least the ostensible authority of SBPEA. White's testimony was also partially corroborated by Rodriguez, who said that SBPEA representatives responded to attendees' questions about withdrawing from membership stating "that's not why we were here."

Nevertheless, White's claims lack the specificity required to sustain an interference violation. Although White testified that someone from SBPEA commented on the religious objection exception to union membership, it is unclear from his testimony what question the SBPEA representative was responding to. As White admits, some attendees asked about donating the equivalent of their union dues to charity instead of supporting SBPEA. A

response consistent with the religious objection provision in the MOU and in MMBA section 3502.5, subdivision (c), would not necessarily interfere with Charging Parties' right to refuse to participate in the activities of any employee organization. Therefore, this claim, too must be dismissed.

Brennan, who withdrew as a charging party in the case, offered the most specific testimony on this subject, stating that she attended a meeting where then-SBPEA president Ready told attendees that the only way members could opt out of membership was through a religious objection. According to Brennan, Rodriguez concurred. As with Charging Parties' other witnesses, Brennan said only that the meeting occurred sometime in Spring 2014. However, Rodriguez denies this. More importantly, it is unclear from Brennan's testimony whether any of the Charging Parties were actually present at the meeting when the alleged statements were made. Statements that might otherwise interfere with employees' protected rights do not violate the MMBA where there was no proof that the employees at issue were present. (See *County of Riverside, supra*, PERB Decision No. 2119-M, p. 19.)[14] Thus, it cannot be concluded that the alleged statements interfered with Charging Parties' rights where it was not shown that any of the Charging Parties' heard the offending statement. To the extent that Charging Parties claim that SBPEA has interfered with the rights of those not named as parties in this case, they lack the standing to assert that claim. (See *IBEW Local 1245 (Tacke)* (2006) PERB Decision No. 1857-M, warning ltr., p. 2, citing *United Teachers of Los Angeles (Hopper)* (2001) PERB Decision No. 1441.)

[14] It is acknowledged that White testified that he went to "almost every SBPEA Board meeting and informational meeting," after the first meeting he attended sometime in April or May 2014. However, without more detail about either when White began attending meetings or when Brennan heard the alleged statements by Ready and Rodriguez, there is still insufficient evidence to find a violation.

Charging Parties also appear to claim that statements by SBPEA representatives outside of union meetings interfered with their protected rights. For example, Gamez testified that shortly after the 2014 membership suspension/expulsion hearings, SBPEA Business Representative Harts told her that she had the option of paying "maybe a little less than the regular dues" and also could designate her dues to a religious organization. Medrano testified that, sometime after the Spring 2014 informational meetings, she spoke with either Harts or Rodriguez and was told "as part of the MOU, you cannot ask not to be a member." These claims were not in the PERB complaint and were raised for the first time at hearing. At this point, these claims are outside of the six-month statute of limitations period for claims under the MMBA. (*County of Santa Barbara* (2012) PERB Decision No. 2279-M, citing *Coachella Valley Mosquito & Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072.) They are accordingly dismissed as untimely.

4. Financial Report Claim

The PERB complaint alleges that SBPEA failed to provide White with financial reports required by MMBA section 3502.5, subdivision (f). PERB Regulation 32602, subdivision (e), states that these claims shall be processed as unfair practice charges. Under MMBA section 3502.5, subdivision (f), unions who have negotiated for an agency shop provision:

> shall keep an adequate itemized record of its financial transactions and *shall make available annually*, to the public agency with which the agency shop provision was negotiated, and *to the employees who are members of the organization, within 60 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or corresponding principal officer, or by a certified public accountant.*

(Emphasis supplied.)

Interpreting substantially similar language in other collective bargaining statutes enforced by PERB, the Board has found that each year, union members are entitled their union's annual financial report that must include both a balance sheet and an operating statement. (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H, p. 11 (*SETC*).)[15] The New York Times Dictionary of Money and Investing defines a "balance sheet" as "[a] summary of a company's assets, liabilities, and net worth at a moment in time." (NY Times Dict. of Money and Investing (2002), p. 19.) A "statement of operations" is "[a] financial statement showing a company's revenues and costs over a period of time." (*Id*. at p. 142.)

The union's duty to provide its financial report is triggered by a member's request. (*California School Employees Association & its Chapter 47 (Shampine, et al.)* (2014) PERB Decision No. 2355, p. 10 (*CSEA*).)[16] The request need not use specific verbiage, so long as the union reasonably understands that the member is seeking the financial report. (*SETC*, *supra*, PERB Decision No. 2069-H, p. 11 [holding a union member's multiple requests for an "annual report" was sufficient to constitute a request for the union's financial report].) Members are only entitled to financial reports for the immediate preceding fiscal year. (*CSEA*, p. 10, citing *Rio Teachers Association (Lucas)* (2011) PERB Decision No. 2157 (*RTA*).) Members seeking additional reports must renew their request each year. (*Ibid*.)

