STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 721, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	Case No. LA-CE-787-M PERB Decision No. 2591-M October 23, 2018

Appearances: Rothner, Segall & Greenstone by Glenn Rothner, Attorney, for Service Employees International Union Local 721; The Zappia Law Firm by Edward P. Zappia and Brett Ehman, Attorneys, for County of Riverside.

Before Winslow, Shiners, and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to the attached proposed decision by an administrative law judge (ALJ). Charging Party Service Employees International Union Local 721 (SEIU) alleges that Respondent County of Riverside (County) violated the Meyers-Milias-Brown Act (MMBA)[1] and PERB Regulations[2] when the County terminated Sheriff's Communications Supervisor and SEIU Chief Negotiator Wendy Thomas (Thomas) based on eight allegedly unfounded assertions that she made in the course of a federal First Amendment lawsuit against the County. SEIU alleges that the MMBA protects Thomas's right to make these assertions,

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

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

while the County disputes this contention because, it claims, Thomas was knowingly dishonest in making the assertions.

The ALJ found that four of the eight challenged assertions were unprotected because they involved knowingly dishonest statements or omissions. The ALJ found that the other four challenged assertions were protected. The ALJ reasoned that "[b]ecause half of the statements . . . were protected under the MMBA, there is direct evidence of unlawful motivation." (Proposed decision, p. 64.) However, the ALJ then found that it was more likely than not that the County would have terminated Thomas based solely on the four unprotected statements. (*Id*. at p. 68.) The ALJ accordingly concluded that SEIU's charge should be dismissed. SEIU excepted to the proposed decision. The County filed no exceptions and urges us to affirm the proposed decision.

We have reviewed the record and considered the parties' arguments in light of applicable law. While we adopt pages 1-32 and 43-49 of the proposed decision subject to the below discussion, our conclusions depart from the ALJ's proposed decision. For the reasons we explain, the MMBA protects Thomas in making each of the eight challenged assertions, and the County therefore violated the MMBA by terminating Thomas' employment because of those assertions.[3]

[3] Neither party excepted to the ALJ's findings that four of the eight challenged assertions were protected. These assertions involved three of the four instances in which the County involuntarily transferred Thomas, as well as a bulletin board access dispute. In the absence of exceptions regarding these issues, they are not before the Board and the ALJ's conclusions regarding these issues are binding only on the parties. (PERB Regs. 32215, 32300, subd. (c); *City of Torrance* (2009) PERB Decision No. 2004, p. 12.) Because we accept the ALJ's conclusions that each of these four assertions was protected, we address only the four remaining challenged assertions, which, for the reasons we explain below, were also protected.

BACKGROUND

There is no need to repeat here the full factual and procedural history. We briefly summarize the background for context. Then, in our legal discussion, we analyze the facts in a more detailed fashion.

The County first hired Thomas in 1996, as a trainee Public Safety Communications Officer. The County promoted her repeatedly thereafter. As a result of one such promotion, in 2001, Thomas moved into a supervisory bargaining unit that is exclusively represented by SEIU. In 2005, the County promoted Thomas into a Sheriff's Communications Supervisor position, which is also part of the SEIU-represented supervisory unit. Thomas remained in that position until the County terminated her in January 2013.

Between 2008 and her termination in 2013, Thomas was an active SEIU leader. She served in a variety of roles, including shop steward, chair of two labor relations committees that SEIU convened with the County, executive board member, and chief negotiator in bargaining for a new collective bargaining agreement. In the latter capacity, Thomas led SEIU on a strike, participated in media interviews, and spoke publicly at Board of Supervisors meetings.

SEIU and Thomas came to believe that County managers were making negative comments about her union activity and retaliating against her for such activity. In 2010, an SEIU attorney presented the County with a letter outlining some of these concerns. The County investigated SEIU's concerns, but SEIU and Thomas were not satisfied with the outcome of that investigation. SEIU and Thomas pursued the matter further by meeting with the County's human resources director, but this process also did not alleviate their concerns.

In December 2010, SEIU and Thomas sued the County and several County representatives in the United States District Court for the Central District of California (District

Court), alleging that the County had taken a range of adverse actions against Thomas and other employees in response to activities protected under the First Amendment. SEIU and Thomas filed an amended complaint in October 2011. Both the original and amended complaints set forth extensive factual allegations over the course of more than 100 often lengthy paragraphs. SEIU's attorneys, representing both SEIU and Thomas in the District Court litigation, drafted both complaints.

In February 2012, the District Court granted summary judgment to the County and individual County representatives, finding that most of the alleged wrongdoing did not rise to the level of adverse action, and further finding no material dispute as to the County's non-retaliatory explanation for those of its acts which did rise to the level of adverse action. The District Court, while noting that it could not determine credibility on a motion for summary judgment, nonetheless wrote in its summary judgment ruling that

> Thomas appears to have fabricated some of the frustrations that form the backdrop against which she asks the Court to view Defendants' adverse employment actions. For instance, Thomas intimates that someone moved her Department-issued car from its reserved parking spot to harass her [citation omitted], but fails to reveal she had asked for the car to be moved (it would not start), and then thanked the sergeant who moved it [citation omitted].

(Proposed decision, p. 15.)

In the wake of the District Court's summary judgment decision, the County investigated Thomas to determine if she had been knowingly dishonest in the District Court proceedings. The County's investigators issued a report finding that Thomas was knowingly dishonest, and the County terminated Thomas based on these findings. The County's termination letter explains the County's basis for terminating Thomas, listing eight allegedly unfounded assertions that SEIU and Thomas made in the District Court litigation.

SEIU appealed Thomas's termination under the parties' Memorandum of Understanding (MOU), and the parties selected an arbitrator to resolve the appeal. SEIU also filed the instant unfair practice charge alleging that the County terminated Thomas for protected conduct. PERB's Office of the General Counsel issued a Complaint. Shortly before the ALJ was scheduled to hear the case, the County filed a superior court action against PERB and moved ex parte for a writ preventing PERB's proceedings from going forward until such time as the arbitrator had issued a final ruling on Thomas's termination. Ultimately, however, the County and SEIU resolved the County's superior court action by reaching an agreement to stay the arbitration until such time as the instant case is complete.

The ALJ then held a five-day evidentiary hearing. After the hearing concluded, but before the ALJ issued a proposed decision, several relevant developments unfolded in federal court. In July 2014, Thomas filed a second federal lawsuit, alleging that the County violated the First Amendment by firing her in retaliation for pursuing the first federal lawsuit. The parties later agreed to stay that action until the instant case is complete.[4]

Next, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) partially reversed the District Court's summary judgment ruling in the first federal lawsuit. (*Thomas v. County of Riverside* (9th Cir. 2014) 763 F.3d 1167.) The Ninth Circuit found that "[a] reasonable juror might well find" that the County had deterred protected speech by removing Thomas from a paid teaching assignment and from an unpaid committee assignment,

[4] The ALJ admitted into evidence not only the District Court's summary judgment ruling in Thomas's first federal lawsuit, but also selected deposition transcripts, pleadings, and discovery responses from the same matter. The record also includes federal and state court records reflecting stipulated stay agreements regarding the arbitration and Thomas's second federal lawsuit. To the extent needed to support our recitation of the background facts, we take notice of additional federal and state court records that the courts have made publicly available online.

prohibiting her from being paid for travel between work sites, interfering with a previously-approved vacation, investigating her for e-mails that did not violate any policy, and involuntarily transferring her work assignment on three occasions in 2010 and 2011. (*Id*. at pp. 1169-1170.) The Ninth Circuit noted that SEIU and Thomas had not appealed the District Court's findings regarding two of the County's allegedly adverse actions—the car-moving incident and an earlier involuntary transfer in 2009. (*Id*. at p. 1169.) Following the Ninth Circuit's decision, the parties reached an undisclosed settlement in Thomas's first federal lawsuit. The second federal lawsuit, as well as the discharge arbitration, remain stayed pending completion of this case.

DISCUSSION

We review exceptions to a proposed decision de novo, but need not address alleged errors that would not impact the outcome. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) We may draw inferences that are contrary to the ALJ's, and we may reach different conclusions on factual matters, legal conclusions, and mixed questions of law and fact. (*City of Milpitas* (2015) PERB Decision No. 2443-M, p. 12.) To the extent that an ALJ assesses credibility based upon observing a witness in the act of testifying, we defer to such assessments unless the record warrants overturning them. (*Los Angeles Unified School District* (2014) PERB Decision No. 2390, p. 12.) We accord no particular deference to those aspects of an ALJ's credibility determination not based on the ALJ's firsthand observations. (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2285-S, pp. 10-11 (*Department of Corrections & Rehabilitation*).)

This case turns on whether the County proved by clear and convincing evidence that Thomas was knowingly dishonest, or showed reckless disregard for the truth. (*Chula Vista*

Elementary School District (2018) PERB Decision No. 2586, pp. 16-17 & fn. 8 (*Chula Vista*) [employee's criticism of management or working conditions protected unless it is shown by clear and convincing evidence that employee acted with actual malice].) Before turning to that analysis, however, we note several preliminary principles.

Although Thomas and the County have starkly different views about many aspects of the assertions Thomas and SEIU made in District Court, federal procedures are well designed to sort out such differences and determine their legal import. An employer defending itself in federal court can respond to any allegedly frivolous contentions by bringing a motion under Federal Rule of Civil Procedure 11 (Rule 11), which allows the employer to seek reimbursement of attorney fees as redress for, and deterrence against, frivolous litigation assertions. While Rule 11 is relevant in that it provided the County with an appropriate avenue for adjudicating its concern about allegedly unsupported allegations, Rule 11 standards do not control our inquiry.[5]

The eight challenged statements also constituted a very small fraction of SEIU's and Thomas's allegations in their lengthy complaints, declarations, and discovery responses, which together recounted thousands of facts. Even if a few of these factual assertions had been

[5] Even assuming for the sake of argument that SEIU's and Thomas's District Court complaints deviated from conventional notice pleading in a misleading manner, the circumstances of this case reveal no reason for us to find that Thomas, a layperson, would lose the MMBA's protection for failing to correct her attorney's alleged omissions. (Cf. *County of San Bernardino* (2018) PERB Decision No. 2556-M, adopting proposed decision at pp. 12-13 [relying on litigation privilege to find an employer agent's superior court declaration to have been protected speech].) In the instant case, because we find Thomas's statements to be free of malicious intent, we need not decide the outer contours of the litigation privilege's application when a litigation participant makes baseless claims. We note, however, that neither the litigation privilege nor *County of San Bernardino*, *supra*, PERB Decision No. 2556-M, protects baseless litigation that an employer brings with the intent of interfering with or retaliating against employees for their exercise of protected rights. (*State of California (State Personnel Board)* (2004) PERB Decision No. 1680-S, adopting warning letter at pp. 2-4.)

erroneous, a small percentage of errors in most instances would not involve such reckless disregard for the truth as to cause the plaintiff to lose protection. This is consistent with our precedent that encourages the parties to respond to problematic speech with more speech, rather than via retaliatory discipline. (See *City of Oakland* (2014) PERB Decision No. 2387-M, pp. 23-25 [absent actual malice, the MMBA protects even false labor speech, because, in part, freedom of speech is preferable to strikes; an employer may respond with its own similar speech, provided that the employer must be careful, given its inherent power in the workplace, not to coerce, threaten, discriminate or retaliate against employees].)

Issues Not in Dispute

We note four critical ALJ determinations that are not in dispute. First, the County did not except to the ALJ's conclusion that the first federal lawsuit that SEIU and Thomas filed against the County, including the eight challenged assertions, related to concerns over terms and conditions of employment. (Proposed decision, p. 44.)

Second, the County did not except to the ALJ's conclusion that it took adverse action against Thomas by placing her on involuntary paid administrative leave, admonishing her not to enter the workplace without an escort, and terminating her. (Proposed decision, pp. 62-63.)

Third, since the County admits that it took these adverse actions because of eight assertions that SEIU and Thomas made in the District Court litigation, there is no need to resort to circumstantial evidence of motivation under *Novato Unified School District* (1982) PERB Decision No. 210 to establish a prima facie case. (Proposed decision, pp. 63-65.) There is also no dispute that the County knew of Thomas's litigation activity, nor any dispute regarding any alleged pretext for discharge. Thus, our analysis turns entirely on whether the challenged assertions are protected or unprotected. (*Rancho Santiago Community College*

District (1986) PERB Decision No. 602 (*Rancho Santiago*), pp. 11-12 & 14 [where employer explicitly states that it disciplined employee as a result of employee statements, there is no question as to motivation and PERB's task is to determine whether the statements were statutorily-protected].)

Fourth, assertions related to workplace conditions are protected unless they are so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" as to cause "substantial disruption of or material interference with" the County's operations. (*Rancho Santiago, supra*, PERB Decision No. 602, p. 13.)

Actual Malice Standard

The instant case deals with allegedly false statements by Thomas in the first federal lawsuit against the County.[6] To lose statutory protection, "an employee's speech must be maliciously untrue." (*Chula Vista*, *supra*, PERB Decision No. 2586, p. 16, internal quotations omitted.) As we recently held in *Chula Vista*

> A party claiming employee speech is unprotected therefore must prove that (1) the employee's statement was false and (2) the employee made the statement 'with knowledge of its falsity, or with reckless disregard of whether it was true or false.' [(*Sutter Health v. UNITE HERE* (2010) 186 Cal.App.4th 1193, 1209 (*Sutter Health*); *Triple Play Sports Bar and Grille* (2014) 361 NLRB 308, 312.)] This standard focuses on the employee's subjective state of mind, not on whether a reasonable person would have investigated before making the statement. (*Sutter Health*, *supra*, 186 Cal.App.4th at pp. 1210-1211.) Even gross or extreme negligence as to the statement's truth is insufficient to prove the actual malice necessary to strip employee speech of statutory protection. (*Id.* at p. 1211.)
>
> [¶ . . . ¶]

[6] We do not in this case consider other scenarios implicated by the *Rancho Santiago* standard, such as where an employee is terminated for insubordination.

> Any party alleging that another party acted with 'actual malice' must satisfy a heightened standard of proof by coming forward with 'clear and convincing' evidence. ([*Id.* at] p. 1206.)

(*Chula Vista*, *supra*, PERB Decision No. 2586, pp. 16-17 & fn. 8.)

