VACATED by City of Santa Monica (2020)
PERB Decision No. 2635a-M

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CHRISTOPHER HALVORSON, Charging Party, v. CITY OF SANTA MONICA, Respondent.	Case No. LA-CE-925-M PERB Decision No. 2635-M March 27, 2019

Appearances: Halvorson Losie Willner by Larry E. Halvorson, Attorney, for Christopher Halvorson; Meishya Yang, Deputy City Attorney, and Liebert Cassidy Whitmore by Adrianna E. Guzman, Attorney, for City of Santa Monica.

Before Banks, Shiners, and Paulson, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Christopher Halvorson (Halvorson) to the attached proposed decision of an administrative law judge (ALJ) dismissing the complaint and unfair practice charge against his employer, the City of Santa Monica (City). In pertinent part, the complaint alleged the City did not hire Halvorson for a promotional position in retaliation for his protected activity under the Meyers-Milias-Brown Act (MMBA).[1] Following a formal hearing, the ALJ dismissed the complaint, finding that Halvorson failed to meet his burden of demonstrating a prima facie case of retaliation. The ALJ further found that even had Halvorson satisfied his burden, the City demonstrated that it made its hiring decision for non-discriminatory reasons.

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

Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions,[2] we conclude that the ALJ's credibility determinations and factual findings are supported by the record, and her conclusions of law are well reasoned and consistent with applicable law. We therefore adopt the proposed decision as the decision of the Board itself, as supplemented by the following discussion.

DISCUSSION

Although the Board reviews exceptions to a proposed decision de novo, to the extent a proposed decision adequately addresses issues raised by certain exceptions, the Board need not further analyze those exceptions. (*City of Calexico* (2017) PERB Decision No. 2541-M, pp. 1-2.) The majority of Halvorson's exceptions raise substantive arguments that the ALJ considered and adequately resolved, and we therefore do not address them here.

The Board also need not address alleged errors that would have no impact on the outcome of the case. (*Los Angeles Unified School District* (2015) PERB Decision No. 2432, p. 2; *Regents of the University of California* (1991) PERB Decision No. 891-H p. 4.) Some of Halvorson's exceptions assert that certain factual findings constitute reversible error but fail to explain how the alleged error impacts the outcome of his case. For example, though the ALJ found Halvorson sufficiently demonstrated that Police Chief Jacqueline Seabrooks and Deputy Chief Alfonso Venegas, both of whom participated in the City's adverse employment decision,

[2] On April 3, 2018, Halvorson concurrently filed documents entitled "Charging Party Halvorson's Motion for Leave to File Reply Brief" and "Charging Party's Reply Brief to the City's Response to Halvorson's Exceptions." PERB Regulations neither expressly permit nor preclude reply briefs. The Board will consider a reply brief if it aids the Board in its decision-making process, particularly where a response raises new issues, discusses new case law, or formulates a new defense. (*City of Milpitas* (2015) PERB Decision No. 2443-M, pp. 13-14.) Because the City's response to Halvorson's exceptions does none of these, and because, as Halvorson admits, much of the content in his Reply reiterates arguments raised in his own statement of exceptions, his Reply does not assist our review of this case. We therefore have not considered Halvorson's Reply in rendering our decision.

were aware of most of Halvorson's protected activities, he further excepts to the finding that Captains Kenneth Semko and Daniel Salerno, who also participated in the City's decision, were not similarly aware but does not explain how finding knowledge on their part would change the outcome of this case. Absent such a showing, we need not consider these exceptions. (*Lake Elsinore Unified School District* (2019) PERB Decision No. 2633, p. 7; *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231a-M, pp. 7-8.)

Many of Halvorson's exceptions challenge the ALJ's determinations that certain witnesses testified more credibly than Halvorson about particular events. The Board's established policy is not to overrule an ALJ's credibility determinations unless all of the relevant evidence convinces us the determinations are incorrect. (*State of California (Department of Social Services)* (2019) PERB Decision No. 2624-S, p. 11, citing *Anaheim Union High School District* (2016) PERB Decision No. 2504, p. 14 [Board normally defers to an ALJ's credibility determinations "unless they are unsupported by the record as a whole"]; *Trustees of the California State University (San Marcos)* (2010) PERB Decision No. 2093-H, p. 3 [Board defers to ALJ credibility determinations absent evidence to support overturning such conclusions]; *Marin Community College District* (1995) PERB Decision No. 1092, p. 9 [ALJ is much better positioned to accurately assess witness credibility based upon firsthand observation than is the Board].) Having carefully examined the entire record, we find no basis for reversing the ALJ's credibility determinations.

For these reasons, we decline to address the majority of Halvorson's exceptions. However, because it questions whether the ALJ applied the proper legal standard to the City's

affirmative defense, we address Halvorson's exception to the ALJ's conclusion that the City established it acted for a non-discriminatory reason.

Halvorson claims that, in concluding the City established its defense to his retaliation claim, the ALJ assigned him the burden of disproving as pretext the City's proffered reasons for hiring Myesha Morrison (Morrison) instead of him for the Crime Prevention Coordinator position, and thus applied the incorrect standard to analyze the parties' shifting evidentiary burdens. Specifically, Halvorson argues the ALJ applied the burden-shifting framework for discrimination cases under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.)[3] We agree with Halvorson that the Title VII framework does not apply in discrimination and retaliation cases before PERB, but conclude the ALJ did not apply that framework here.