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[15] *SETC*, was decided under Government Code section 3587, which is part of the Higher Education Employer-Employee Relations Act, codified at Government Code section 3560 et seq. Government Code section 3587, is substantially similar to MMBA section 3502.5, subdivision (f).

[16] *CSEA*, was decided under Government Code section 3546.5, which is part of EERA. Government Code section 3546.5, is substantially similar to MMBA section 3502.5, subdivision (f), except as noted below.

In this case, SBPEA provided White with its 2013-2014 financial report by September 12, 2014, the date specified by White. SBPEA's response included a "Consolidated Statement of Financial Position," describing SBPEA's total assets and liabilities on hand as of June 30, 2014. This appears to satisfy the requirements of a "balance sheet," within the meaning of MMBA section 3502.5, subdivision (f). Charging Parties raise no arguments or evidence to the contrary. Likewise, the documents also include both a "Consolidated Statement of Activities and Changes in Net Assets (Deficit)" and a "Consolidated Statement of Cash Flows" which collectively detail SBPEA's cash levels, and deficit levels at the beginning and the end of fiscal year 2013-2014. These documents appear to be consistent with the definition of an "operating statement" within the meaning of subdivision (f). Once again, Charging Parties do not argue otherwise. Charging Parties argue that the provided report does not comply with subdivision (f), because SBPEA did not create the report itself. This argument is unpersuasive because unions are only required to have the report be *certified* by union officers or by a CPA. SBPEA's financial report included a letter from its CPA, although unsigned, attesting to the accuracy of the reports. At hearing, Rodriguez confirmed that SBPEA hired the CPA to audit its records. (But see *Claremont Faculty Association (Lukkarila)* (2016) PERB Decision No. 2474, p. 5 (*CFA*).)[17]

[17] In *CFA*, the Board held that providing an unsigned financial report was insufficient to satisfy the requirements of Government code 3546.5, that the report be "*signed* and certified as to its accuracy by its president and treasurer, or corresponding principal officers." (Emphasis supplied.) MMBA section 3502.5, subdivision (f), at issue in this case, requires only that the report be "certified as to its accuracy by its president and treasurer, or corresponding principal officer, or by a certified public accountant." "Where statutes referring to one subject contain a critical word or phrase, omission of that vital word or phrase from a similar statute on the same or related subject is presumed to have been deliberate by the Legislature and expressing a different legislative intent." (*Sacramento City Unified School District* (1987) PERB Order No. IR-49, pp. 88-89, citations omitted.)

Charging Parties further argue that SBPEA did not comply with White's request for prior financial reports. They also appear to argue that SBPEA was obligated to provide the required financial reports to other members even in the absence of any request. Both arguments are rejected. As stated above, unions' duty to provide its annual financial report is triggered by a members' request. (*CSEA*, *supra*, PERB Decision No. 2355, p. 10.) Moreover, "members are only entitled to financial reports for the immediate preceding year." (*CSEA*, *supra*, PERB Decision No. 2355, p. 10, citing *RTA*, *supra*, PERB Decision No. 2157.) There was no evidence in this case that White or any other Charging Party requested SBPEA's financial reports earlier than August 2014. At that time, SBPEA was only obligated to produce its report for the 2013-2014 fiscal year. Thus, SBPEA did not violate MMBA section 3502.5, subdivision (f), by failing to provide earlier financial reports. Charging Parties' claim that SBPEA failed to provide required financial reports is dismissed.

REMEDY

MMBA Section 3509, subdivision (b), authorizes PERB to order "the appropriate remedy necessary to effectuate the purposes of this chapter." (*Omnitrans* (2010) PERB Decision No. 2143-M, p 8.) This includes an order to cease and desist from conduct that violates the MMBA. (*Id.* at p. 9.) PERB's remedial authority includes the power to order an offending party to take affirmative actions to make the charging party whole and to effectuate the purposes of the MMBA. (*City of Redding* (2011) PERB Decision No. 2190-M, pp. 18-19.) PERB may order remedial action even in those cases where the respondent does not exclusively control the means to undo the harm caused by the violation. (See *Omnitrans* (2009) PERB Decision No. 2030-M, p. 31 [ordering respondent to pursue a court order to expunge an employee's criminal record].)

In this case it has been found that SBPEA interfered with Charging Parties' protected rights by maintaining language in the 2014-2017 MOU containing misleading terms about employees' rights to opt out of membership and become agency fee payers. Because of this, SBPEA is ordered to cease and desist from interfering with employees' right and to take affirmative actions to rectify the violation. Thus, SBPEA is further directed to request to reopen negotiations with the County concerning the MODIFIED AGENCY SHOP article, and to negotiate terms that are consistent with this decision. (See *Berkeley Unified School District* (2012) PERB Decision No. 2268, p. 17 [ordering respondent to renegotiate contract term inserted into the agreement through unlawful means].)