Application of Actual Malice Standard to the Four Assertions at Issue

1. Assertions Regarding Thomas's 2009 Involuntary Transfer

The County claims SEIU and Thomas made knowingly dishonest assertions regarding the County's 2009 decision to transfer her to the Ben Clark Training Center (BCTC). Specifically, the County challenges SEIU's and Thomas's assertion that

> Thomas notified Defendant Grotefend on or about March 26, 2009 that she was supposed to be released for collective bargaining. Immediately following Thomas' attendance at the first bargaining session and Thomas' notification to Grotefend that she planned on participating in collective bargaining sessions through June 2009, Defendants' [sic] removed Thomas to a remote work site and provided her a work space that was substandard compared to that given to other supervisory employees at the same facility, even though supervisory office space was available at that time.

The two adjectives SEIU and Thomas used to describe her new work location—"remote" and "substandard"—are subjective. Because these assertions were largely based on opinion, they were unlikely to lose protection under the actual malice standard. (See *Chula Vista*, *supra*, PERB Decision No. 2586, p. 19 [e-mail containing a mix of opinion and fact did not lose statutory protection].) While the ALJ commented that Thomas offered "somewhat weak" explanations for these adjectives, the ALJ did not find them to be deliberately dishonest. Nor do we so find.

The ALJ found, however, that Thomas "knew, prior to March 26, 2009, that her unit was being moved to the BCTC," and therefore that the County "had already planned to move

[her unit] to the BCTC before receiving any notification from her about bargaining obligations." (Proposed decision, p. 54.) The record does not support these findings.

As an initial matter, the truth of the challenged assertion does not turn on whether March 26, 2009 is an accurate date. This is particularly the case given the "on or about" language that SEIU and Thomas used in making this allegation in their federal court complaint. (*U.S. v. King* (5th Cir. 1983) 703 F.2d 119, 124 fn.2 ["on or about" is only an approximate allegation].)

Our review of the record reveals the following. In an e-mail dated March 12, 2009, management learned that Thomas would miss work for bargaining on March 26, 2009. While the evidence does not reveal the exact date management notified Thomas that she would be moved to the BCTC, the record suggests that this notification occurred between March 11, 2009 and the end of the month. Since no party was able to pin down exactly when management notified Thomas of the move, and it appears likely that the notification occurred shortly after management learned that Thomas would miss work for bargaining, the County did not prove by clear and convincing evidence that Thomas demonstrated actual malice in alleging that management announced the move shortly after learning that Thomas would be participating in bargaining.

Furthermore, the ALJ erred when she found that Thomas, in her testimony, "denied attending any meetings, or participating in any discussions, where the move to the BCTC was discussed prior to the move." (Proposed decision, p. 54, underline in original.) In reviewing Thomas's testimony, including that portion which the ALJ cited in describing Thomas's alleged dishonesty, we find the record does not support any claim that Thomas so testified. Rather, in a one word answer to an unclear question, Thomas apparently testified that, prior to

management's *announcement of the decision* to move her unit to the BCTC, she had not been party to any meetings or discussions about moving to the BCTC. The record proves this to be true. Indeed, the record reflects that Thomas was involved in discussions about the move—including touring the facility and choosing a cubicle—only after the move was announced.

Given the above findings, the record does not demonstrate that Thomas exhibited actual malice in her assertions regarding her transfer to the BCTC, and we therefore find that the MMBA protects those statements.

2. Assertions Regarding the County's Investigation of Thomas for Alleged Rude and Discourteous Behavior

The County claims Thomas made knowingly dishonest assertions regarding a personnel investigation that Thomas's direct supervisor, Heather Woods (Woods), initiated in 2009. Specifically, the County challenges SEIU's and Thomas's assertion that

> On or about June 1, 2009, and during the 2009 MOU negotiations, a local newspaper "The Press Enterprise" ran an article about the Sheriff's Department granting pay raises to their executive staff during the 2009 budget crisis. An SEIU member was quoted in the article criticizing the Sheriff's Department's decision. The following day on June 2, 2009 under the direction of Defendant Grotefend, Defendant Woods initiated a vague personnel investigation of Thomas. Defendant Woods told Thomas that although the complaint was vague, it was the best they could come up with at the time.

The ALJ began by finding that "the truth or falsity of this claim is not entirely clear-cut." (Proposed decision, p. 57.) The ALJ also found it "curious" that the County's own investigation made no finding on the "crux" of this assertion—Woods' alleged statement to Thomas that the complaint was "vague" but "the best they could come up with." (*Ibid*.) We, too, find this omission curious, especially given that the County terminated Thomas for being knowingly dishonest in attributing the statement to Woods.

These observations, as well as other evidence, show that Thomas was not knowingly dishonest or reckless as to the truth of this allegation. Thomas testified that Woods made the statement in question. Woods, for her part, explicitly and repeatedly admitted describing the investigation as "vague." While Woods did not recall saying that the investigation was the "best that they could come up with," she admitted both in the investigation and at hearing that she could not remember the specifics of the conversation. She nonetheless testified that she would not have made any such statement, as there were no unsupported charges against Thomas. From this evidence, the ALJ concluded that the statement attributed to Woods is an inherently unlikely statement for a management agent to make, because it would be an admission that the County was bringing unsupported charges against Thomas.

We disagree that Woods' statement was so inherently unlikely. Based on the record, it appears this alleged comment—"*the best they could come up with*"—likely has a much more innocent meaning: that management, in notifying Thomas that she was being investigated for "rude and discourteous" conduct, used the best summary it could come up with to encapsulate for Thomas the type of allegations against her, even if the phrase they used was still somewhat vague. This interpretation matches well with Woods' admitted comment that the investigation was "vague," as well as the summary of the investigator's interview of Woods in the County's Personnel Investigation.

Based on our review of the record, therefore, we find it more likely than not that the lawsuit's allegation and Thomas' testimony regarding Woods' alleged statement were not knowingly false or reckless as to their truth. We therefore find that the County has not shown clear and convincing evidence of actual malice, and the MMBA protects Thomas and SEIU in making this allegation.

7 percent per annum, from the date of her discharge, January 10, 2013, to the date she is reinstated or declines the offer of reinstatement;

3. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees. 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, 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 Service Employees International Union Local 721.

Members Winslow and Shiners joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-787-M, *Service Employees International Union Local 721 v. County of Riverside*, in which all parties had the right to participate, it has been found that the County of Riverside (County or we) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3506 and 3506.5, subdivisions (a) and (b), and therefore committed unfair practices under MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivision (b).

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

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected activity;

2. Denying employee organizations the right to represent their members.

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

1. Offer Wendy Thomas (Thomas) reinstatement to her former position, or, if that position no longer exists, then to a substantially similar position;

2. Make Thomas whole for lost benefits, monetary and otherwise, which she suffered as a result of the County's conduct, including back pay, plus interest at the rate of 7 percent per annum, from the date of her discharge, January 10, 2013, to the date she is reinstated or declines the offer of reinstatement.

Dated: _____ COUNTY OF RIVERSIDE

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 721, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-787-M PROPOSED DECISION November 24, 2014

Appearances: Rothner, Segall & Greenstone by Glenn Rothner, Attorney, for Service Employees International Union Local 721; The Zappia Law Firm by Edward P. Zappia and Brett Ehman, Attorneys, for County of Riverside.

Before Valerie Pike Racho, Administrative Law Judge.

In this case, a union alleges that its chief negotiator was placed on administrative leave and then fired because she filed a federal lawsuit accusing her employer of retaliating against her because of her protected speech, political, and union activities. The employer denies retaliatory action and asserts that the employee was fired because she was dishonest in some of her claims before the federal court.

PROCEDURAL HISTORY

Pre-hearing

On July 26, 2012, Service Employees International Union (SEIU) Local 721 (Local 721) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the County of Riverside (County). On August 27, 2012, the County filed a position statement responding to the charge.

On September 20, 2012, Local 721 filed a first amended charge. On October 31, 2012, the County filed a position statement responding to the first amended charge.

On January 17, 2013, the PERB Office of the General Counsel issued a complaint (PERB complaint) alleging that the County violated the Meyers-Milias-Brown Act (MMBA or Act) sections 3506 and 3506.5, subdivisions (a) and (b), and therefore committed unfair practices under MMBA sections 3509, subdivision (b), and PERB Regulation 32603, subdivision (b).[1] The PERB complaint accused the County of unfair practices by its actions of placing Local 721 chief negotiator Wendy Thomas on administrative leave pending an investigation and refusing her access to County facilities unless she was accompanied by a supervisory escort because of Thomas's protected conduct, namely, (1) holding union office, (2) filing jointly with Local 721 a federal lawsuit against the County regarding union-related speech and work place issues,[2] (3) testifying at a grievance arbitration hearing, and (4) previously filing an unrelated unfair practice charge against the County. On February 6, 2013, the County filed an answer to the PERB complaint denying any violation of the law and alleging affirmative defenses.

On February 21, 2013, the parties met for an informal settlement conference before PERB, but the dispute was not resolved and the matter was then set for formal hearing (the hearing) to commence in May 2013.

On March 5, 2013, Local 721 filed a second amended charge and motion to amend the PERB complaint. On March 29, 2013, the County filed opposition to Local 721's motion to amend the PERB complaint. On April 5, 2013, Local 721 filed a response to the County's opposition to the motion to amend the PERB complaint.

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[1] The MMBA is codified at Government Code section 3500 et seq. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[2] Case No. 5:10-CV-01846-VAP-DTB.

On April 10, 2013, the assigned administrative law judge (ALJ) determined that Local 721's motion to amend the PERB complaint was appropriate under PERB Regulations 32647 and 32648, and issued an amended complaint (amended PERB complaint) alleging that the County took additional adverse actions against Thomas because of the protected conduct previously discussed above by issuing her a written notice of intent to terminate employment on or about December 20, 2012, and by issuing her a written notice of termination on or about January 20, 2013.

On April 30, 2013, the County filed a motion to dismiss, or in the alternative, to stay proceedings pending resolution of a disciplinary appeal (motion to dismiss/stay). Also on that date, the County filed an answer to the amended PERB complaint, again denying any violation of the law and alleging affirmative defenses.

On or about May 1, 2013, Local 721 filed opposition to the County's motion to dismiss/stay. On or about May 3, 2013, the County filed a reply to Local 721's opposition to its motion to dismiss/stay. On May 21, 2013, the ALJ denied the County's motion to dismiss/stay.

On May 22, 2013, the County filed an objection to the ALJ's ruling on its motion to dismiss/stay and requested under PERB Regulation 32200 that the Board itself rule on the

motion and that the ALJ join in the County's request to certify the matter to the Board.[3] On May 23, 2013, the ALJ issued a written decision declining to join the County's request to certify the matter to the Board.

Thereafter, the hearing was held on five non-consecutive days between May 28, 2013, and June 10, 2013.

Post-hearing

The parties filed simultaneous opening briefs on or about August 27, 2013, and simultaneous reply briefs on or about October 4, 2013. The record was closed and the case was submitted for decision upon receipt of the final briefs.

Via email on August 19, 2014, and by letter dated August 20, 2014, Local 721 requested administrative notice of the decision of the Ninth Circuit Court of Appeals issued on August 18, 2014, affirming in part, and reversing in part and remanding, the grant of summary judgment by the federal district court in favor of the County in Thomas's and Local 721's

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[3] PERB Regulation 32200, Appeal of Rulings on Motions and Interlocutory Matters, provides:

> A party may object to a Board agent's interlocutory order or ruling on a motion and request a ruling by the Board itself. The request shall be in writing to the Board agent and a copy shall be sent to the Board itself. Service and proof of service pursuant to Section 32140 are required. The Board agent may refuse the request, or may join in the request and certify the matter to the Board. The Board itself will not accept the request unless the Board agent joins in the request. The Board agent may join in the request only where all of the following apply:
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> (a) The issue involved is one of law;
>
> (b) The issue involved is controlling in the case;
>
> (c) An immediate appeal will materially advance the resolution of the case.

lawsuit. (*Thomas et al. v. County of Riverside et al.* (9th Cir. 2014) 763 F.3d 1167, 1171 (*County of Riverside*).) Also on August 20, 2014, the County filed opposition to Local 721's request for administrative notice. The ALJ informed the parties via email that same day that she would rule on the request for administrative notice in this proposed decision.

RULING ON REQUEST TO REOPEN RECORD TO TAKE ADMINISTRATIVE NOTICE

There is no PERB regulation that specifically addresses a request to reopen the evidentiary record after a case is submitted for decision before an ALJ. However, PERB Regulation 32190(a) provides generally for "[w]ritten motions made before, during or *after* a hearing [to be] filed with the Board agent assigned to the proceeding." (Emphasis supplied.) In *Antelope Valley Community College District* (1979) PERB Decision No. 97,[4] the Board considered timing and notice requirements for a request for administrative notice. In that case, an ALJ took official notice of a stipulation offered by the same parties in a separate proceeding before PERB that had taken place after the conclusion of the unfair practice hearing before the ALJ. The Board noted that although Government Code section 11515 was not controlling over PERB procedures, that section allowed for official notice to be taken after submission of a case for decision as long as notice and opportunity for additional argument on the matters officially noticed was provided. The Board stated:

> Where official notice is to be taken of matters not referred to in the hearing itself, the parties should be so informed and given a chance to contest debatable facts. Such post-hearing procedure is appropriate.
>
> However, the better general practice would dictate that official notice be taken before the close of the hearing, and that the

[4] 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.)

> parties be informed of matters to be noticed and given a reasonable time to refute them. Nevertheless, no harm or deprivation of due process occurs where the facts officially noticed are clearly incontestable. No purpose is served by permitting such matters to be challenged.

(*Id*. at p. 24; footnote and citation omitted.)

Here, the County provided supplementary argument regarding Local 721's request for administrative notice, arguing that the decision of the Ninth Circuit is not relevant to this proceeding. The timing of issuance of the decision of the Ninth Circuit, i.e., after briefs were submitted in this case, does not deprive the County of any due process rights in this proceeding as the officially noticed fact is incontestable. In any event, the decision of the Ninth Circuit regarding the federal lawsuit has no direct bearing on the legal issues presented in this case and is relevant only for factual background purposes. Thus, administrative notice of that decision is appropriate in this circumstance and Local 721's request is therefore granted.

FINDINGS OF FACT

The Parties

The County is a public agency within the meaning of MMBA section 3501(c) and PERB Regulation 32016, subdivision (a). Local 721 is a recognized employee organization within the meaning of MMBA section 3501, subdivision (b), and an exclusive representative under PERB Regulation 32016, subdivision (b). Until her release from employment and at all relevant times, Thomas was a public employee within the meaning of MMBA section 3501, subdivision (d) and included in the bargaining unit represented by Local 721.

Overview of Thomas's Employment With the County

Thomas began her employment with the County in 1996 as a trainee Public Safety Communications Officer.[5] That position is responsible for answering 911 emergency calls, handling radio communications, and dispatching calls for service for the County's Sheriff's Department (Department). At the time of her initial employment and until approximately 2001, Thomas was included in a bargaining unit represented by Laborers International Union of North America (LIUNA).[6] Thomas was promoted several times to positions requiring progressively higher levels of responsibility throughout her tenure with the County.