In *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*), PERB adopted the *Wright Line* burden-shifting framework developed by the National Labor Relations Board (NLRB) to determine whether an employer's conduct was motivated by anti-union animus. (*Id.* at p. 14; see *Wright Line* (1980) 251 NLRB 1083 (*Wright Line*); see also *NLRB v. Transportation Mgmt. Corp.* (1983) 462 U.S. 393 [approving *Wright Line* framework]; *Martori Bros. Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721 [applying *Wright Line* framework to discrimination claim under Agricultural Labor Relations Act].) Under *Wright Line*, once a prima facie case of discriminatory conduct is established, i.e., that the employee's protected activity was a motivating factor in the adverse action, the burden then shifts to the employer to show it would have taken the same action even in the absence of such

[3] Once a plaintiff establishes a prima facie case thereunder, the employer is required to articulate a legitimate, non-discriminatory reason for the employee's differential treatment. If the employer produces a legitimate reason, the presumption of discrimination vanishes and the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the employer's proffered justification is pretext. (*Young v. United Parcel Service, Inc.* (2015) __ U.S. __, 135 S.Ct. 1338, 1345.)

activity. (*NLRB v. Transportation Mgmt. Corp.*, *supra*, 462 U.S. at pp. 399-403; *Wright Line*, *supra*, 251 NLRB at pp. 1089-1091.) If the employer's proffered reasons for the adverse action are found to be either false or not actually relied upon, "the employer fails by definition to show that it would have taken the same action for those reasons." (*Faurecia Exhaust Systems, Inc.* (2008) 353 NLRB 382, 383; *Ozburn-Hessey Logistics, LLC v. NLRB* (D.C. Cir. 2016) 833 F.3d 210, 219.) Accordingly, the NLRB has adopted a two-part approach where it first determines whether the employer's proffered reasons for the adverse action are pretextual, and if it finds they are not, proceeds to decide whether the employer has proven that it would have taken the same adverse action in the absence of the employee's protected activity. (*Faurecia Exhaust Systems*, *supra*, at p. 383; *Ozburn-Hessey Logistics*, *supra*, at pp. 219-220.)

Likewise, under PERB precedent once a charging party establishes a prima facie case of discrimination or retaliation, the burden shifts to the employer to prove it would have taken the same adverse action even if the employee had not engaged in protected activity. (*Novato*, *supra*, PERB Decision No. 210, p. 14; *McFarland Unified School District* (1990) PERB Decision No. 786, pp. 10-11, affd., *McFarland Unified School District v. PERB* (1991) 228 Cal.App.3d 166.) To prove this affirmative defense, the employer must demonstrate it had both an alternative, non-discriminatory reason for taking the adverse 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, pp. 12-13, 31 (*Palo Verde*).) Though we have not explicitly adopted the NLRB's two-part approach to the defense, in applying the *Palo Verde* standard PERB has required the employer to prove both that its proffered reasons for taking the adverse action were not a pretext for retaliation and that it would have taken the same adverse action even if the employee had not

engaged in protected activity. (E.g., *Cabrillo Community College District* (2019) PERB Decision No. 2622, pp. 6-9 [rejecting argument that employer's investigation of employee's academic credentials and its subsequent termination of his employment based on the results of the investigation were a pretext for retaliation]; *City of Davis* (2016) PERB Decision No. 2494-M, pp. 44-45 [concluding that employer's issuance of a performance improvement plan was based on employee's documented performance deficiencies and rejecting union's argument that the claimed deficiencies were pretextual]; *Chula Vista Elementary School District* (2011) PERB Decision No. 2221, pp. 21-23 [finding no evidence to support employer's claim that adverse action was taken because of employee's poor interpersonal skills].)

Although the burden of proving the defense rests with the respondent, the charging party "has the right to attempt to discredit or undermine the employer's stated reason" by "challeng[ing] . . . the employer's evidence to ensure that the employer's evidence is credible, [its] affirmative defense is honestly invoked[,] and [its] justification for the challenged action is the true cause for the action taken." (*Los Angeles Unified School District* (2016) PERB Decision No. 2479, pp. 27, 29.) Moreover, evidence that supports the prima facie case may undermine the employer's defense by suggesting the reasons for the adverse action are pretextual. (See *Adelanto Elementary School District* (2019) PERB Decision No. 2630, p. 11 [in determining whether a prima facie case is established, PERB "must consider evidence of the alleged wrongdoing in order to determine if the employer exaggerated or otherwise mischaracterized what occurred, thereby evidencing an unlawful motivation"].)

Thus, while *Novato* provides a "formal framework" for the respondent to establish its legitimate reason(s) for the adverse action (*Wright Line, supra*, 251 NLRB at p. 1089), the evaluation of evidence under this framework "is less formulaic than it may appear from our

usual articulation of the *Novato* standards." (*San Diego Unified School District* (2019) PERB Decision No. 2634, p. 13, fn. 7.) The essence of the *Novato* test is to determine whether the employer acted for a discriminatory reason. (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 3.) To make this determination, we weigh the evidence supporting the employer's justification for the adverse action against the evidence of the employer's unlawful motive. (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 19; *Rocklin Unified School District* (2014) PERB Decision No. 2376, p. 14; *Palo Verde*, *supra*, PERB Decision No. 2337, p. 33.) Evidence offered in support of the charging party's prima facie case may undermine or support the respondent's defense, while evidence offered in support of the defense may undermine or support the prima facie case. (See, e.g., *Southside Hospital* (2005) 344 NLRB 634 ["A respondent supports, rather than rebuts, the inference that it acted for unlawful reasons when it proffers false explanations for its actions"].) As a result, while the burden-shifting framework provides a useful structure to guide the parties' presentation of evidence and PERB's analysis of the evidence, the outcome of a discrimination or retaliation case ultimately is determined by the weight of the evidence supporting each party's position.[4]

Although Halvorson is correct that PERB precedent requires the respondent to prove its reasons for the adverse action were not pretextual, we agree with the ALJ that the City met its burden here. The City presented credible evidence that it selected Morrison over Halvorson

[4] As the U.S. Supreme Court found in upholding the NLRB's use of the *Wright Line* framework, providing the employer with an affirmative defense does not remove or lower the charging party's ultimate burden of proving the adverse action was taken because of the employee's protected activity. (*NLRB v. Transportation Mgmt. Corp.*, *supra*, 462 U.S. at pp. 401-402.) This is consistent with the requirement in PERB Regulations that the charging party must prove the allegations in the complaint by a preponderance of the evidence. (PERB Reg. 32178; PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.)

both because it deemed her to be more qualified for the promotional position and because she performed better than Halvorson during an internal interview—these are legitimate, non-discriminatory reasons. Though Halvorson argued those reasons were pretextual because, in his view, he was more qualified than Morrison for the position, the ALJ found the weight of the evidence sufficient to prove the City's affirmative defense.