In addition, by failing to clarify employees' rights in light of the problematic MOU language, SBPEA deprived Charging Parties of the right to make an intelligent decision over whether to opt out of membership during this period. Therefore, starting with the 2014-2015 agency fee collection period, SBPEA is directed to refund all Charging Parties the difference between any membership dues paid and the fee amount collected for a similarly situated agency fee payer during the equivalent time period. Payments shall be augmented by interest at a rate of 7 percent per annum. (*Paso Robles Public Educators (Andrus, et al.)* (2004) PERB Decision No. 1589, p. 12 (*Paso Robles Educators*).) Refund payments shall continue until SBPEA successfully renegotiates the MODIFIED AGENCY SHOP article, and notifies represented employees of the newly negotiated terms. If the County refuses to reopen negotiations, or if SBPEA and the County fail to reach an agreement for new language, after completing good faith negotiations, then refund payments shall cease upon SBPEA's clear notice to represented employees that, notwithstanding the language in the MOU, that represented employees have the right to opt out of membership and become agency fee payers.

Finally, SBPEA is directed to post a notice of this order. The notice should be subscribed by an authorized agent of SBPEA, indicating that it will comply with the terms thereof. The notice shall not be reduced in size and reasonable efforts will be taken to insure that it is not altered, covered by any material, or defaced, and will be replaced if necessary. Posting such a notice will inform employees that SBPEA has acted in an unlawful manner, and is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of the MMBA that employees be informed of the resolution of the dispute and SBPEA's readiness to comply with the ordered remedy. (*City of Selma* (2014) PERB Decision No. 2380-M, proposed dec., pp. 14-15.)

The notice posting shall include both a physical posting of paper notices at all places where notices to represented employees are customarily placed, as well as a posting by electronic message, intranet, internet site, and other electronic means customarily used by SBPEA to communicate with its employees in the bargaining unit. (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento* (2013) PERB Decision No. 2351-M.)

Charging Parties also request that they be reimbursed for fees and costs in this case. PERB will award attorneys' fees and costs of hearing only if the unfair practice charge or defense thereto is both without arguable merit *and* pursued in bad faith. The term "bad faith" includes conduct that is dilatory, vexatious or otherwise an abuse of process. (*Omnitrans*, *supra*, PERB Decision No. 2143-M, p. 8.) A fees award is typically reserved for particularly egregious conduct such as lying under oath about the fundamental basis for the case. (See e.g., *City of Alhambra* (2009) PERB Decision No. 2037-M, p. 3; *Los Rios College Federation of Teachers/CFT/AFT/Local 2279 (Deglow)* (1997) PERB Decision No. 1238, p. 2.) These

standards are not met here. Accordingly, Charging Parties' request for fees and costs is denied.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the San Bernardino Public Employees Association (SBPEA) violated Meyers-Milias-Brown Act (MMBA), Government Code, section 3502. SBPEA violated the Act by maintaining Memorandum of Understanding (MOU) language indicating that union members were required to remain members for the duration of the MOU, and that only employees hired after the MOU became effective could become agency fee payers. This failed to inform represented employees of their right to opt out of union membership and become agency fee payers. All other allegations were dismissed.

Pursuant MMBA Section 3509, subdivision (b), it hereby is ORDERED that SBPEA, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

Interfering with represented employees' rights by failing to inform them through the MOU of their right to opt out of union membership and become agency fee payers.

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

1. Request to reopen negotiations with the County of San Bernardino over the MODIFIED AGENCY SHOP article in order to clarify that union membership is not required as a term of continued employment and that any represented employees hired after the effective date of the 1989-1991 MOU have the right to opt out of membership and become agency fee payers.

2. Refund to Charging Parties (Brenner, Gamez, Glasgow, Johnson, Keyes, Medrano, Olague, Reamirez, Rocha, Ulloa, and White) the difference between any membership dues paid and the fee amount collected for a similarly situated agency fee payer during the equivalent time period, starting with the 2014-2015 agency fee collection period until SBPEA has successfully renegotiated the MODIFIED AGENCY SHOP article, pursuant to Section B.1 of this order. If the County refuses to reopen negotiations, or if SBPEA and the County fail to reach an agreement for new language, after completing good faith negotiations, then refund payments shall cease upon SBPEA's clear notice to represented employees that, notwithstanding the language in the MOU, represented employees have the right to opt out of membership and become agency fee payers. Refund payments shall be augmented by interest at a rate of 7 percent per annum.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in SBPEA's bargaining units customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of SBPEA, 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 SBPEA to communicate with its employees in the bargaining units represented by SBPEA. Pursuant to *City of Sacramento, supra*, PERB Decision No. 2351 and other applicable authority, SBPEA shall identify and include in its electronic posting any and all affected employees represented by SBPEA employed at the County, who are no longer employed as of the date of posting, or use personal delivery or some alternative means of notification reasonably devised to ensure that any and all

affected employees who are no longer employed by the County. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

4. 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 a representative of the Charging Parties.

Right to Appeal

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
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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 or received by electronic mail before

the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 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).)