In 2001, Thomas was promoted to a lead position that removed her from the LIUNA unit and placed her in the supervisory unit represented by SEIU.[7] In 2005, she was promoted to Sheriff's Communications Supervisor, the position she held until her employment was terminated. In her supervisory role, she was primarily responsible for training and supervising Sheriff's communications officers. In 2002, Captain Larry Grotefend became commanding officer over the 911 Communications Center (Dispatch Center), where Thomas worked.[8] At least two times between 2005 and 2008, Thomas applied for, but did not receive, a promotion to Sheriff's Communications Manager. Captain Grotefend made those decisions.

[5] The title of this position was later changed to Sheriff's Communications Officer.

[6] LIUNA's unit includes the Communications Officer classification. The supervisory unit represented by SEIU includes the classifications of Senior Communications Officer and Communications Supervisor.

[7] At that time, the supervisory unit was represented by SEIU Local 1997, the predecessor to Local 721.

[8] Captain Grotefend retired from the Department in July 2012.

As will be discussed in more detail below, in 2008, Thomas was in a special assignment[9] as Dispatch Training Unit Supervisor while still under the command of Captain Grotefend at the Dispatch Center. In April 2009, the Dispatch Training Unit, including Thomas, was moved to the Ben Clark Training Center (BCTC) located a few miles away from the Dispatch Center. Captain Grotefend retained command of that unit after it was moved.

In late February or early March 2010, Thomas was involuntarily transferred to a new special assignment as Advanced Officer Training Dispatch Supervisor under the command of Captain Richard Coz. Thomas's direct supervisor in that assignment was Lieutenant Terry Wood. When she received that assignment, she moved from a modular building at the BCTC to an office in the main building at the BCTC and stopped having direct daily interaction with other employees represented by Local 721. In November 2010, Thomas was informed that her special assignment under Captain Coz was ending and she would be transferred back to the Dispatch Center as a floor supervisor again under the command of Captain Grotefend. Thomas did not request the transfer. Communications Manager Heather Woods was Thomas's direct supervisor in that last assignment. The transfer back to the Dispatch Center did not actually occur until January 2011. These several transfers of assignment in a relatively short time period largely form the backdrop of Thomas's concerns that led to the events underlying this charge.

Thomas's Union Leadership

In 2008, Thomas began to take an active role in the governance of Local 721. She was elected to its bargaining team that year and also trained as a shop steward. Over the next two

[9] Special assignments are rotated. According to Thomas, it is typical to hold a special assignment for two or three years.

years, she became the official note-taker for Local 721's bargaining team, an active shop steward representing employees in grievances and arbitrations, and chair of a County labor-management committee and a Sheriff labor-management committee. Thomas continued in her active steward role until she was released from employment by the County. Local 721 and the County were engaged in negotiations for successor agreements each year from 2008 to 2012. It is undisputed that Thomas spent a considerable amount of time at the bargaining table in each of these years. For example in 2011, Thomas received approximately 18 weeks of released time for bargaining and other union activities.

In 2010, Thomas was elected to Local 721's executive board representing the Inland area, which covered public employees in Riverside and San Bernardino counties. In 2011, Thomas became the chief negotiator for Local 721. Regarding that negotiations cycle, an agreement was reached between Local 721 and the County in February or March 2012, following a one-day strike in January 2012. Thomas was interviewed by media outlets in connection to the strike. She also spoke publicly at meetings of the County's Board of Supervisors in or around July 2012 in support of Local 721.

Events Leading Up to the Filing of a Federal Lawsuit

By the fall of 2009, Thomas was concerned that Department supervisors were displeased with her union activities. Specifically, she believed that Department administrators, including Captain Grotefend, had been making negative comments about positions she was

taking in negotiations and about the amount of time she spent negotiating.[10] She wanted to withdraw from the bargaining team at that point, but was persuaded by her team to stay. She contends that managers informed her that time off for union activities was to be restricted to eight hours per month, and time spent in excess of that limit would be at her own expense. She also had been removed from participation in certain Department committees. She expressed her concerns to Local 721 leadership, but also stated her reluctance to take formal legal action at that time, instead desiring to try and resolve issues informally with Department administration.

A union attorney drafted a letter outlining Thomas's concerns that was presented to Department management in a meeting attended by union representatives, then-Sheriff Stanley Sniff and then-Undersheriff Valerie Hill. Thomas was assured that the Department would look into her concerns. An investigation over her claims was initiated by the Department's Internal Affairs Bureau.[11] She was not satisfied with the outcome of the Department's investigation, which apparently did not find sufficient evidence substantiating her claims, and scheduled a meeting with the County's human resources director. That meeting took place in or around August 2010. Thomas was accompanied by a Local 721 official. Thomas testified at the

[10] According to Thomas, her immediate supervisor at the time, Lieutenant Erick Schertell, informed her about these issues and she testified regarding his statements to her. Lieutenant Schertell did not testify at the hearing. His out of court statements are hearsay if offered for their truth. Hearsay is admissible in PERB hearings, but may not, without independent corroborating evidence, form the basis of a factual finding unless it would be admissible over objection in civil actions. (See PERB Regulation 32176.)

[11] The Internal Affairs Bureau either later became known as the Professional Standards Bureau, or they are separate but related sections of a division that performs internal investigatory functions. Both titles were used interchangeably throughout the hearing. The record is not entirely clear on this point, but that is immaterial to the issues presented for decision. For ease of discussion, the bureau will be referred to herein as Internal Affairs. This division of the Department conducts personnel and workplace investigations.

hearing that, from her perspective, there was no follow-up by the County after her meeting with the human resources director. Thereafter, she and Local 721 decided to file a lawsuit in federal court alleging retaliatory actions by the County in response to Thomas's protected speech, political, and union activities.

Thomas's Allegations in the Federal Lawsuit

On December 1, 2010, Thomas and Local 721 jointly filed a lawsuit seeking damages and injunctive and declaratory relief against the County and several individual supervisory and/or managerial employees[12] in the United States District Court, Central District of California. A proposed first amended complaint (federal complaint) was filed in that case on or about September 23, 2011. The allegations of retaliation by the County were numerous[13] and spanned workplace concerns specific to Thomas (e.g., various shift changes, involuntary transfers, denials of release time and shift differential pay, removal from committees and teaching assignments, and initiation of personnel investigations) as well as employment issues affecting other specific employees or the unit generally (e.g., denial of training opportunities and premium/specialty pay for union bargaining team members).

The federal complaint was drafted by attorneys for Local 721, but Thomas admitted during the hearing that she reviewed the document when it was filed and that its contents were

[12] Undersheriff Colleen Walker, Chief Deputy Rick Hall (Captain Grotefend's direct supervisor), Captain Grotefend, Lieutenant Schertell, Woods, Communications Manager Margie Gemende, and Human Resources Director Brian McArthur were named as individual defendants.

[13] They were discussed in approximately 77 separate paragraphs.

true. Relevant to this case, Thomas and SEIU specifically alleged the following in the federal complaint:[14]

> 45. Thomas notified Defendant Grotefend on or about March 26, 2009 that she was supposed to be released for collective bargaining. Immediately following Thomas' attendance at the first bargaining session and Thomas' notification to Grotefend that she planned on participating in collective bargaining sessions through June 2009, Defendants' [sic] removed Thomas to a remote work site and provided her a work space that was substandard compared to that given to other supervisory employees at the same facility, even though supervisory office space was available at that time. **This was the first of three involuntary transfers the Sheriff's Department made of Thomas in the span of less than two years.**
>
> […]
>
> 48. On or about June 1, 2009, and during the 2009 MOU negotiations, local newspaper "The Press Enterprise" ran an article about the Sheriff's Department granting pay raises to their executive staff during the 2009 budget crisis. An SEIU member was quoted in the article criticizing the Sheriff's Department's decision. The following day on June 2, 2009 under the direction of Defendant Grotefend, Defendant Woods initiated a vague personnel investigation of Thomas. Defendant Woods told Thomas that although the complaint was vague, it was the best they could come up with at the time.
>
> […]
>
> 61. Defendants refused to allow Thomas access to a bulletin board for SEIU represented employees in a common area at Thomas' work site until Thomas filed a grievance in February 2010. Thomas was only provided with such bulletin board after SEIU agreed to pay for the purchase of a bulletin board equal in size to the one provided free of charge for LIUNA represented employees.
>
> […]

[14] The numbers below refer to the corresponding numbered paragraphs in the federal complaint.

75. On or about March 4, 2010, without any prior notification Defendant Gemende removed Thomas' normal supervisory access to certain email groups. Thomas was also excluded from supervisory information, promotional processes, awards presentations (even when Thomas was a recipient) and supervisor staff meetings.

76. On or about March 2010, Defendants changed Thomas' work place for a second time. **This second involuntary transfer placed Thomas into a small room, with no windows, and very poor ventilation.** The relocation also completely removed Thomas from any direct contact or communication with other SEIU represented employees and other Advanced Officer Training personnel located in the modular buildings.

[…]

79. Also on or about April 9, 2010, Thomas' County issued vehicle had been removed from the dedicated Dispatch Training Unit parking spot at her work site, even though Thomas had possession of the vehicle's keys. Sergeant Zachary Hall informed Thomas he had been ordered to immediately remove Thomas' vehicle. With the help of other personnel, Sergeant Hall manually pushed the vehicle out of the dedicated parking spot to an area on the other side of the parking lot.

80. On or about May 6, 2010, after being notified that she would receive a stipend from SEIU, Defendants directed Thomas to submit an application with the Sheriff's Department and the County for approval of "outside employment." Thomas was not employed by SEIU, rather, she was only receiving a monthly stipend for performing work as an elected Executive Board member on behalf of SEIU during her non-County working time.

[…]

90. On or about November 16, 2010, SEIU announced Thomas had been reelected to the 2011-2012 bargaining team without any opposition. **The following day, Thomas was informed she was going to be placed back under the command of Defendant Grotefend and transferred, for a third time, to another work site.** Thomas asked her direct supervisors why she was being transferred. They said they didn't know, had no issues with her work performance, and that the order to transfer her came from higher up in the administration.

> […]
>
> 92. On or about December 7, 2010, Heather Woods informed Thomas that the Department would not honor Thomas' pre-approved vacation times for 2011 due to the Department's involuntary transfer of Thomas effective January 27, 2011. This created a substantial hardship on Thomas, as her husband Randall Thomas, also a Sheriff's Department employee, had already selected his vacation based on Ms. Thomas' prior approval of her vacation times. The Department's decision not to honor Thomas' vacation time was inconsistent with the Department's past practice.
>
> […]
>
> 99. On March 11, 2011[,] Thomas was again informed that she was being involuntarily transferred from her previously selected shift assignment. **This was the fourth involuntary transfer in a two year period.** This time Thomas was placed on a day shift. Although Thomas informed Captain Grotefend that she did not want to be transferred to the dayshift due to personal hardships it would create, he ordered the transfer. The transfer resulted in a loss of compensation and increased stress to Thomas, as she had to locate appropriate childcare and transportation to and from school for her two children.
>
> […]
>
> 108. On June 27, 2011, at about 1115 hours, during an active collective bargaining session, Thomas had to halt the negotiations she was leading for over an hour and a half for a sergeant from Internal Affairs to present her with the results of a 44 page internal affairs investigation…and the proposed disciplinary action against her.

(Bold text in original.)

Federal Court Proceedings

The County filed two motions for summary judgment in the federal lawsuit—one on behalf of the County and one on behalf of the individual defendants. Thomas and SEIU filed opposition to the motions, and each side filed objections to the evidence the other submitted in

support of its position. Judge Virginia A. Phillips heard argument regarding the County's motions on February 6, 2012.

On February 13, 2012, Judge Phillips issued a 52-page written order (the Order), ruling on the evidentiary objections and granting the County's motions for summary judgment. Regarding the various alleged retaliatory acts discussed in the Order, Judge Phillips concluded that "for every act of which Thomas accuses them, Defendants have either produced a legally sufficient non-retaliatory explanation, or the act of which Defendants are accused does not rise to the level of an adverse employment action in the first place." (See County Exhibit 1-3 (the Order) p. 49.) Local 721 and Thomas appealed.[15]

Germane to the issues in this case, Judge Phillips observed at pages 34 and 35 of the Order that:

> Thomas appears to have fabricated some of the frustrations that form the backdrop against which she asks the Court to view Defendants' adverse employment actions. For instance, Thomas intimates that someone moved her Department-issued car from its reserved parking spot to harass her [citation omitted], but fails to

[15] As previously discussed, on August 18, 2014, the Ninth Circuit issued a decision that affirmed in part, and reversed and remanded in part, the Order of the district court granting the County's motions for summary judgment. The Ninth Circuit noted that Thomas alleged more than thirty adverse employment actions, but the district court only discussed nine of those in depth and dismissed the remainder as "petty workplace gripes" that did not rise to the level of retaliatory action without any analysis. (*County of Riverside*, *supra*, 763 F.3d 1167, 1168.) The Ninth Circuit found that some of those allegations suggested a general retaliatory campaign that warranted more specific analysis by the district court. (*Id.* at p. 1169.) Of the nine incidents that were scrutinized in more detail by the district court, the Ninth Circuit concluded that four should have survived summary judgment (i.e, the transfers from Dispatch Training Unit Supervisor to Course Coordinator in February 2010, back to Dispatch Floor Supervisor in November 2010, and from graveyard shift to day shift in 2011, and an internal investigation for rude and discourteous emails. (*Id.* at pp. 1169-1170.) The car moving incident and Thomas's transfer to the BCTC in April 2009 were not raised on appeal. (*Id.* at p. 1169.) Three other allegations analyzed in detail by the district court were properly dismissed as unsupported. (*Id*. at pp. 1169-1170.)

> reveal she had asked for the car to be moved (it would not start), and then thanked the sergeant who moved it [citation omitted].

In another section of the Order, on page 47, Judge Phillips found that Thomas had made misleading statements about the length of time she had been assigned to the BCTC in relation to the point in time when Thomas learned that she would be moved back to the Dispatch Center under the command of Captain Grotefend.

In addressing Thomas's argument that the reasons for her transfer in April 2009 were pretextual due to an email written by a management representative a few weeks after the transfer, which stated that the manager grew tired of the dispatch supervisors' demands, Judge Phillips concludes "[t]his is thin thread from which from which to suspend the argument that Defendants bore Thomas sufficient ill will to transfer her, and five other people, to chill Thomas's union activity." (County Exhibit 1-3, p. 38.) Judge Phillips also stated that in context, the full email painted different picture than that portrayed by Thomas. (*Id.* at p. 37.) Judge Phillips also described Thomas's evidence of retaliation by the County as "wan and largely circumstantial," whereas the County's evidence to the contrary was "direct." (County Exhibit 1-3, p. 39.)