Taken as a whole, the evidence demonstrates that the City met its burden of showing it had legitimate, non-discriminatory reasons to select Morrison for promotion over Halvorson and that it, in fact, acted based on those reasons. Accordingly, we reject Halvorson's exception that the ALJ improperly assigned him the burden of proving the City's reasons for hiring Morrison instead of him were pretextual.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-925-M are DISMISSED.

Members Banks and Paulson joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CHRISTOPHER HALVORSON, Charging Party, v. CITY OF SANTA MONICA, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-925-M PROPOSED DECISION (October 31, 2017)

Appearances: Larry E. Halvorson, Representative, for Christopher Halvorson; Liebert Cassidy Whitmore by Adrianna E. Guzman, Attorney, and Meishya Yang, Deputy City Attorney, for City of Santa Monica.

Before Valerie Pike Racho, Administrative Law Judge.

INTRODUCTION

A civilian employee of a city police department alleges in this case that he was passed over for promotion because he participated in negotiations and pursued several grievances and unfair practice charges against the public agency employer. The employer denies that there was a retaliatory motive behind its promotional decision and asserts that it simply selected a more suitable candidate for the position.

PROCEDURAL HISTORY

On June 2, 2014, Christopher Halvorson, Robert Mapes, Lemont Davis, Jeanne Roccapriore, and Michael Machnov (collectively, "Charging Parties,") filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the City of

Santa Monica (City), alleging a violation of the City's duty to meet and confer in good faith under the Meyers-Milias-Brown Act (MMBA).[1]

On July 7, 2014, the City responded to the charge allegations through a position statement.

On September 10, 2014, Charging Parties filed a first amended unfair practice charge, reasserting violations of the City's duty to meet and confer in good faith and alleging interference with protected rights, interference with the formation of an employee organization, and retaliation against Mapes and Roccapriore.

On March 10, 2015, Charging Parties filed a second amended unfair practice charge, only alleging retaliation against Mapes and Halvorson.

On June 5, 2015, the PERB Office of the General Counsel issued a partial dismissal and a complaint in the case. The following allegations were dismissed from the charge, as amended: (1) all allegations of the City's duty to bargain in good faith (due to Charging Parties' lack of standing); (2) allegations involving "time off allowances"; (3) allegations regarding domination or interference with the formation of an employee organization; and (4) allegations of retaliation occurring before December 2, 2013.[2] A complaint was issued as to allegations of retaliation against Mapes occurring in 2014 and against Halvorson occurring in 2015.

On June 20, 2015, the City filed an answer to the complaint, denying all material allegations and raising various affirmative defenses.

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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] No appeal of the partial dismissal was filed.

On July 23, 2015, the parties participated in an informal settlement conference but the matter was not resolved.

Between July 30 and August 5, 2015, Charging Parties Machnov, Davis, and Roccapriore each withdrew as parties to the case. Thus, Mapes and Halvorson were the only remaining Charging Parties.

On October 29, 2015, the City filed a motion for leave to file an amended answer to the complaint, and an amended answer to the complaint, which alleged an additional affirmative defense.[3] Charging Parties did not oppose the amendment.

A seven-day formal hearing commenced on January 19, 2016, and concluded on January 27. Halvorson appeared with his representative. On the fifth day of the hearing, Halvorson withdrew the allegation at paragraph 6 of the complaint that "on or about January 29, 2015, Respondent took adverse action against [him] by changing his ranking for a promotional opportunity." The City did not oppose the withdrawal.

Neither Mapes nor his representative of record, Oshea Orchid, appeared during the hearing or otherwise communicated with PERB regarding Mapes's absence. One of the City's representatives, Adrianna Guzman, stated for the record that Mapes and the City had entered into a settlement agreement before the start of the hearing that included Mapes's withdrawal as a party to the case, and that she expected Orchid to submit a signed copy of the agreement to PERB. By the final day of the hearing, however, no such document had been received by PERB. The administrative law judge (ALJ) stated at the conclusion of the presentation of evidence that, even without a signed withdrawal, since Mapes had made no attempt to contact PERB to explain his absence over the seven days of hearing, his claims in the matter were

[3] The additional affirmative defense was untimeliness of one of the allegations regarding Mapes.

deemed abandoned by his failure to appear and prosecute the case.[4] (See e.g., *State of California (Department of Corrections)* (2006) PERB Decision No. 1806-S, p. 6 [an ALJ may dismiss a matter, *sua sponte*, for a party's lack of due diligence].)[5] Thus, Halvorson is the only remaining Charging Party in the case.

Halvorson and the City filed simultaneous closing briefs on April 7, 2016. At that time, the record was closed and the matter was submitted for decision.

FINDINGS OF FACT[6]

Jurisdiction and Unit Information

The City admits that it is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a), and that Halvorson is a public employee within the meaning of MMBA section 3501, subdivision (d). Therefore, the parties are within the jurisdiction of PERB. Halvorson is included in a "general" employee bargaining unit that is exclusively represented for employment relations with the City by the Santa Monica Municipal Employees Association (SMMEA). SMMEA's unit includes civilian employees of the Santa Monica Police Department (Department). At all relevant times, SMMEA and the City were parties to a current memorandum of understanding (MOU) setting forth terms and conditions of employment for the bargaining unit.

Halvorson's Employment History

[4] Mapes's written withdrawal was never submitted to PERB. It is presumed that this was an oversight. As of the present day, neither Mapes nor his representative have ever communicated with the ALJ about the status of the case.

[5] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617.)

[6] The entire record has been reviewed. Facts that were deemed irrelevant have been omitted from the discussion.

Halvorson has been a civilian employee of the Department since August 2002. He holds a Bachelor's degree in Writing and Professional History from the University of North Alabama and a Master of Fine Arts degree in Film and Writing from Columbia University. Halvorson was first employed by the Department in the position of Park Ranger (Ranger). As will be discussed more fully below, he held that position until 2014, when it was eliminated and reclassified as a result of a merger of three different classifications. The duties of the Ranger position were to patrol the City's parks on foot, by car, and by bicycle; to enforce park rules and regulations and other City ordinances; to issue citations for rule violations; and to assist the public. Halvorson described the Rangers as "the eyes and ears of the Department," and noted that a former Deputy Chief had described the Rangers as "ambassadors" of the Department.

In October 2006, Halvorson filed his first unfair practice charge against Department management (Case No. LA-CE-324-M). The thrust of that charge was that after submitting a grievance complaining about his supervisor to a union representative and Lieutenant (Lt.) Alfonso Venegas, Halvorson received discipline alleging that he was insubordinate. Case No. LA-CE-324-M was resolved through a settlement agreement reached at PERB in January 2007. In April 2008, Halvorson filed a second unfair practice charge against the Department (Case No. LA-CE-454-M). The allegations in that charge again involved action taken against Halvorson by Lt. Venegas. Case No. LA-CE-454-M was also resolved by means of a settlement agreement negotiated at PERB in April 2009.

The Department's Reorganization Plan

In late 2012, the Department began to explore a broad reorganization plan under the direction of Chief of Police Jacqueline Seabrooks. Chief Seabrooks began her tenure in the

Department in May 2012. By that time, former Lt. Venegas had been appointed as Deputy Chief, the Department's second highest ranking officer. All of the witnesses who worked within the Department acknowledged that the reorganization was "a big deal" to the City and Department management. The portion of the proposed reorganization plan that is relevant to this case was a proposal to merge the civilian classifications of Airport Services Officer (ASO), Downtown Services Officer (DSO), and Ranger into one classification, which ultimately was titled, Pubic Services Officer (PSO). According to Deputy Chief Venegas, these classifications had similar job duties and compensation, with the only real difference being the material "underneath the boots" of the respective employees, i.e., grass for Rangers, cement for DSOs, and tarmac for ASOs. From the Department's perspective, since the only variance was in work location, a merger of these classifications into a single position was intended to provide the Department with greater staffing flexibility and the civilian employees with a path for career advancement. In regard to the latter objective, the reorganization plan also included the creation of civilian Police Administrator positions with a "rank" at the functional equivalent of a Police Lieutenant. The Police Administrators were to oversee the various civilian departments, including Animal Control, City Jail, Forensics, Police Records and "Public Services," which would include oversight of employees at the airport, parks, and downtown.

By early July 2013, the Rangers had heard rumors that the Department wanted to merge their position with ASOs and DSOs. Mapes, who was a Ranger, contacted City Employees Associates (CEA), a firm that provides labor representation services to SMMEA, to request assistance in the matter. Shortly thereafter, an SMMEA board member sent an e-mail to several Rangers, including Halvorson, stating that the merger issue had been raised during

SMMEA's and the City's current contract negotiations. The union was awaiting a proposed job description from the City and expected further discussions over the issue. Halvorson testified that the Rangers already had ongoing complaints about their pay being out of sync with what they perceived as increasing dangers in the performance of their job duties, and a dispute that some of them had regarding working out of class earlier in the year on a Crime Reduction Team. That assignment was supposed to have been temporary for 30 days, but was extended for 90 days, and involved training that touched on Police Officer duties in Halvorson's opinion. Halvorson also contended that Rangers were the lowest paid out of the civilian classifications. The Rangers' primary concerns about their position being merged with the others were that their duties would increase and become more dangerous, especially when assigned to downtown areas, where more crimes are committed and the focus of duties is geared toward enforcement rather than public outreach. The Rangers believed that their current pay was inadequate for such assignments.

Michael Gaskins, an employee of CEA, contacted City Human Resources (HR) Manager Michael Earl via e-mail on July 19, 2013, requesting to hold a meeting with the City to discuss the Rangers' duties and a possible new job title. Gaskins had previously met privately with Halvorson and seven or eight other Rangers to discuss the Rangers' concerns over the possible merger. Halvorson and Mapes volunteered to assist Gaskins in the merger discussions with the City.

2013 Merger Negotiations and Ranger "Out of Class" Grievance

On September 10, 2013, the first meeting was held between the City and SMMEA over the merger issue. Gaskins, Halvorson, and Ranger Emma Alvarez met with Deputy Chief Venegas and HR Director Donna Peter. Deputy Chief Venegas noted that the three positions

were paid roughly the same wages, with DSOs making around eight or nine cents more per hour than the other classifications. He offered that all of the classifications should therefore be brought up to the DSO salary level post-merger. Deputy Chief Venegas also stated that the employees in the existing classifications would all need to be cross-trained, but since their duties were already so similar, extra pay for the training was not warranted. At some point, although it is not entirely clear that it was in this initial meeting, Deputy Chief Venegas stated that another option for the PSO position was to make it promotional. This meant that employees could either elect to stay in their current ASO, DSO, or Ranger positions, or to apply for the new PSO position. If the promotional route was chosen for the PSO classification, the City would retain the former classifications but not replace employees in those positions as they retired from employment or otherwise vacated the positions.