<u>The County Investigates Thomas for Potential Dishonesty in the Federal Lawsuit</u>

Assistant Sheriff Steve Thetford was the commanding officer over Internal Affairs in early 2012 when the Order was issued.[16] He first became aware of it upon receiving an email from either the County's legal counsel, or from someone in the County human resources

[16] Assistant Sheriff Thetford has been with the Department since 1987 and held various ranks from Patrol Officer to his current management position. He first had experience in Internal Affairs in the mid-1990s. He left that division to become a Lieutenant, then Captain, at the Palm Desert station. In the late-2000s he was promoted to Chief Deputy. In December 2011, he was promoted to Assistant Sheriff over Internal Affairs and several other divisions. At the time of the hearing, he was the Assistant Sheriff in charge of the Corrections division.

department. He testified that he could not recall precisely who sent that email to him. After reviewing the Order, Assistant Sheriff Thetford determined that an investigation into Thomas's potential dishonesty before the federal court should be conducted. He believed an investigation was warranted under the circumstances because Department policy prohibits dishonest conduct by employees both during and outside the course of employees' job duties, and Judge Phillips suggested that Thomas had fabricated certain facts in her presentations to the Court. He considered such an allegation to be serious. It is undisputed that Assistant Sheriff Thetford was solely responsible for deciding to investigate Thomas. He testified that the areas of the Order that were discussed in the previous section of this proposed decision were the motivation behind his decision to launch the investigation.

Prior to reading the Order, Assistant Sheriff Thetford had no involvement in the federal litigation, although he had been aware that it was ongoing. He admitted, however, that he was aware of Thomas's collective bargaining and grievance activities. He was a member of the County's bargaining team and was involved in the processing of at least two grievances that involved or were initiated by Thomas. One of those grievances went to arbitration in or around July 2012. Assistant Sheriff Thetford and Thomas were present at the arbitration hearing. Assistant Sheriff Thetford was also vaguely aware of a previous PERB charge, but he testified that he had no knowledge of the content or circumstances of that charge or when it was filed.

- Department General Orders and Applicable Contract Provisions

Department General Orders section 202.02 provides that "Department members shall speak the truth at all times whether under oath or not." Department General Orders section 202.04 provides that "Department members, whether on or off duty, shall be governed by the ordinary and reasonable rules of good conduct and behavior." The memorandum of

understanding (MOU) between the County and Local 721 provides causes for employee discipline at Article XI, section 2 including:

> a. Dishonesty;
>
> […]
>
> f. Willful violation of an employee regulation prescribed by the board of supervisors or the head of the department in which the employee is employed;
>
> […]
>
> m. Conduct either during or outside of duty hours which adversely affects the employee's job performance or operation of the department in which the employee is employed.

- Investigation Procedures and Administrative Leave

Within a week or two of his review of the Order, Assistant Sheriff Thetford instructed Captain Virginia Busby to assign individuals who were not named or involved in the federal lawsuit to investigate Thomas's conduct in connection with that litigation. Captain Busby chose Investigators Robert Strasburg and Cassandre Pemberton to lead the investigation.[17]

Assistant Sheriff Thetford met initially with an Internal Affairs team that included, in order of command, Captain Busby, Lieutenants Mark Bostrom and Keith Price, Sergeant Tyler Clark,[18] and Investigators Strasburg and Pemberton. Assistant Sheriff Thetford told the team to do a short preliminary review of the Order and accompanying evidence to determine what the focus of the investigation should be and report to him before moving forward. He

[17] Collectively, Strasburg and Pemberton are referred to herein as "the investigators." Captain Busby did not testify at the hearing.

[18] Assistant Sheriff Thetford did not remember clearly the sergeant who was assigned. He thought it may have been a Sergeant Brown. Sergeant Clark was identified by Strasburg and Pemberton.

described the case to the team as "high-profile" and wanted to make sure they were objective and careful.

Strasburg and Pemberton reported directly to the Internal Affairs chain of command described above in connection to this assignment. Strasburg testified that he was told by his commanding officers words to the effect of "if there's nothing there, there's nothing there." Both Strasburg and Pemberton testified at the hearing that they were not personally familiar with Thomas before being assigned to investigate her conduct and bear no animus toward union activities. They are both members of the Riverside Sheriff's Association (RSA), the employee organization representing sworn peace officers of the Department. Strasburg formerly held office in RSA. Pemberton's mother is the president of the flight attendants' union for Alaska Airlines.

Strasburg and Pemberton began the investigation in March 2012 by reviewing the Order and the voluminous evidence submitted in connection with the federal lawsuit including deposition transcripts, exhibits, and declarations. Additionally, they were made aware of some allegations against Thomas by employees of a hostile work environment. Strasburg interviewed two employees in March 2012 who were about to retire—Griselda Valdivia and Judy Quinn—in connection to the hostile work environment claim. After those interviews, Strasburg did not think there was probable evidence of hostile work environment.[19] Strasburg finished his work on other ongoing personnel investigations between March 2012 and June 2012. During that same time period, Pemberton continued reviewing documents related to the

[19] Later, other employees were interviewed over the hostile work environment charge. Ultimately, the investigators concluded that there was insufficient evidence to support that contention. Thomas was essentially being accused of making the working environment hostile for her supervisors and managers, a variation of the usual fact pattern underlying such claims and one which they believed would be difficult to sustain.

Thomas investigation. By June 2012, Strasburg was able to focus on the Thomas investigation with Pemberton.

After initial review of the roughly seventy paragraphs in the federal complaint alleging retaliation and the accompanying evidence, Strasburg and Pemberton found eleven allegations that they believed showed some evidence of dishonesty by Thomas. In or around June 2012, Strasburg and Pemberton presented to their superiors the eleven areas they believed involved potentially false or misleading statements. After discussion at the meeting, a consensus was reached that only eight of the eleven allegations warranted further investigation, and the remainder presented insufficient grounds to continue investigating. Strasburg and Pemberton were instructed to determine whom should be interviewed in connection with the eight allegations going forward and to conduct those interviews.[20] They did so over approximately the next six months. Assistant Sheriff Thetford had no direct involvement or input into the focus or procedures of the investigation from that point. That was left to Strasburg and Pemberton.

Assistant Sheriff Thetford testified during the hearing that upon learning that there was at least initial evidence of Thomas's dishonesty, he decided to place her on administrative leave for the remainder of the investigation. He asserted such action was consistent with Department practices, even though no written policy mandates it. Strasburg and Pemberton also confirmed that employees under investigation for dishonest conduct are always placed on administrative leave while the investigation proceeds.

[20] It appears that the investigators treated the four alleged involuntary transfers described at paragraphs 45, 76, 90, and 99 of the federal complaint as one allegation of dishonesty.

On the morning of July 21, 2012, Lieutenant Bostrom and Sergeant Clark arrived at Thomas's work location at the Dispatch Center to inform her that she was being placed on administrative leave. Thomas was on duty at the time when the officers arrived. They asked to speak with her privately. She spoke with them in a manager's office where they told her that an investigation was being conducted regarding allegations of dishonesty and her performance as a supervisor. She began to cry.

The Internal Affairs officers told Thomas that she would need to turn over to them her access cards to the building and her employee identification card, and retrieve her personal belongings. She was issued a letter outlining the terms of her investigative leave, including that she was not to access Department facilities while on leave unless accompanied by supervisory escort. She was told not to speak with anyone other than union representatives regarding the investigation.[21] The officers escorted her through the building in view of dispatchers on the floor as she collected her belongings. Assistant Sheriff Thetford testified that notice to employees that they are being placed on administrative leave routinely occurs either at an employee's work site, as in this case, or by summoning the employee to the Internal Affairs office. Thomas asserted that had she been summoned to the Internal Affairs office, which is in a different location than the Dispatch Center, she would not have reported to work that morning and would not have been forced to retrieve her personal items under escort and in view of other employees.

[21] Assistant Sheriff Thetford testified that this instruction is standard and is used to preserve the integrity of the investigation. Thomas was permitted to continue other union activities during her administrative leave.

- The Investigative Report

Strasburg and Pemberton completed their investigation in or around mid-December 2012 and presented their findings to Assistant Sheriff Thetford in an 86-page written report (investigative report) with approximately 800 additional pages of attached exhibits. Assistant Sheriff Thetford then reviewed it and made at least one substantive change.

In order to avoid lengthy testimony by Strasburg and Pemberton over each and every conclusion contained in the investigative report, the parties stipulated during the hearing that it accurately contains their analysis and conclusions.[22] Strasburg wrote the bulk of the investigative report, but Pemberton also wrote some sections of it. Strasburg reviewed everything that was authored by Pemberton. The investigative report set forth the specific allegations in the federal complaint that were investigated,[23] summarized each interview that was conducted regarding the allegations, and summarized pertinent documentary evidence reviewed. All of the documentary evidence considered was also included in the 800-page attachment. The final consensus was that of the eight remaining allegations of dishonesty against Thomas, five of them were sustained, two were not sustained, and one was unfounded.[24] The final version of the investigative report is discussed in detail below.

[22] Thus, I consider the stipulation to mean that the writing contained in the investigative report may be treated as if Strasburg and Pemberton also testified regarding all of the specific conclusions contained therein.

[23] These are the same as the numbered paragraphs of the federal complaint that were quoted verbatim in this proposed decision at pages 11 to 13, ante.

[24] According to the testimony of Woods, the conclusion "unfounded" in the context of a personnel investigation means that the alleged misconduct did not occur, whereas the conclusion "not sustained" means that there was not enough evidence to prove the alleged misconduct.

Strasburg testified that, in his personal opinion, he believed all eight allegations under investigation were actually sustained. But Pemberton did not agree that there was adequate evidence of dishonesty for the allegations regarding Thomas's removal from an email server group, requirement that she submit an application for outside employment to receive a union stipend, and service of a personnel investigation during a negotiations session. Moreover, Assistant Sheriff Thetford's initial review of the investigative report resulted in one of the allegations being changed from sustained to not sustained. He did not believe there was enough evidence to support dishonesty for that particular allegation, but did not remember at hearing which one was changed.

Allegations of Dishonesty That Were Not Sustained/Unfounded

Thomas asserted in the federal complaint and during her investigative interviews that after she was placed under the command of the BCTC, she was removed from certain supervisory email groups, which inhibited her ability to effectively communicate information to the recruits in her charge. Communications Manager Gemende informed the investigators that after Thomas complained that she was not receiving emails directed toward supervisors at the Dispatch Center, some email access was restored to Thomas, but it was determined that she did not need all of the information directed to Dispatch supervisors because some did not pertain to her work at BCTC.[25] The investigators concluded that Thomas lacked an understanding of Department protocol regarding dissemination of email via blanket email groups after an employee has been transferred to a new work location, but she was not dishonest in her assertions to the federal court. The allegation that Thomas was dishonest in this instance was determined unfounded.

[25] Gemende did not testify at the hearing.

Regarding the allegation pertaining to requiring Thomas to apply for outside employment in order to receive her union stipend, the investigative report noted that it was Thomas who first inquired to her supervisor at the time, Lieutenant Wood, whether she was required to submit an application. Lieutenant Wood did not know the answer to that question and inquired up the chain of command.[26] Thomas was instructed to fill out the application form in case that it was determined to be necessary, so as not to cause delay in Thomas's receipt of the stipend. For this reason, the investigators concluded that there was no retaliatory purpose behind the Department asking Thomas to complete the application for outside employment.

However, Chief Deputy Hall also denied Thomas's application, rather than finding it was not required under the circumstances, and opined that the denial "should not" impact Thomas's ability to collect the stipend.[27] Thomas found this assertion ambiguous, and wondered whether she would be open to disciplinary action if she continued to accept the stipend. The investigators agreed with Thomas, concluding:

> Although the application never applied to or prohibited Supervisor Thomas from receiving a stipend, she was left with a vague response in the denial for outside employment and how it applied to her stipend.

Thus, this allegation of dishonesty against Thomas was not sustained by the investigators.

Thomas claimed in the federal complaint and during her investigative interviews that in June 2011 she had to halt negotiations for over an hour in order to receive service of the results of a personnel investigation. The Internal Affairs sergeant tasked with serving the personnel

[26] Lieutenant Wood did not testify at the hearing.

[27] Chief Deputy Hall did not testify at the hearing.

investigation results, John Salisbury, was a personal friend of Thomas's. They had arranged the time and date for service. Thomas told the investigators that there was no other option than to meet during the negotiation session because of the deadline by which Sergeant Salisbury had been instructed to serve her. Thomas asserted that the service interfered with her ability to participate in negotiations. Sergeant Salisbury told investigators that the service was cordial and that Thomas told him that the negotiations session was on a lunch break during his meeting with her.[28] The investigators concluded that Thomas and Sergeant Salisbury had different perceptions of the incident and there was no evidence to clearly prove either perception. Therefore, the allegation that Thomas was dishonest was not sustained by the investigators.

- Allegations of Dishonesty That Were Sustained Misconduct

1. Multiple Involuntary Transfers

Regarding the first alleged retaliatory transfer, Thomas claimed in the federal complaint and during her investigative interviews that shortly after notifying Captain Grotefend on March 26, 2009, that she needed to be released for negotiations through June, and immediately after attending the first bargaining session, she was involuntarily transferred to a "remote" work site with a "substandard" work space compared to other supervisory employees at the same facility.

The investigators found significant that Thomas admitted to attending a meeting on February 11, 2009, where it was discussed that the entire Dispatch Training Unit, which Thomas was assigned to supervise, would be moved to a new building. Thomas was then necessarily aware that she was not the only employee slated to be relocated and admitted during her investigatory interviews to probably seeing emails discussing the move during discovery for the lawsuit, but still maintained that the move was retaliatory. Thus, the

[28] Sergeant Salisbury did not testify at the hearing.

investigators concluded that Thomas was aware of the need and plan to move her entire unit well in advance (six weeks) of her informing Captain Grotefend that she would be participating in negotiations. The investigators therefore found that Thomas deceptively implied to the federal court that she was transferred immediately after informing the Department of her bargaining obligations and because of those obligations.

The investigators noted that before the move Thomas shared an office measuring 162 square feet with two subordinates, but the new work space provided her with a private cubicle measuring 150 square feet. Although the cubicle did not have a door, it was in the corner and positioned so that it was not exposed to the rest of the office. Thus, the investigators concluded that her assertion to the federal court that the new space was substandard was deceptive and misleading. The investigators also noted that her description of the new location at a modular building at the BCTC as "remote" was also deceptive and misleading since the distance from her home to either work location was roughly twelve miles, and the Department had provided her with a car specifically for travelling the approximately four miles between the Dispatch Center and the BCTC as needed.

Thomas further alleged retaliation in the federal complaint by a second involuntary transfer in March 2010 from her cubicle in the modular building to the main building at the BCTC. She was assigned a small, windowless, poorly ventilated office in which she was cut off from direct contact with other SEIU-represented employees.[29] The investigators found these assertions to be deceptive because the space had been used as an office previously, she was given comparable office equipment as that in her previous location, and she was not

[29] During hearing testimony, the County admitted that work was done on the office addressing Thomas's complaints about it after she was transferred to a different assignment.

prevented from communicating with SEIU-represented employees via email, telephone and other means.

Thomas asserted a third retaliatory transfer in the federal complaint when she was informed that she would be assigned back to the Dispatch Center the day after it was publicly announced on November 16, 2010, that she had been reelected to the Local 721 bargaining team.[30] The investigators concluded that this transfer was merely a routine rotation in assignment. They further concluded that Thomas had deceptively withheld information from the federal court regarding the length of time she had been in her current assignment and the impact that her bargaining obligations would likely have on training operations and staffing.

Regarding Thomas's assertion of a fourth retaliatory transfer, which was actually a change in shift time from graveyard to day at the same work location, the investigators concluded that Thomas's absences (presumably for collective bargaining) were easier to cover on day shift because there were other supervisors available to cover floor operations. The investigators noted that Thomas failed to disclose to the federal court that she was offered various scheduling options to assist her with the change, such as the "4/10" schedule[31] that she selected and to which no other supervisor was assigned. They concluded these particular omissions were deceptive, and that her collective misrepresentations regarding the Department's various transfer actions in the federal complaint and accompanying evidence, as well as in her investigative interviews, violated the Department's general order regarding

[30] Thomas also asserted in the federal complaint and during the hearing that Lieutenant Wood and Captain Coz told her they did not know why she was being transferred, they were happy with her work, and the decision had come from Department administration. These accounts of Lieutenant Wood and Captain Coz are uncorroborated hearsay.

[31] It is commonly understood that an employee on such a schedule works ten hours per day on four days per week.

employees speaking the truth at all times. Thus, the investigators sustained, as a group, the allegations that Thomas was dishonest when she accused the County of several retaliatory transfers.

2. The "Vague" Personnel Investigation

The allegation in the federal complaint over the Department's initiation of a personnel investigation concerning Thomas, on the heels of an unnamed SEIU representative's quote in a local newspaper that was critical of management, centered upon Woods's alleged statement to Thomas that "although the complaint was vague, it was the best they could come up with at the time." The investigative report did not discuss Woods's alleged statement, but noted that Thomas acknowledged her receipt of a memorandum in the early morning on June 2, 2009, informing her that she was being investigated for rude and discourteous behavior. The investigators also noted that Thomas had confirmed with Woods by that same afternoon that the investigation was entirely limited to accusations made against her and another supervisor by a trainee named Spargur. Thus, the investigators concluded that since Thomas knew exactly what was at issue in this personnel investigation on the same day she was informed of it, her assertion to the federal court approximately 18 months later that it was "vague" was dishonest and misleading. They also found that she had provided no evidence linking the newspaper article to the personnel investigation, and so the implication that these events were causally connected was unfounded and untrue.

3. Bulletin Board Access

Thomas alleged in the federal complaint that the Department refused Thomas access to a bulletin board for posting Local 721 materials at the Dispatch Center until she filed a grievance and Local 721 agreed to pay for the board. Thomas also stated that a board was

provided without cost to LIUNA. The investigators found these assertions to be untrue for several reasons.

First, multiple witnesses interviewed confirmed that there had been, for many years, a union bulletin board in place at the Dispatch Center to which all employees had unrestricted access. Second, after Thomas complained that Local 721 did not have suitable board space, Captain Grotefend purchased a larger board at the Department's expense and split it down the middle for LIUNA and Local 721. The investigators found significant that Thomas acknowledged in an email to Chief Deputy Hall after installation of the larger, delineated board that all the MOU required was "reasonable" bulletin board space, which had been provided after the grievance was filed. Finally, a dedicated Local 721 board was installed and purchased by the Department—not the union—when Thomas continued to express dissatisfaction. Thomas admitted in her investigative interview that she did not actually know who paid for that final board, but her statement to the federal court attributed the purchase to Local 721, which was not true. The investigators found that her "omission of the relevant facts was unequivocally reckless and dishonest."

4. Moving Thomas's Vehicle

Thomas's assertions to the federal court regarding the movement of her Department-issued vehicle were that she discovered on April 9, 2010, that her vehicle had been moved from a dedicated spot at her worksite even though she possessed the only set of keys. Thomas claimed that Sergeant Zachary Hall later informed her that he had been ordered to move the vehicle manually to an area on the other side of the parking lot and received assistance from

other personnel to do so.[32] In her investigative interview, Thomas stated that she could not think of any other reason than retaliation for her vehicle to have been moved without her knowledge.

The investigators found this claim dubious, since Thomas herself had requested via email on April 6, 2010, that Sergeant Hall inspect and fix her vehicle because it would not start, she admittedly did not attempt to drive it from April 6, 2010, to April 9, 2010, and she sent an email to Sergeant Hall afterward thanking him for moving the car. Sergeant Hall was asked to move the inoperative car out of the reserved parking spot by Lieutenant Wood. Sergeant Hall presumed the reason he was asked to move the car was because it was not working but was still occupying one of the reserved spots, of which there were only a few. The investigators noted that this was one of the specific examples of fabricated frustrations with which Judge Phillips took issue in the Order. The investigators concluded: "The degree to which the evidence does not support Supervisor Thomas's allegation is staggering. Thomas clearly misrepresented and omitted relevant facts known to her well in advance of filing her lawsuit."

5. Refusal to Honor Thomas's Pre-Approved Vacation

Thomas alleged in the federal complaint that Woods informed her on December 7, 2010, that the Department would not honor Thomas's pre-approved vacation selection for 2011 due to her transfer from the BCTC back to the Dispatch Center. Thomas asserted that this denial created a substantial hardship since her husband, also a Department employee, had already selected his vacation to match hers.

[32] Sergeant Hall did not testify at the hearing. It is unclear from the record whether he holds the rank of Sergeant or Lieutenant, because he was identified under both ranks in the investigative report.

The investigators found Thomas's assertions to be "clearly wrought with omission, deception, and dishonesty" because they create a reasonable impression that Thomas's pre-approved vacation was ultimately denied, when, in fact, the opposite was true. Thomas was allowed to take the 2011 vacation times she had selected while still stationed at the BCTC. Thomas was informed, before her transfer back to the Dispatch Center was effective, that the employees there had not yet submitted their vacation requests and that she would need to submit hers in seniority order unless she had already pre-paid for her vacation. Then, in January 2011, she was notified that her previously selected vacation time was approved.

During her investigative interview, Thomas said that the request was first denied, then later granted. She acknowledged that she took the time off as requested. Thomas admitted to the investigators that there was no actual hardship to her, merely the potential for one. The investigators concluded that her assertions to the federal court, after she had already returned from vacation taken during the disputed time period, and while still claiming hardship, demonstrated her "willingness to offer selective and knowingly untrue information."

- Investigators' Conclusions

The investigative report stated that the sustained allegations of dishonesty violated the Department general orders previously discussed herein. The investigators acknowledged that employees "have an absolute right to grieve or bring forward allegations of work place misconduct[,]" but determined as members of the Department, "personnel are required to so honestly." They ventured that Thomas "displayed very poor judgment by manipulating standard and reasonable operating procedures and falsely representing such circumstances as retaliation." The investigators ultimately concluded that Thomas had done so to enhance her chance of success in the litigation.

Dismissal Proceedings

The Department guideline for discipline where an employee has been found to be dishonest is termination from employment. After his review of the investigative report, Assistant Sheriff Thetford decided that dismissal was warranted because of the sustained allegations of Thomas's dishonesty in the federal lawsuit and throughout the investigative process. Assistant Sheriff Thetford noted that while he acted consistently with the Department's guideline in this case, it was within his discretion to impose other discipline. He testified that if discipline is greater than 24 hours, then he must be the decision-maker.

Assistant Sheriff Thetford instructed his Internal Affairs subordinates to draft a letter of intent for termination, which he then reviewed and approved. It was based entirely on the findings and conclusions in the final investigative report. Assistant Sheriff Thetford agreed with all of those findings. The letter of intent for termination was issued to Thomas on or about December 20, 2012. It informed her that her termination would be effective at the close of business on January 10, 2013, and cited as cause for termination violations of MOU Article XI, section 2, subsections (a.) (dishonesty), (f.) (willful violation of employee regulation), and (m.) (adverse on or off duty conduct). Thomas was informed that she was entitled to respond to the charges verbally or in writing by January 9, 2013. A *Skelly*[33] hearing was held before Assistant Sheriff Thetford, but his opinion did not change. The final written notice of termination was issued to Thomas on January 10, 2013, and her termination was effective as of that date.

[33] *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (*Skelly*).

Hearing Testimony of Thomas, Captain Grotefend, and Woods

Thomas, and where applicable, Captain Grotefend and Woods, were questioned at the hearing regarding events giving rise to the allegations in the federal complaint. Select portions of that testimony and relevant documentary evidence are recounted below.

- First Involuntary Transfer

Thomas testified during direct examination that although she attended the February 2009 meeting where it was discussed that her Dispatch Training Unit would be relocated, at that time the Department planned to move the unit to the "RCIT" building, which was across a walkway in the same complex of buildings as their current location. She therefore maintained that her assertions in the federal complaint were truthful, because she did not learn about the plan to move to a modular building at the BCTC, four miles away from the Dispatch Center, until right before it happened and after she had participated in bargaining.

Thomas asserted that employees in the Dispatch Training Unit were informed and actually moved to the BCTC within a seven to ten day period after her need for bargaining release time was communicated to the Department (according to the federal complaint, on or about March 26, 2009) and after she attended the first bargaining session. It is undisputed that the move occurred by April 1, 2009. Thomas testified as follows:

> Q All right. So, had you previously[34] had any knowledge or participation in any meetings where a move to the Ben Clark Training Center approximately four miles away was planned?
>
> A No.
>
> […]

[34] Thomas's preceding testimony stated that she was not aware until the end of March 2009 that she and her unit were moving to the BCTC.

> Q Had you ever seen any emails or heard any discussion about a move not across the walkway, but to the Ben Clark Training Center?
>
> A Not until way late in discovery, I may have seen some emails.
>
> Q In the discovery, meaning what?
>
> A For the Federal lawsuit.
>
> Q Okay. But did you see any such emails prior to the move to the Ben Clark Training Center?
>
> A No.

(Hearing Transcript, Volume I, pp. 59-60.)

Thomas also explained that her assertion that the BCTC was remote was not based on the distance to her home, but on her continued supervision of employees working at the Dispatch Center several miles away.

Captain Grotefend stated that he was informed by Department administration in early March 2009 that the RCIT building was no longer available to house the Dispatch Training Unit, which required finding another location for them to move into.[35] Space at the Dispatch Center itself had become cramped, which was the sole reason the move was necessary. He disputed Thomas's characterization of the new space at BCTC as "substandard," because the new space represented a much larger and more private work space for Thomas than did her previously shared office space at the Dispatch Center.[36] He acknowledged that Thomas had

[35] Thomas was not a named recipient of the email that Captain Grotefend identified as notifying of the space problem at the RCIT building.

[36] Prior to the move to the BCTC, Thomas had shared an office with two of her subordinates. Her complaint regarding the privacy of her cubicle space at the BCTC was that she sometimes had to have discussions with trainees about performance and personnel issues

complained about not being assigned an office with a door at the BCTC modular when one stood vacant, but he contended that the closed office space was for managers, not for a supervisor, like Thomas. He assigned a communications manager to one of the two offices. The other was kept vacant for a yet-to-be assigned manager.

Woods testified on direct examination as follows:

> Q Okay. Prior to the time Ms. Thomas was moved and others were moved to BCTC, which I think is undisputed at this point, did you have any discussions with Ms. Thomas about the move?
>
> A Yes. From the time that the decision was made to initially move them next door and then to move them to the Ben Clark Training Center, yeah, it was an open discussion the entire time. Everyone was aware of what was going on.
>
> […]
>
> Q Was Ms. Thomas aware, that you know, about the move to BCTC prior to the move taking place?
>
> A Yes. She was fully aware.
>
> Q Approximately, how long before the move to BCTC was she made aware?
>
> A As soon as we were notified that we had lost the space next door and we had the decision to move out there, they were—they were notified. I would have to guess that's at least a few weeks before because we had to take the time to run the data lines, pick out their offices, which she was fully part of.
>
> Q What do you mean by she was fully part of?
>
> A We brought them out there. We showed them the space that they were going to be occupying. We initially had assigned her and her staff into one large cubicle. She didn't like

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and that doing so in a cubicle allowed other people to overhear these conversations. She further explained that she could attain privacy in her old, shared office space by asking her office mates to leave the room.

> the logistics of that, so we worked with her and moved her to a different cubicle so that she was separate from her staff. They were all part of it. They were excited about it. It was a much better change for them.
>
> Q Did she tell you, personally—Did Ms. Thomas tell you, personally, that she was excited about the move?
>
> A Yeah. They were all—Yeah. There wasn't any — There was—The only negative that she expressed during the whole thing was not getting a private office. Other than that, yes, everyone was excited about it, and it was always an open discussion.
>
> Q Were you with her when they were out at the BCTC looking at the office space?
>
> A Yes.

(Hearing Transcript, Volume IV, pp. 51-52.)

Woods clarified during redirect examination that the tour of the new space at the BCTC with Thomas and other staff members took place sometime shortly after March 11, 2009, upon Captain Grotefend's email notification that there was space available at that facility.[37] She noted that the tour had to be done quickly because the new space had to be prepared for the unit's arrival.

Local 721 presented a case in rebuttal with Thomas as the only rebuttal witness. She was not questioned about touring the new Dispatch Training Unit space at the BCTC facility a few weeks prior to the move and allegedly prior to her March 26, 2009 notification to the Department of her release time needs.

[37] Thomas was not a recipient of that email.

- Moving Thomas's Vehicle

Thomas explained on direct examination that the County vehicles assigned for employees' personal use were cars that were not officially registered. Because the vehicles were not registered, they were not allowed to be driven on the street and were used only for travel within the Department's facilities. Thus, if the cars needed even routine maintenance or fuel, she would require assistance from Sergeant Hall. Thomas regularly parked her assigned vehicle in one of several parking spaces reserved for the Dispatch Training Unit.