After the meeting, Gaskins and Halvorson discussed filing a grievance alleging that the Rangers were performing duties outside of their job description as a way to gain leverage in the merger negotiations. On September 20, 2013, Gaskins submitted a grievance on behalf of all of the Rangers to Ranger Supervisor Don Williams. Halvorson did not sign the grievance and his name was not mentioned in it. The grievance alleged that Rangers were currently performing the duties of DSOs, ASOs, Police Officers, Animal Control Officers, and Traffic Services Officers and raised safety concerns. The remedy sought was "appropriate compensation" for "higher level" duties or removal of those duties. Shortly after the grievance was submitted, Halvorson passed Deputy Chief Venegas walking in a hallway. Deputy Chief Venegas commented to Halvorson, "Chris, you really turned up the heat." Halvorson understood him to be referring to the grievance. Halvorson asked the Deputy Chief if he

wanted to talk about it, but the Deputy Chief replied, "I better not." Deputy Chief Venegas did not testify about this particular exchange with Halvorson.

On October 1, 2013, Halvorson, Mapes, and Gaskins attended a meeting with Department management to discuss the out-of-class grievance. Supervisor Williams and Lt. Pasquale Guido[7] represented the Department. Either in this particular grievance meeting or at some contemporaneous time, Halvorson said that Lt. Guido bragged that he "loved confrontation." Also around this same time, Lt. Guido had made statements that led Halvorson to believe Lt. Guido was reading Rangers' e-mails over working out-of-class issues because Lt. Guido had announced in a meeting that some of the Rangers were "organizational terrorists." A few days after the grievance meeting, Mapes and Halvorson were called to task by Supervisor Williams and Lead Ranger Gregory Marsh[8] for failing to be at a park for the full 20 minutes of their assignment, despite Marsh acknowledging that Halvorson and Mapes had left the park due to a radio call out.

Also a few days following the grievance meeting, Halvorson received a telephone call at home from Ranger Alvarez.[9] Alvarez said that Marsh was telling the Rangers that Halvorson and Mapes were only acting in their own interests as they had filed a grievance without informing the entire unit. Alvarez also said that Marsh was encouraging Rangers to e-mail Deputy Chief Venegas directly if they disagreed with the grievance. Halvorson testified that it would ordinarily be considered going outside of the chain of command to e-mail the

[7] At some point before his retirement, Lt. Guido legally changed his name to "Pasqual Guida." Because he is referred to in the record primarily as Lt. Guido, that is how he shall be referred to herein. He did not testify.

[8] Lead employees are included in the SMMEA bargaining unit.

[9] Alvarez did not testify at the hearing.

Deputy Chief directly about an issue; thus, Halvorson concluded that if Rangers were being told to send e-mails to the Deputy Chief, that such action must have been pre-approved by management. Marsh testified that Lt. Guido had told him "something like that," regarding allowing Rangers to send Deputy Chief Venegas e-mails about their thoughts over either the grievance or merger issues. Deputy Chief Venegas testified that he did not believe that he ever received any e-mails from Rangers about those issues.

On October 5, 2013, Lt. Guido provided a written response to the grievance, concluding that the issue of compensation could not be resolved through the grievance process since it was a negotiable issue, and noting that the City and SMMEA were addressing the matter through their current MOU negotiations. On October 9, 2013, Gaskins sent a letter to Chief Seabrooks requesting that she review the grievance. Gaskins wrote that Mapes and Halvorson were the Rangers' representatives for the issue. Halvorson testified that he had asked Gaskins to do so because some of the Rangers were not aligned with his and Mapes's position and because there was a lot of talk among Rangers that if the grievance was further pursued the Department may just eliminate their positions altogether. Halvorson believed that management had already linked Mapes and him with the grievance and they had been labeled as troublemakers, so he associated himself with it as a way of allowing his fellow employees to distance themselves.

On October 15, 2013, Halvorson sent an e-mail to all of the Rangers with the subject line "Grievance—Rumor Control." Halvorson noted that some of the Rangers were working against the grievance, which would only hasten the merger process. Halvorson stated that he had put his own name on the grievance appeal to the Chief because he did not believe that he was speaking on everyone's behalf. Halvorson denied that he was working only for his own interests because whatever wage increases were achieved would be applicable to all of them.

He also wrote, "[s]ome of you are weak individuals and I accept that." Also around this time, Mapes sent an e-mail to the Rangers regarding the merger and grievance issues.

On October 23, 2013, Chief Seabrooks and Captain Kenneth Semko met with Gaskins and Ranger John Michalski regarding the out-of-class grievance. HR Manager Earl and SMMEA board member Suzie Kim-Lockwood may also have been present, but they did not testify about it. Halvorson and Mapes chose not to attend the meeting. Gaskins had no clear recall of this meeting during his testimony, even after looking at related documents in an attempt to refresh his recollection. Michalski testified that Chief Seabrooks made reference to an employee's e-mail while holding a document in her hand and stating that she considered it to be "bullying" Rangers into supporting the employee's point of view over the merger. Chief Seabrooks did not testify at the hearing. Michalski did not recall that Chief Seabrooks ever referred to Halvorson by name, but having received Halvorson's e-mail himself, Michalski believed her to be referring to Halvorson as the author of the one in question. Regarding Captain's Semko's participation in the meeting, Michalski could only recall that he and Captain Semko had a discussion about the Rangers' assistance on animal control calls, and Michalski disputing the statistics that Captain Semko cited in that regard. Captain Semko did not remember being at this meeting.