In early April 2010, Thomas's vehicle would not start, so she asked Sergeant Hall to look at it. They met in the parking lot. She had the only set of keys. Sergeant Hall could not get the vehicle to start and kept the keys in order to further look into the problem. Later that same day, the keys were back on her desk. Since the keys were returned to her, Thomas assumed that the car was fixed. She did not attempt to drive the car that day or over the next few days, however. Thomas testified as follows:

> Q At the end of that week, did you notice anything unusual about the car that had been assigned to you?
>
> A I showed up on the morning of that Friday and the car was gone, except for I still had the keys.
>
> Q Okay. So what did you do about that?
>
> A I contacted my direct supervisor, Lieutenant Wood.
>
> Q And what did Lieutenant Wood tell you?
>
> A He told me that he had ordered Zach Hall to move the car.
>
> Q Okay. Was anything else going on in regard to your terms and conditions of employment at the end of that week?

A There was an accumulation of things that had been going on with all these other things surrounding, but on that particular Friday when I showed up, not only had my car been removed, but I had been locked out of all the computer servers and everything else. So when I showed up, I couldn't—I couldn't access anything. I'd been completely locked out.

[…]

Q So this was the end of a week in April. Your car, which you think has been repaired because your keys have been returned to you, is missing. You are locked out of access to the computer system. No one told you that was to happen, and no one told you why. What did this signify to you at that moment in time?

A That they were even more upset with me. That they were trying to tell me that I need to get out, that I don't belong to dispatch anymore.

Q Okay. Had someone wanted to move the car without picking it up and carrying it, what would they have had to do to involve you in that?

A They could have just asked me for the keys, and then they would have been—The car only had one set of keys to it because they were damaged cars that I guess they got for a reduced rate. So my particular car, for that one, only had the one set of keys to it, so they just would have had to come get the keys from me and move the car.

(Hearing Transcript, Volume II, pp. 13-15.)

During cross-examination on this issue, Thomas testified as follows:

Q And I understand your testimony was that, while you believed Zach Hall was going to fix the car and had fixed it, you were not aware that he was actually going to move it or had moved it; is that correct?

A At what point? I did become aware that he had moved it after the fact.

Q Well, I mean, at the time, did I understand your testimony was that your understanding was he was just going to fix it but had not moved it?

A On the time of the original request when I asked him to fix it?

Q Yes.

A I didn't know if they'd have to move it while they fixed it, but my request was for him to fix the car, not to move the car.

[…]

Q Exhibit 1-45. Do you recognize this email from—the email chain between you and Zach Hall?

A Yes.

Q And on or before April 9, 2010, at 9:49 a.m., you thanked him for moving the car?

A Correct.

(Hearing Transcript, Volume II, p. 75, lines 3-26.)

The email chain from April 9, 2010, to which Thomas referred in her testimony above stated the following in substance:[38]

>>>Wendy Thomas 4/9/10 9:12 AM>>>
hummmm….look what I found when I was cleaning out some of my e-mails

>>>Zachary Hall 4/9/10 9:18 AM>>>
Ha! I was just looking at these the other day….Back when times were good….

>>>Wendy Thomas 4/9/10 9:48 AM>>>
exactly my thoughts :(

and thanks for moving the car…one less thing for me to get in trouble for now….

[38] The original emails were listed in the reverse chronological order. Lack of capitalization and punctuation in original. Sad face and ellipses in original.

> [Zachary Hall 4/9/10 9:49 AM]
> I don't understand what that was all about….I am going to try and get you a new car today….

(Respondent's Exhibit 1-45.)

On redirect, Thomas testified regarding the email exchange above as follows:

> Q So my question is about the phrase thanks for moving the car. Can you tell me what your attitude was when you included that phrase in that email?
>
> A I was being, I don't know if the word is facetious with him of one less thing for me to have to get in trouble over.
>
> Q So you didn't intend it as a sincere thank you for moving your car?
>
> A No.

(Hearing Transcript, Volume II, p. 105, ln. 10-18.)

- Refusal to Honor Thomas's Pre-Approved Vacation

As in her investigative interview, Thomas admitted at the hearing that her previously selected vacation time was ultimately honored and she went on vacation during that time period. She noted that she was not informed that the Department was asking her to reselect her vacation until after the federal lawsuit was filed. The lawsuit was filed on December 1, 2010, and she was first informed of the vacation selection issue on December 7, 2010. She thought she was told within a couple of months that the Department would grant her original vacation request.[39]

Thomas testified that the allegation was included in the federal lawsuit because it had always been Department practice to honor previously selected vacation time when an

[39] The issue was actually resolved within approximately one month. (See Respondent's Exhibit 1-55.)

employee is transferred to a different assignment.[40] Thomas asserted that although she and her husband took vacation during the time that was originally selected, they had to change their plans to go beach camping because they missed an applicable window period for reservations. In a supplemental declaration submitted to the federal court in response to Woods's declaration in support of the County's motion for summary judgment, Thomas acknowledged that her vacation request was ultimately approved. (Charging Party's Exhibit T, p. 13, para. 41.) When asked on cross-examination why she included this allegation in the federal complaint knowing that the issue had been resolved, she testified: "Because the allegation still remained. They still denied my initial, pre-approved vacation due to the filing of the federal lawsuit." (Hearing Transcript, Volume II, p. 79, ln. 20-22.)

Woods testified on direct examination that she believed Thomas's allegations to the federal court regarding this issue were misleading because she never denied Thomas's request, but simply asked her to select vacation times with the other employees at the Dispatch Center since there were nine supervisors more senior than Thomas and no one there had yet selected vacation. Woods also noted that Thomas was told the time off would be granted without rebidding if she had already paid for her vacation. Woods admitted that she knew Lieutenant Wood, Thomas's supervisor at the BCTC, had previously approved Thomas's vacation selection and that by asking Thomas to resubmit her request there was a possibility that time could be unavailable. Woods thought the way she was handling the issue was consistent with the way another employee, Dawn White, had been treated upon her return to the Dispatch Center after being transferred from the BCTC.

[40] The only evidence supporting this contention was Thomas's testimony and her own assertions through documentary evidence (the email exchange in Respondent's Exhibit 1-55).

In email communications between Thomas and Woods over the issue, Thomas disputed that her situation was analogous to White's and otherwise argued that Department practice dictated that her previous selection be granted because her transfer was involuntary. (See Respondent's Exhibit 1-55.) Woods informed Thomas in an email on January 10, 2011, that the vacation time that Thomas had requested while at the BCTC was available on the dispatch supervisors' schedule and therefore was granted. (*Ibid*.)

ISSUES

Did the County violate the MMBA by (1) placing Thomas on administrative leave, (2) refusing her access to County facilities unless she was accompanied by a supervisory escort, (3) issuing her its notice of intent to terminate her employment, and (4) terminating her employment in retaliation for her protected activities?

CONCLUSIONS OF LAW

To demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code sections 3506 and 3506.5, subdivision (a), and PERB Regulation 32603, subdivision (a), the charging party must show that (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416.) The charging party bears the initial evidentiary burdens of production and persuasion. (*Los Angeles Superior Court* (2010) PERB Decision No. 2112-I.)

If the charging party produces sufficient evidence demonstrating a prima facie case, and therefore an inference of unlawful motivation, the burden shifts to the respondent to prove that

it had an alternative non-discriminatory reason for the challenged action; and that it, in fact, acted because of this alternative non-discriminatory reason and not because of the employee's protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 31 (*Palo Verde*).) Where there is evidence that the employer's adverse action was motivated by both lawful and unlawful reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730 (*Martori Bros.*).) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.)

The Prima Facie Elements

1. Protected Conduct

The threshold requirement for a prima facie claim of discrimination is that the employee exercised rights protected by the MMBA. The MMBA guarantees that employees have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. (MMBA, § 3502.)

The amended PERB complaint alleges that Thomas's protected activities were (1) holding office in Local 721, (2) pursuing with Local 721 a federal lawsuit against the County regarding union-related speech and work place issues, (3) testifying at a grievance arbitration hearing, and (4) filing an earlier unfair practice charge against the County. The County does not dispute in its closing briefs that being an elected union officer (*Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778), participating in grievances (*ibid.*)

and filing unfair practice charges (*Golden Gate Bridge Highway & Transportation District* (2011) PERB Decision No. 2209-M) are protected conduct under the MMBA.

The County also does not argue against Thomas's protected right, with Local 721, to file a lawsuit in federal court raising legitimate concerns over terms and conditions of employment. (See generally, *Mt. San Antonio Community College District* (1982) PERB Decision No. 224 [employees raising legitimate employment concerns to third parties is protected activity]; see also *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246, pp. 16-18.) As the bulk of the federal complaint falls within that ambit, it is not at issue and need not be discussed in depth. Rather, the central dispute in this case is whether Thomas's several purportedly dishonest statements made during the course of otherwise protected activity lost the protection of the MMBA. If so, the County could not violate the MMBA by firing an employee for misconduct not shielded by the protection of the labor relations statute.

A. Standards Governing Protected Speech and Representational Activities

It is well-established that communication, both written and verbal, that is related to employer-employee relations loses protection of California's labor relations statutes only if it is so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" as to cause "substantial disruption of or material interference with" the employer's operations. (*Pomona Unified School District* (2000) PERB Decision No. 1375, p. 16, citing *Rancho Santiago Community College District* (1986) PERB Decision No. 602 (*Rancho Santiago*).)

Recognizing freedom of speech rights of employers, employee organizations, and employees, the Board generally considers speech protected "even if defamatory and even if

erroneous, unless it can be shown that such speech was made with malice and with knowledge it was false." (*Rocklin Teachers Professional Association, CTA/NEA (Romero)* (1995) PERB Decision No. 1112, warning letter, p. 4, citing *State of California (Department of Transportation)* (1983) PERB Decision No. 304-S.)

In analyzing speech during representational activity by union officers, the Board acknowledged that

> while seeking to resolve divergent and often conflicting interests, representatives of both unions and employers may resort occasionally during representational meetings to intemperate speech or less than civil conduct. It is for this reason that party representatives are afforded significant latitude in their representational speech and conduct, which serves the ultimate goal of accommodating divergent interests and resolving conflicts. Consequently stewards must be free to speak and act for the union, consistent with good faith and free of employer interference, restraint or coercion.

(*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 7 (*Dept. of Corrections & Rehabilitation*).) Thus, an employer who disciplines an employee for speech or conduct while acting as a representative of a union "must take care not to punish protected activity. To justify such discipline, an employer must demonstrate that the employee's speech or actions were so disruptive as to shed the protected status such activity otherwise enjoys." (*Ibid*.)

In applying the standards discussed above, the Board has held speech protected and rejected employers' attempts to discipline employees for using disparaging language such as "chickenshit," to describe employer conduct (*Rio Hondo Community College District* (1982) PERB Decision No. 260), and for hyperbole, such as comparing the employer's actions to that of the gestapo in Nazi Germany. (*Rancho Santiago, supra*, PERB Decision No. 602.)

In *Rancho Santiago, supra,* PERB Decision No. 602, an employee wrote a series of newsletters sharply criticizing her employer that were widely distributed among employees and touched on concerns common to all employees regarding employment conditions. The Board stated:

> While [the employee's] choice of language is frequently exaggerated and overstated, we do not find it sufficiently flagrant, opprobrious or malicious as to lose its protected status. [] All of the incidents referred to have some basis in fact. *The articles unmistakably express [the employee's] opinions regarding these incidents. The underlying events were widely known at the college and are explained in graphic detail in the articles, enabling the reader to make his/her own judgment. Indeed, the sophisticated audience of college instructors and administrators is quite capable of drawing its own judgments about both the articles and events.*

(*Id.*, at pp. 13-14; emphasis supplied.)

Similarly, the National Labor Relations Board (NLRB) has found speech protected that might contain negligent or even intentional misstatements of fact. In *Atlantic Towing Company* (1948) 75 NLRB 1169, an employee reported at a union meeting a conversation he overheard between a manager and a representative of one union competing with another where the manager purportedly encouraged the competing union to beat its challenger in signing up the company's employees. The employee was fired for dishonesty. The NLRB held the action unlawful and found significant that the statements occurred during a union meeting, where it deemed "essential that employees be permitted the widest possible latitude in their discussions at these meetings." (*Id.*, at p. 1171.) The decision further noted that

> truth is not always apparent and men are influenced in their conduct by rumors, by inferences from known facts, and even by mere suspicions which may ultimately prove to be unfounded but which *the exigencies of the situation do not permit of verification;* it would, therefore, be decidedly unrealistic to hold that the organizational and concerted activities envisaged by the

> Act exclude the utterance by employees *of honestly believed statements of fact or opinion*, which, in some cases, may actually be unfounded in fact.

(*Id.*, at p. 1172; emphasis supplied.)

Citing *Atlantic Towing Company*, the United States Supreme Court in *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin* (1973) 418 U.S. 264 (*Old Dominion*), noted that vigorous exercise of the right to persuade other employees to join a union must not be "stifled by the threat of liability for the overenthusiastic use of rhetoric or the innocent mistake of fact," and that the NLRB has found statements of fact or opinion relevant to an organizing campaign protected by statute even if defamatory and erroneous "unless made with knowledge of their falsity." (*Id.*, at pp. 277-278.) At issue in that case was a union newsletter disparaging employees who did not join the union, calling them "scabs," and defining that term through a famous literary work on the subject.[41] The Court held the

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[41] "The Scab"

> After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which he made a scab. A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.
>
> When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.
>
> No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.
>
> Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The

rhetoric cited by the union was entitled to the protection of the labor relations statute at issue as it could not reasonably be interpreted as making false representations of fact against the complaining employees, but rather was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members toward those who refuse to join." (*Id.*, at p. 286.)

In *Rainbow Municipal Water District* (2004) PERB Decision No. 1676-M (*Rainbow*), the Board adopted, as its own, the decision of an ALJ finding unlawful an employee's discharge for telling other employees and the union about a conversation he overheard between a manager and employee, where the manager purportedly offered favors to the employee if he would help the manager oust a labor consulting firm affiliated with the union. Citing to *Mediplex of Wetherfield* (1995) 320 NLRB 510 (truth or falsity of statement not proper test for situations involving innocent misunderstandings of fact) and *The Hertz Corporation* (1998) 326 NLRB 1097 (knowingly false statements lose protected status), the ALJ found that even if the employee had misconstrued the manager's remarks, there was no evidence that the employee acted in bad faith or with knowledge that his report was untrue, and his statements in furtherance of union interests (*Los Angeles Unified School District* (1992) PERB Decision No. 957) were protected. (*Rainbow, supra*, proposed decision at p. 10.)