Sometime within the next two weeks, Chief Seabrooks addressed the merger issue during a regular staff meeting. Halvorson did not attend this staff meeting because he contended that the Chief had scheduled it before his and Mapes's start time, and seemed to imply that this was done intentionally to exclude them. Halvorson admitted that he knew about the meeting in advance and could have attended it if he had desired to do so. Rangers Lemont Davis and Roger Gray testified about the Chief's statements in the meeting. During the

meeting, Chief Seabrooks referred to "someone" who had tried to bully employees in an e-mail and said that the person would be "dealt with." Chief Seabrooks never identified the author of the e-mail in question. No one from Department management ever discussed Halvorson's "Grievance—Rumor Control" e-mail with him and he was never reprimanded over it.

On October 30, 2013, Chief Seabrooks provided a written grievance denial to Gaskins. On November 11, 2013, Gaskins submitted an appeal of the denial to HR Manager Earl and requested review at the City Manager level of the grievance procedure. In December 2013, SMMEA agreed to table the out-of-class grievance as the City agreed to resume negotiations with SMMEA over the proposed merger. This occurred after Halvorson learned from Supervisor Williams that the City was planning to order new uniform patches to designate Rangers as PSOs, which caused Halvorson to complain to Gaskins that the City was moving ahead with the merger without completing negotiations. Gaskins then sent an e-mail to HR threatening an unfair practice charge in response to unilateral action by the City. This e-mail did not mention Halvorson. Halvorson also testified that Supervisor Williams told him that the Chief had consulted with SMMEA board members over the plan to move forward with the merger, and they had told her they had no objection to the plan.

2014 Merger Negotiations

On January 15, 28, and February 5, 2014, SMMEA and the City held meet and confer sessions over the proposed merger of the ASO, DSO, and Ranger positions. Halvorson attended each of these sessions. Also present for all or most of them on behalf of SMMEA were Kim-Lockwood, Gaskins, Mapes, and DSO Carlton Palmer. HR Manager Earl and Deputy Chief Venegas represented the City at each of the meetings. All proposals were made verbally. Before the negotiations began, the Rangers had met and determined that they would

ask for a $4.00 per hour wage increase. Safety and training were also primary concerns for Rangers, as well as having to apply and pass a new probationary period if the PSO position was instead made promotional.

At the session on January 15, 2014, the City offered a 2.5 percent salary increase for the PSO position. According to HR Manager Earl, SMMEA countered with a 16 percent increase. It is not clear whether the 16 percent equated with the $4.00 per hour increase discussed internally by the Rangers, but that is plausible. Halvorson prepared and handed SMMEA's wage proposal over to management. Halvorson testified that at one of the January sessions, Mapes presented Deputy Chief Venegas with a petition signed by 18 out of 19 Rangers stating their support for "increased wages" for the PSO position and no application or probationary period being required. According to Halvorson, Deputy Chief Venegas was "miffed" and "flustered" when he received it. Deputy Chief Venegas did not remember ever seeing a petition that only pertained to Rangers.

At the bargaining session on January 28, 2014, SMMEA dropped its wage increase proposal to 6 percent, stating that if the City agreed to it, that was something which it could take back to its members for a vote. The record does not reflect that the City made any counter proposal that day.

The final bargaining session was on February 5, 2014. HR Manager Earl informed the SMMEA representatives that the City's final position on a salary increase for the new PSO position was 4 percent. According to Halvorson, Kim-Lockwood responded that under the MOU, a promotional position is entitled to a 5 percent increase, and so she asked whether the City could at least offer that much. Kim-Lockwood recalled that she asked to the City to consider an increase greater than 4 percent, but she could not recall the exact amount that she

requested. HR Manager Earl recalled only that SMMEA had rejected the City's 4 percent offer. Deputy Chief Venegas remembered that at the previous meeting SMMEA had been asking for 6 percent, but at the final meeting SMMEA had gone up to 12 percent, making him believe the parties were too far apart to reach an agreement. The parties caucused. Halvorson and Mapes discussed that the employees would be really upset with an offer of only 4 percent, when they were supposed to try for a $4.00 per hour increase. After the caucus, HR Manager Earl and Deputy Chief Venegas briefly reentered the meeting. Deputy Chief Venegas said that the merger was off the table and the PSO position would therefore be promotional. According to Halvorson, Deputy Chief Venegas was quite angry and stormed out the room. None of the other witnesses who testified about this session described Deputy Chief Venegas's demeanor that way. Halvorson also stated that everyone was surprised that negotiations had ended so abruptly.

Events Leading Up to an Employee Vote Over the Merger

The next day, Halvorson and Mapes discussed the final bargaining session with Lt. Mike Beautz. According to Halvorson, Lt. Beautz asked them what they had done to make Deputy Chief Venegas so angry and stated that the Deputy Chief had called the employees "greedy." Former Lt. Beautz did not recall making statements about Deputy Chief Venegas.[10] He recalled instead that he and Chief Seabrooks had had a conversation about the merger issue at some point, and she had stated that she thought the employees' resistance to the merger was "greed related." Lt. Beautz offered his opinion to Chief Seabrooks during the conversation that the employees were not greedy, but simply seeking parity among the civilian classifications.

[10] At the time of the hearing, Lt. Beautz had retired from the Department.

Lt. Beautz helped Halvorson and Mapes craft a new proposal that sought to expand the merger to also include Animal Control Officers, Traffic Services Officers, and Jailers in addition to the other three classifications already under consideration. Lt. Beautz testified that he had been thinking about the merger issues for a long time and he thought his plan would be beneficial to both civilian employees and the Department. Halvorson sent the new proposal to Deputy Chief Venegas, Gaskins, and Kim-Lockwood by e-mail on or about February 6, 2014. Lt. Beautz's participation in drafting it was not detailed in the e-mail. Deputy Chief Venegas responded that the Department had made its position clear at the previous bargaining meeting. Deputy Chief Venegas testified that the new proposal encompassed things that had not been discussed in negotiations and that those other positions had different training requirements and duties than the three classifications suggested for merger. Thus, the proposal was not acceptable to the Department.

Shortly thereafter, Kim-Lockwood informed ASOs, DSOs, and Rangers in a memorandum that there would be a staff meeting held on February 12, 2014, with management and union representatives present, to discuss the issues raised in the merger negotiations.

Halvorson attended the staff meeting on February 12, 2014. Gaskins and Kim-Lockwood were there for SMMEA. Chief Seabrooks spoke briefly about the reorganization plan in broad strokes and then left the room as Police Officers also exited. Deputy Chief Venegas remained in the meeting with ASOs, DSOs, and Rangers to address the particular issues facing those employees.

Halvorson provided the following account of the February 12 staff meeting. Deputy Chief Venegas stated that the PSO position would be promotional, meaning that employees would have to apply for it and pass probation and backgrounds, and as a promotional position,

the pay increase would be 5 percent under the MOU. Deputy Chief Venegas said that PSO seniority would be based on employees' scores in their interviews.[11] Deputy Chief Venegas also stated that he was not there to discuss money and that he was tired of discussing money. His tone and demeanor were angry and threatening. A Ranger asked if they would lose their jobs if they did not apply for the PSO positions and Deputy Chief Venegas said they would not. The Department, however, would not backfill positions lost through attrition. Ranger Gray may have asked about whether PSOs would be required to ride a bicycle. Deputy Chief Venegas then held up a document in one hand while angrily hitting it with his other hand and stating that the Department would hold employees to their job descriptions, they were not working out of class, and "these" were already their duties. Another Ranger raised the issue that "Rob [Mapes] and Chris [Halvorson]" were supposed to bring an offer for the employees to vote on, to which Deputy Chief Venegas replied, "you mean those two guys weren't speaking for everyone in this room after all?" At some point, Gaskins left the meeting. After that, Halvorson described the Deputy Chief's anger as going "from one level of anger to, I'd say it was almost unleashed completely at that point." Then Deputy Chief Venegas said, "We're done dealing with that sidewalk lawyer guy or whatever he is, he's not a lawyer[,]" and the Department was "done with that[,]" meaning negotiations. He also disparaged union negotiations generally.

Deputy Chief Venegas testified that he probably had a Ranger job description in his hand during the staff meeting. He recalled discussing that employees' duties in the promotional position would not be anything more than they were currently doing and the Department would, in any case, hold all employees responsible for their current duties. He

[11] Halvorson said this had employees very worried, because it might have been the case that employees could lose seniority if they attained the promotional position.

admitted that he might have been exhibiting a certain level of frustration in the meeting but denied that he ever yelled. Regarding the staff meeting, Kim-Lockwood was only asked whether Chief Seabrooks spoke first and Deputy Chief Venegas stayed behind to address ASOs, DSOs, and Rangers, which she affirmed. Rangers Gray and Davis also attended and testified about the staff meeting. They corroborated Halvorson's account that Deputy Chief Venegas said the PSO position would be promotional with a probation period and background check, that seniority would be tied to the interview or ranking process, and that he held what appeared to be a Ranger job description while stating employees would be accountable for performing the duties in their job description. Gray testified that he "didn't think [Deputy Chief Venegas] was real happy" with the Rangers' position in negotiations and it seemed that they were going to be under increased scrutiny regarding performance of duties, which made Gray uncomfortable. Davis said that Deputy Chief Venegas appeared to be "a little irritated" during the meeting based on the way he was holding the job description. Neither Gray nor Davis corroborated Halvorson's other descriptions of Deputy Chief Venegas's comments regarding Gaskins, union negotiations, money, and "those guys" (Halvorson and Mapes) not representing everyone in the room. They also did not describe Deputy Chief Venegas's demeanor during the meeting as being angry or threatening.

Sometime in the following week, Kim-Lockwood and Deputy Chief Venegas spoke about determining whether employees in the ASO, DSO, and Ranger classifications would still consider a merger of the positions into the PSO classification. The City and SMMEA ultimately agreed to let employees decide the issue.[12] According to Kim-Lockwood, Gaskins

[12] Kim-Lockwood believed that Deputy Chief Venegas called her, but Deputy Chief Venegas was fairly adamant that Kim-Lockwood had been the one to call him. The fact of whom was responsible for making the initial contact is not material to deciding the issues in

suggested that the affected employees vote over whether they favored merger and elimination of the current classifications or having the PSO position be promotional and the current positions maintained. Department and City management were not involved in the decision to put the issue to a vote and did not provide input on the wording on the ballots.

Kim-Lockwood oversaw the voting process. At first, employees left ballots in an envelope near her work station. Some employees raised concerns over privacy and it was then decided to have the vote take place in person on February 26, 2014.[13] Managers were not present during the voting. Employees did not sign their names to the ballots, but separate ballots were created for each affected position, making it possible to determine how the employees in each position voted as a whole. All ASOs (approximately four employees) and DSOs (approximately five employees) voted to approve the merger. Out of the approximately 19 Rangers, 11 or 12 voted in favor of the merger. Thus, a majority of all affected employees voted to proceed with the merger and eliminate their current classifications in favor of a single PSO classification. Deputy Chief Venegas testified that he was aware of these voting statistics, but he was not aware of how any particular employees voted, including Halvorson. Kim-Lockwood, the individual who was responsible for the tally of ballots, said that she did not know how individual employees voted, since no one wrote their names on the ballots. The ballots were destroyed after they were counted. The City approved the new PSO, Lead PSO, and Police Administrator positions between February 27 and March 3, 2014.

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this case, but Deputy Chief Venegas's account was more precise than Kim-Lockwood's and is therefore credited.