Not all factual misrepresentations and exaggerations retain their protected status, however. In *State of California (Department of Corrections)* (2006) PERB Decision

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> scab sells his birthright, country, his wife, his children and his fellow men for an unfulfilled promise from his employer.
>
> Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.

(*Id.*, at p. 268.)

No. 1826-S (*Dept. of Corrections* (*Zanchi)*), the Board adopted the ALJ's conclusion that the unfair practice complaint should be dismissed because the employer had met its burden in presenting its defense, but did not adopt the ALJ's conclusion that the charging party had stated a prima facie case.[42] (*Id*., at p. 2.) The essential facts of the case are as follows. The charging party was a corrections officer. Her husband was also employed by the department of corrections. They had planned a trip to Paris, France and had purportedly purchased airline tickets. The charging party requested and received leave time for the trip. Before the scheduled time of the trip, she was offered and accepted a limited-term assignment as a sergeant. The employer's policy regarding such assignments was that previously-approved vacation time was forfeited. She asked if she could take her trip, but was told that she could not. She did not take her vacation. She later applied for a permanent sergeant position but did not receive it. Then, she grieved the loss of the vacation time and requested reimbursement for her airline tickets. Through the course of processing the grievance, the department of corrections began an investigation into the employee's claims for reimbursement. Another employee had informed the employer that the charging party's husband said they decided not to go to France after the September 11, 2001 terrorist attacks and he encouraged his wife to try and get reimbursement for their costs from the employer. The employer sustained the allegations of dishonesty against the charging party.

[42] The hearing in that case took place after remand from the Board in *State of California (Department of Corrections)* (2003) PERB Decision No. 1579-S, reversing a Board agent's initial dismissal of the charge for lack of nexus. In *Dept. of Corrections (Zanchi)*, the Board vacated its decision in Decision No. 1579-S, and adopted as its own the original warning and dismissal letters of the Board agent dismissing Zanchi's charge. (*Dept. of Corrections (Zanchi), supra,* PERB Decision 1826-S, at p. 2.)

The Board stated, "[t]he problem with Zanchi was not that she filed a grievance but that a portion of what she said in it was fraudulent." (*Dept. of Corrections* (*Zanchi), supra*, PERB Decision No. 1826-S, p. 6.) The Board continued, "[f]iling a grievance is protected activity. Making a fraudulent claim is not." (*Ibid*.) The Board concluded that Zanchi was not investigated by the employer because she filed a grievance, but because of the fraudulent, unprotected contents of her grievance, and therefore, there was no nexus between the protected conduct and adverse action and failure to state a prima facie case. (*Ibid*.)

The NLRB reached a similar conclusion in *The Hertz Corporation, supra*, 326 NLRB 1097. There, an active union steward wrote numerous letters that were distributed to employees, the employer, and state and federal government agencies (including the President of the United States) raising both personal and general employment concerns. After receiving complaints about the truthfulness of the some of the claims in the steward's letters, the employer told him he could write as many letters as he liked, but the content must be truthful or he would be fired. After that meeting, the steward completed his work for the day, returned home, and drafted another letter, which he sent late in the evening to the employer, employees and government agencies. In addition to alleging racial harassment and recounting some details of the meeting that aligned with testimony of other witnesses in the unfair practice hearing, he also stated in the letter that the employer had threatened if he wrote any more letters, he would be immediately fired. The employer, finding that last statement blatantly false, fired the steward. An arbitration hearing proceeded wherein an arbitrator concluded that the employee was fired for dishonesty and not his concerted protected activities.[43]

[43] A statement of the arbitrator was quoted in the proposed decision of the ALJ. It said in part:

In the unfair practice proceeding, the ALJ considered whether the arbitrator's decision was repugnant to the federal labor relations statute. The ALJ concluded that the steward's statement at issue in his final letter was a deliberate falsehood that lost the protection of federal statute and had an "inflammatory tendency to disrupt the employer-union relationship." (*The Hertz Corporation, supra*, at p. 1101.) The ALJ therefore concluded, and the NLRB agreed, that the decision of the arbitrator was not repugnant to federal law and dismissed the complaint. (*Id*. at p. 1097.)

The NLRB has set forth criteria for when an employee may be lawfully disciplined for giving allegedly false testimony during a grievance arbitration. In *Big Three Industrial Gas & Equipment Co*. (1974) 212 NLRB 800, 803 (*Big Three Industrial*), the Board held that the employer must show not only that the testimony was false, but that it was "willingly and knowingly false, that it was uttered with the intent to deceive, and that it related to a substantial issue." This standard is essentially the same as that for perjury. (*Ibid*.) In that case, the NLRB upheld the conclusion of the ALJ that the individual had not given knowingly false testimony,

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> First of all, we must keep in mind that the grievant's written rendition of what took place during a meeting between the Employer, the grievant and the bargaining unit's exclusive bargaining agent, goes to the very heart of the relationship between the Union and the Employer. A lie or misrepresentation about what took place during those meetings, which is disseminated to fellow employees…has the potential of severely disrupting the work force, inflaming the employees' anger, undermining and making the Union irrelevant, and creating an atmosphere of tension and anxiety which could lead to very serious consequences. Given that realization, at minimum an employee, if writing a letter…as the grievant did herein, must be
>
> honest and truthful. If not, there is no question in my mind that the Employer can respond.

(*The Hertz Corporation, supra*, at p. 1100.)

and therefore, the employer's justifications for discipline were pretextual. (*Id.* at p. 806.) While PERB has not specifically adopted a standard for when assertions made under oath lose protection if false, it has espoused the similar idea that a statement uttered with "malice and with knowledge it was false" lose its protected status. (*Rocklin*, *supra*, at warning letter, p. 4.)

B. Analysis of Thomas's Statements in the Federal Complaint

The parties' essential arguments regarding Thomas's speech are straightforward. Local 721 argues that none of Thomas's statements in the federal complaint were willingly or knowingly false, and therefore, they all retained the protection of the MMBA. Local 721 asserts that as to facts not included in the federal complaint for which the County has punished Thomas, it was under no obligation to provide the federal court with every fact that might have favored the County on the ultimate legal issue of retaliation. It contends that these omissions constitute effective advocacy, not fraud, that would cause the protective shield of the Act to fall. (See Local 721's reply brief, p. 5.) The County argues that all of Thomas's false and deceptive claims in the federal complaint over which it acted lost their protected status, that it conducted a full and fair investigation into Thomas's statements in the lawsuit and sustained the allegations of dishonesty against her, and that it acted consistently with its disciplinary policies for findings of employee dishonesty by firing her.

Neither parties' arguments are wholly persuasive, because as discussed below, I find that some of the statements for which the County took action against Thomas retained protection of the Act, while some were deliberately false or misleading and therefore lost their protection. Because the facts underlying these incidents have been recounted here at length, I will focus only on those facts adduced at hearing that shed light on the truth or falsity of the

claims in the federal complaint. Although the County treated all of the involuntary transfers as one allegation of dishonesty, I will discuss each of those separately.

It must first be noted that Thomas's statements to the federal court were not uttered in a forum and/or directed to an audience where courts, PERB, and the NLRB have permitted substantial leeway for free expression and union advocacy, and have therefore forgiven factual inaccuracies, exaggeration, and simple mistakes. Her statements were not made in a union meeting, for example, where, as discussed above, the employer may not stifle the free exchange of views because that tempers concerted activity. (*Atlantic Towing Company*, *supra*, 75 NLRB 1169.) Nor were her statements mere rhetorical hyperbole, made either to induce employees to join the union (*Old Dominion, supra*, 418 U.S. 264), or to criticize the actions of the employer and incite collective action (*Rancho Santiago*, *supra*, PERB Decision No. 602). In that same vein, a reader of these statements would not be able to discern for themselves the accuracy of the events she was describing because she recounted widely known and shared experiences, or understand that she was merely expressing an opinion.

Thomas also was not using intemperate speech in her role as a zealous employee advocate in a representational meeting (*Dept. of Corrections & Rehabilitation, supra*, PERB Decision No. 2282-S) or informing fellow employees of overheard management conversations, even if misunderstood, that may show the employer trouncing on employee rights (*Rainbow, supra*, PERB Decision No. 1676-M). Rather, Thomas's statements were made to a federal court under penalty of perjury for the purpose of persuading a finder of fact to find that the County violated the law. Unlike hastily repeating a rumor in a union meeting, or using figurative language to impart an opinion, the statements here were assertions of fact, held out as true to the federal court. They were made not only in the federal complaint itself, but in

numerous declarations and depositions submitted as evidentiary support in the case. Thus, Thomas's speech before the federal court is not entitled to the same latitude bestowed by the cases cited in the immediately preceding paragraphs. If Thomas intentionally deceived the federal court about any material fact she held out as showing the County's unlawful conduct, then the deception must lose its statutory protection. (*Big Three Industrial, supra*, 212 NLRB 800, 803.)

a. Move to the BCTC (First Involuntary Transfer)

The Department took issue with Thomas's characterizations of the location as remote and substandard, and Thomas provided somewhat weak explanations during the hearing to support her contentions in this regard.[44] What Thomas failed to do, however, was refute Woods testimony that, contrary to the impression Thomas created in the federal complaint, Thomas actually knew prior to March 26, 2009, that her unit was being moved to the BCTC. Since Thomas knew that, it means the Department had already planned to move to the unit to the BCTC before receiving any notification from her about bargaining obligations.

In fact, according to Woods, Thomas had toured the facility and picked out her own cubicle by mid-March 2009. Thomas had the opportunity to refute this point during her rebuttal testimony, but did not. But most importantly, I find that Thomas gave false testimony in the hearing on this issue when she denied attending any meetings, or participating in any discussions, where the move to the BCTC was discussed prior to the move. (See Hearing Transcript, Vol. I, p. 59.) Thomas toured the facility with Woods and her team before moving.

[44] Notably, she did not refute or address the testimony of Captain Grotefend stating that the closed office space at the BCTC modular was for managers, not supervisors. Thomas asserted in the federal complaint that she was provided substandard work space compared to other *supervisors* working in the same location. She provided no evidence to support that contention at the hearing.

I find this to be the functional equivalent of attending a "meeting" to discuss the move before it occurred. Because I find that she lied during the hearing on this point, I discredit all of Thomas's testimony on this issue. Further, since Thomas was deliberately untruthful in her testimony regarding this issue before PERB, I find it more likely than not that she also knew the claim was false when she submitted it to the federal court and did so with the intent to deceive. Thus, I find that Thomas's inclusion of this allegation in the federal complaint was knowingly false.

b. Second Involuntary Transfer

The Department found dishonest Thomas's assertions over this issue because the space had been previously used as an office and she had comparable equipment to use as in her cubicle at the modular building, and because she could still contact SEIU-represented employees by phone, email, and other means. These reasons do not demonstrate as untrue Thomas's assertions that the transfer was involuntary, that the physical office space had issues (the County admitted to later fixing some ventilation problems in the room), and that she no longer worked in the same physical location on a daily basis with other SEIU-represented employees. Thus, this allegation in the federal complaint was not knowingly false.

c. Third Involuntary Transfer

The Department found that Thomas made false assertions for this claim because she did not tell the federal court about her bargaining obligations and the impact her current position in upcoming negotiations would have on the Department's staffing needs, as well as the length of time she had been in her previous assignment prior to the transfer. The Department's reasons for discipline on this point do not show that Thomas made false statements to the federal court. It is not clear how including facts about the length of time Thomas would spend in bargaining,

or how long she held her previous post, would transform the adverse nature of a change in assignment that she did not seek. Omitting that the Department could cover its staffing needs more easily by the shift change did nothing to mislead the federal court regarding this allegation.[45] Thus, this allegation in the federal complaint was not knowingly false.

d. Fourth Involuntary Transfer

The Department found Thomas was deceptive in her assertions to the federal court because she did not mention that the Department offered her a special 4/10 shift to assist with her transfer to day shift from graveyard shift, and that it would be easier (for the Department) to cover her many absences due to negotiations on day shift than on graveyard. Again, these reasons supporting the Department's actions do not show that Thomas lied to the federal court about the change in shift time being involuntary and unwanted, regardless of whether the Department offered her a 4/10 assignment to mitigate her discomfort. I find it insignificant that Thomas herself had requested day shift during previous bargaining cycles. This time she

[45] See, e.g., California Civil Code section 1710:

> A deceit [] is either:
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> 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
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> 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
>
> 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
>
> 4. A promise, made without any intention of performing it.

made clear to the Department that she did not want to change shifts. Thus, this allegation in the federal complaint was not knowingly false.

e. Vague Personnel Investigation

Analysis of the truth or falsity of this claim is not entirely clear-cut. The County points out that since Thomas knew exactly what was at issue in the personnel investigation on the same day that she was first informed of the investigation initiated by trainee Spargur's complaint, describing it as being vague to the federal court 18 months later was misleading. There is some validity to this argument. However, the investigative report itself did not address in substance Thomas's assertion that Woods told Thomas, "although the complaint was vague, it was the *best they could come up with at the time*." It seems that Woods's statement is the crux of the allegation of wrongdoing against the Department by Thomas, and it is curious that the investigators did not make a specific finding on this point.

At the hearing, Woods denied that she said, or would ever say, something like it was the "best they could come up with at the time" because that implies that the Department was trumping up charges. But she could not recall all of the details of a conversation occurring three years earlier, and was not certain whether she ever used the word "vague" to describe Spargur's complaint to Thomas. She said if she did use that word it was because at that stage they would still have needed to investigate to flesh out Spargur's claims. Thomas testified that Woods said the precise sentence that was attributed to her in federal complaint. I credit Woods here, not only because her testimony was, on whole, more consistent, forthright, and believable than Thomas's, but also because I find it implausible that a manager would have said something to Thomas akin to "this is the best we can come with." Such a statement intimates that it was Department management, not the subordinate employee, who falsely orchestrated

the investigation to harass Thomas. Including such a falsehood in the federal complaint was material and I believe it was done with the intent to deceive. Therefore, I find that this allegation in the federal complaint was knowingly false.

f. Bulletin Board Access

The Department found Thomas's statement that Local 721 had been denied access to a union bulletin board before filing a grievance over the issue to be false because there had always been a shared union board in that space and employees confirmed during the investigation that Local 721 sometimes posted materials on it. The Department also concluded that Thomas was untruthful in claiming that the new board had been paid for by Local 721 because the Department actually paid for it.

Although admittedly not spelled out precisely in the federal complaint, it is apparent that Thomas's objection over this issue was that Local 721 did not have a bulletin board for its exclusive use that would not be shared with any other employee organization. The Department did not, in fact, provide a private bulletin board for Local 721 until after the grievance was initiated, as stated in the federal complaint. So, for the most part her statement on this issue is true. Furthermore, Thomas credibly testified that she believed Local 721 paid for the bulletin board because they had offered to do so. The County did not dispute that the offer had been made. If anything, this appears to be an innocent misrepresentation to the federal court. On balance, it cannot be concluded that Thomas made knowingly false representations to the federal court on this issue.

g. Moving Thomas's Vehicle

This allegation is arguably the most blatantly deceptive in the federal complaint. The

omissions of fact here, unlike ones previously discussed which had no material bearing on the truth of the underlying claims, are so patently important that they change the whole nature of the event claimed to be retaliatory. Additionally, Thomas's testimony at hearing about this event was almost inconceivable. She continued to maintain, despite admitting asking for help for the inoperative car and after learning that it had been moved out of its designated spot, that the Department could and should have simply asked her for her keys in order to move it. Her testimony still implies, years later, that the Department moved the car manually to confound her, and not because it would not start.

I do not believe, given the email exchange between Thomas and Sergeant Hall and her testimony that they discussed the issue, that he would not have told Thomas that he was unable to get the car running and that was the reason it had to be moved. Their email exchange demonstrates that they were friendly with each other. Even if, before the day she discovered the car had been moved she genuinely believed that it had been fixed by Sergeant Hall, it defies logic for her to continue to maintain at the hearing that that the car could have been moved by starting the engine with use of the keys. Her casual banter with Sergeant Hall shows that she certainly knew, on April 9, 2010, that the car was inoperative and his possession of keys would have been of no use in getting it to move. This is so, because there would have been no other logical reason for her to get "in trouble" unless she allowed the car to remain, inoperative, in a coveted designated parking spot. Her further attempt, on redirect, to characterize her email exchange with Sergeant Hall as providing "insincere" and "facetious" thanks to him for moving the car only further hurt her credibility on this issue. Because she must have known, contemporaneous with the underlying events, that the car was moved because it was not functioning, her statements during the hearing that the Department should

have involved her by asking for the keys demonstrates her further attempt to obfuscate the issue. I specifically discredit all of her testimony on this point. The fact that Thomas made untrue assertions in her testimony before PERB bolsters the conclusion that it was included in the federal complaint with full knowledge that it was false and with the intent to deceive.

h. Refusal to Honor Thomas's Pre-Approved Vacation

The omission of fact here is subtle but material. It is clear that Thomas intended the federal court to believe that the Department never granted her previously selected vacation time because it is reasonable to assume that together, the phrases "would not honor" and "substantial hardship" in this context mean the vacation was not ever granted. Thomas only filed a supplemental declaration with the court clarifying that she received her selected vacation time after Woods filed her own declaration with the court explaining that the vacation period Thomas selected while stationed at the BCTC was granted after her transfer.

Furthermore, Thomas's testimony that her vacation plans were disrupted (purportedly the "substantial hardship" suffered) because she and her husband missed a window to reserve a spot for beach camping does not ring true. There was only a one-month period in December 2010 where Thomas was unsure whether her previously selected time would be honored. Woods told Thomas that if she had pre-paid for her vacation, the time would be granted without bidding along with the other Dispatch Center supervisors. Thomas wrote lengthy emails to Woods, arguing that the Department was violating its past practice and disputing that her situation was similar to another transferred employee. If Thomas really had been in jeopardy of losing her reservation window, I do not think she would have held back that information from Woods, and yet, that was not offered as a justification by Thomas in their email exchange. Especially since I have found other instances of untruthful testimony by

Thomas during the hearing, I discredit her testimony on this issue and find that this allegation was included in the federal complaint with the intent to deceive.

The statements above found to have been knowingly false—i.e., regarding the first involuntary transfer, the vague personnel investigation, the car moving incident, and the refusal to honor previously selected vacation time—lost their protected status. (*Department of Corrections (Zanchi), supra*, PERB Decision No. 1826-S; *The Hertz Corporation*, *supra*, 326 NLRB 1097; *Big Three Industrial, supra*, 212 NLRB 800.) It cannot be found, however, that the statements regarding Thomas's second, third, and fourth transfers of assignment or regarding bulletin board access were knowingly false. Therefore, those statements by Thomas that the County admittedly took action upon were an exercise of protected conduct.

2. The Employer's Knowledge of the Protected Conduct

To demonstrate the knowledge element of a prima facie case, at least one of the individuals responsible for taking the adverse action must be aware of the protected conduct. (*Oakland Unified School District* (2009) PERB Decision No. 2061.) In other words, the issue is whether "the individual(s) who made the ultimate decision to take adverse action against the employee had such knowledge." (*Sacramento City Unified School District* (2010) PERB Decision No. 2129, p. 7, citing *City of Modesto* (2008) PERB Decision No. 1994-M.)

Assistant Sheriff Thetford was the ultimate decision-maker for all of the alleged adverse actions at issue in this case. He readily admitted to being aware of Thomas's role on the Local 721 bargaining team and her grievance activity on behalf of unit employees. Thomas testified without contradiction that Assistant Sheriff Thetford was present with her at a grievance arbitration hearing in July 2012. He was vaguely aware of a previous unfair practice charge against the County, but the record does not clearly demonstrate his understanding, if

any, of Thomas's involvement in that previous charge. He was necessarily aware that Thomas had filed the federal lawsuit because her claims in that action motivated his decisions to place her on administrative leave pending investigation and to terminate her employment. The bulk of the federal complaint has been found to be protected by statute. Thus, the knowledge element of the prima facie case is demonstrated.

3. Adverse Actions

The Board uses an objective standard to determine whether there is evidence of adverse action. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In *Newark Unified School District* (1991) PERB Decision No. 864 the Board stated:

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

(*Id.*, pp. 11-12.)

Placing an employee on involuntary paid administrative leave has been considered an adverse action. (*San Mateo County Community College District* (2008) PERB Decision No. 1980.) It is beyond dispute that dismissal from employment is an adverse action. (*City & County of San Francisco* (2011) PERB Decision No. 2207-M.) Thus, placing Thomas on administrative leave while the investigation into her misconduct continued, and notifying of the Department's intent to terminate her employment and ultimately dismissing her from employment were adverse actions. Moreover, a reasonable person in Thomas's circumstances would view the admonition against entering Department facilities without an escort as having an adverse impact on employment, because it implies that the employee is untrustworthy and/or dangerous. This is especially true here, because it is undisputed that Thomas was

permitted to continue union duties while on leave, and thus likely that she had need to access Department facilities during that time and had to do so under escort. For these reasons, there is sufficient evidence of the adverse actions alleged in the amended PERB complaint.

4. Unlawful Motivation

The final element of a prima facie case is demonstrating a causal connection or nexus between the employer's adverse actions and the employee's exercise of protected rights. Because direct evidence of an employer's discriminatory motive is rare, nexus is ordinarily shown through circumstantial evidence. Circumstantial evidence of unlawful motivation usually includes close timing between the protected conduct and adverse acts, coupled with additional evidence of: disparate treatment of the employee; a departure from established procedures; inconsistent, contradictory, ambiguous, vague, or exaggerated justifications offered by the employer; a cursory investigation of the employee's misconduct; animus toward union activists; or any other evidence that could demonstrate an employer's unlawful motivation. (See e.g., *North Sacramento School District* (1982) PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210.)

However, where there is direct evidence, i.e., the employer's words or conduct reveal that its adverse action was based on the employee's union activities or other protected acts (*Contra Costa Community College District* (2006) PERB Decision No. 1852), no further evidence of nexus is required to demonstrate a prima facie case. (*Regents of the University of California (Davis)* (2004) PERB Decision No. 1590-H (*UC Davis*); *Alisal Union Elementary School District* (1998) PERB Decision No. 1248 (*Alisal*).)

In *UC Davis, supra*, PERB Decision No. 1590-H, the Board found direct evidence of nexus between protected conduct and adverse action where the employer admitted to laying off

employees due to complaints by employees found to be protected under the applicable labor statute. In *Alisal*, *supra*, PERB Decision No. 1248, a former union officer was issued a counseling memorandum for her alleged unprofessional and disruptive confrontation with employees in a school office. The employee was given the opportunity to respond in writing and did so twice, disputing the events as outlined by the employer and criticizing the employer's investigation into the incident. The employer then issued written discipline, asserting the employee had a history of discourteous behavior and did not take responsibility for her actions, offering the employee's responses to the counseling memorandum as proof. The Board found the employee's written responses protected and held: "Because [the employer] issued the disciplinary memorandum as a direct response to [the employee's] protected activity, we find it unnecessary to resort to circumstantial evidence to establish the requisite nexus between the two." (*Id.*, p. 6.)

Because half of the statements that the County disciplined Thomas over were protected under the MMBA, there is direct evidence of unlawful motivation between those statements and the adverse actions at issue and resorting to circumstantial evidence is therefore unnecessary. (*UC Davis*, *supra*, PERB Decision No. 1590-H; *Alisal*, *supra*, PERB Decision No. 1248.)

As to the other protected conduct alleged in the amended PERB complaint, aside from close timing between Thomas's testimony at a grievance arbitration hearing and speech in support of Local 721 at a meeting of the County's governing board, the record presents no other circumstantial indicators of nexus between those protected activities and the adverse actions. There was no evidence presented of anti-union animus by Assistant Sheriff Thetford, the final decision maker. Nor was there evidence of disparate treatment, a departure from

established procedures, cursory investigation into Thomas's misconduct, or inconsistent justifications for the County's actions. Local 721 concedes as much, arguing circumstantial evidence of nexus to be unnecessary and irrelevant where, as here, there is direct evidence of unlawful motivation for protected speech. (Local 721's reply brief, p. 3.) Thus, I find that the actions in this case could not have been motivated by Thomas's holding union office, testifying at a grievance arbitration, or filing a previous unfair practice charge against the County, because of the lack of evidence to support an inference of the County's discriminatory motive in response to those activities.

Because the County took adverse actions against Thomas by placing her on administrative leave and terminating her employment, in part, because of statements that were protected by the MMBA, Local 721 has met its burden of showing a prima facie case..

The Employer's Burden

Where, as here, the charging party has presented a prima facie case of discrimination, the burden shifts to the employer to prove that it had, and acted upon, an alternative non-discriminatory reason for the adverse actions. (*Palo Verde*, *supra*, PERB Decision No. 2337.) This case presents the situation where the employer's actions were motivated by both lawful and unlawful reasons, and therefore, the question in this instance is whether the adverse actions would not have occurred "but for" the protected activity. (*Martori Bros.*, *supra*, 29 Cal.3d 721, 729-730.) In assessing the evidence, PERB's task is to determine whether the employer's "true motivation for taking the adverse action was the employee's protected activity." (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 3, citations omitted (*Regents*); see also *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C.) Further, PERB "weighs the employer's justifications for the adverse action

against the evidence of the employer's retaliatory motive." (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, p. 14.) If PERB determines that an employer's action was not taken for an unlawful reason, it has no authority to also determine whether the action was otherwise justified or proper. (*City of Santa Monica* (2011) PERB Decision No. 2211-M.)

Even where there is direct evidence of unlawful motivation, an employer may prove that the employee's protected activity was not the true motivation for its action, which is sufficient to defeat the prima facie case. (*Regents*, *supra*, PERB Decision No. 2302-H.) In that case, although the employer specifically referenced the employee's protected conduct as part of its written grounds for termination, there was sufficient evidence of performance concerns that showed the employer would have taken the same course of action, regardless of the protected conduct. (*Id.* at proposed decision, p. 33.)

A different result was reached in *Dept. of Corrections & Rehabilitation, supra*, PERB Decision No. 2282-S. There, a union steward was disciplined in direct response to so-called unacceptable conduct during a representational meeting, which the Board found protected. There was no other basis offered by the employer for the discipline. Thus, the Board found that the employer could not meet its burden to defeat the prima facie case where the "discipline is seen to arise from, and only from, [the employee's] protected conduct." (*Id.* at p. 14.)

In this case, it is clear that Thomas's protected activity was not the true reason for her administrative leave and ultimate termination from employment. Rather, the County has met its burden that it acted because it found that Thomas had been dishonest in the federal complaint. Unlike the circumstance in *Dept. of Corrections & Rehabilitation, supra*, PERB Decision No. 2282-S, in this case the discipline did not solely arise from protected conduct, as

half of the Thomas's statements upon which the County took action lost the protection of the Act.

The evidence demonstrates that the investigators were thorough and unbiased in their investigation of Thomas's conduct and appeared to follow all regular Departmental procedures for investigation, including placing Thomas on administrative leave. There was no evidence that they were motivated by any animus toward Thomas's union activities, and there was no evidence that other employees facing similar circumstances had been treated any differently. The investigators independently determined that Thomas had misrepresented facts to the federal court after investigating only a few allegations in the federal complaint. Where there were disagreements among the investigators and/or Assistant Sheriff Thetford regarding the sufficiency of evidence, those were resolved in Thomas's favor. The investigative report itself even criticized Chief Deputy Hall's handling of Thomas's application for outside employment over the union stipend issue. Assistant Sheriff Thetford could have, but did not, remove that piece from the report because he had the final say over its content. These actions by the investigators, who were the only County representatives tasked with deciding whether Thomas should face discipline, do not lend support that they were unlawfully motivated.

Moreover, Department general orders and guidelines for discipline, as well as the MOU, together provide that an employee can be terminated for dishonesty while on or off duty. Law enforcement employees are held to higher standards of conduct than the general public, and honesty and credibility are crucial to the proper performance of duties. Dishonesty is never tolerated. (*Ackerman v. State Personnel Bd.* (1983) 145 Cal.App.3d 395, 400.) While the cited case involved a sworn peace officer, which Thomas is not, there is no reason to

believe that non-sworn employees of the Department were held to any lower standard of conduct than that expected of peace officers.

The record shows that, consistent with its policies, the County fired Thomas because she was dishonest in the federal complaint and during its investigation. It is more likely than not that even if the County had not acted upon the protected statements, Thomas still would have been fired for her false and misleading assertions that were unprotected by the Act. The issue before PERB is not whether the Department's concerns were justified or whether her administrative leave and termination from employment were for "good cause." (*City of Santa Monica*, *supra*, PERB Decision No. 2211-M.) The sole issue before PERB is whether the County retaliated against Thomas for her protected speech. On that issue, I conclude that her protected speech was not the true motivation behind the County's actions against Thomas.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, the complaint, as amended, and underlying unfair practice charge in Case No. LA-CE-787-M, *Service Employees International Union, Local 721 v. County of Riverside*, are hereby DISMISSED.

Right to Appeal

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231

FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

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).)