[13] Kim-Lockwood testified that those initial ballots were destroyed when it was determined that an in person vote would take place.

Halvorson was one of the Rangers who voted against the merger and thus to remain a Ranger. According to Halvorson and Rangers Roccapriore and Jasmin Brown, who also voted "no" regarding the merger, it was "common knowledge" among staff regarding the Rangers who had not supported the merger by voting "no." Roccapriore and Brown explained that one could figure out the way people voted by the employees with whom they associated.

PSO Compensation Grievance

The City granted former ASOs, DSOs, and Rangers in the new PSO position a 4 percent salary increase. On April 2, 2014, Gaskins filed a grievance on behalf of newly appointed PSO employees with HR Manager Earl. The grievance alleged that employees believed that voting "yes" on the merger question meant that they would receive a 5 percent pay increase because Deputy Chief Venegas had stated in the February 12 staff meeting that promotional positions are entitled to a 5 percent adjustment per the MOU. Thus, SMMEA alleged that the City had violated the promotional pay provision of the MOU by failing to grant a 5 percent salary increase. Halvorson was not specifically named as filing or being associated with this grievance.

HR Manager Earl provided a written response on April 15, 2014, contending that the City believed SMMEA was in acting in bad faith by filing the grievance and he had received authorization from the City Manager to file an unfair practice charge against SMMEA. The City noted that its last offer regarding salary for the PSO position was a 4 percent increase. The City further asserted that the MOU provision regarding promotional pay was not applicable since employees had voted to approve the merger; thus, employees did not have to apply for or pass probation and a background check to attain the PSO position, and so it was not considered "promotional." On April 23, 2014, SMMEA sent a letter to HR Director Peter

requesting review of HR Manager Earl's grievance denial. There is no other information in the record regarding this grievance.

Cross-Training Issues, Hazing Complaint to HR, and Overtime Assignments[14]

As discussed during negotiations, the Department wanted former ASOs, DSOs, and Rangers to be cross-trained in each other's former assignments because, as PSOs, they could be assigned to any of those work locations and corresponding duties. According to Halvorson, the scheduling of cross-training was supposed to be first by volunteers and then according to seniority. He was surprised, therefore, given his higher seniority than other former Rangers, that he was scheduled third for cross-training. Lead PSO Stanley Paez, who was partially responsible for the cross-training schedule, testified that there was no rule regarding seniority for the scheduling of cross-training. He also said that Halvorson's position on the cross-training schedule never came up as a point of discussion between him and PSO Supervisor Art Lopez. Lopez had the final say over the cross-training schedule. Lopez confirmed that they asked for volunteers first and then it was assigned based on seniority, but they also had to take into account the training and vacation schedules of the trainers when making assignments.

After the merger vote, there was some tension between former ASOs, DSOs, and Rangers regarding the negotiations that had occurred. During negotiations, Former DSO Palmer had shared with Halvorson that the DSOs were afraid that if employees pushed too

[14] In addition to the events discussed in this section of the decision, Halvorson introduced other evidence regarding instances that he alleged showed that former Rangers were either treated differently than former DSOs and ASOs, or otherwise singled out for harsh treatment. This included evidence regarding denied vacation requests for former Rangers, including Halvorson, where similarly situated former DSOs allegedly were granted their requested time off, and an episode where Halvorson and his partner were radioed to respond to a call after they had attempted to start their lunch break. I find that this evidence was inconclusive as to the version of events that Halvorson was advancing and therefore warrants no further discussion.

hard for pay increases that the City would simply eliminate their positions and they would be laid off. Former Ranger Brown testified that, during the negotiations period, she overheard former DSO Maria Cervantes speaking loudly in the locker room that Rangers were "sticking their nose[s] in everybody's business."[15] Cervantes was later assigned as one of the cross-trainers.

Former Rangers, including Roccapriore, had issues with Cervantes allegedly mistreating them during cross-training. Roccapriore testified about an incident where Cervantes was trying to force her to have a car towed from a parking structure, which Roccapriore did not agree needed to be done, and a supervisor had to be summoned to diffuse the situation. Later, in a meeting over the incident with Lt. Darrick Jacob and PSO Supervisor Lopez, Roccapriore was asked whether she was one of the "no" votes and if she was trying to "start a revolt." Halvorson raised the issue of hazing of former Rangers in the initial unfair practice charge filed in this case, which was served on HR Director Peter on or about May 29, 2014.[16] On that same day, Halvorson sent an e-mail to Peter saying that the City needed to address the hazing of former Rangers by a former DSO. In light of these allegations, he asked the City to pause and delay the cross-training for those who had not yet completed it. Peter responded the same day confirming her receipt of the unfair practice charge and that she would discuss his request with the City Attorney's office.

The following week, another employee wrote to Peter complaining of hazing by a former DSO. Peter wrote to Halvorson and the other then-Charging Parties in this case, saying

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[15] Neither Palmer nor Cervantes testified.

[16] HR Director Peter testified that when HR receives an unfair practice charge, the charge is forwarded to the City Attorney's office. HR does not, however, regularly forward the charge to Department management.

that she needed additional information from them regarding the hazing complaint and that Department management needed to be informed immediately of what was happening. Halvorson responded to Peter, identifying Cervantes as the former DSO who was hazing former Rangers and alleging that the instruction for it was coming from "the top"—i.e., Deputy Chief Venegas—because the Deputy Chief was still angry with Mapes and him for their part in the negotiations. Halvorson also said that he feared further retaliation by Deputy Chief Venegas because of their past history. Halvorson requested that the City conduct an investigation and also that he not be cross-trained by Cervantes.

On June 10, 2014, HR Director Peter informed Halvorson and the other complainants that, in consultation with the City Attorney's office and Chief Seabrooks, the City had decided to hire an outside investigator to investigate the hazing claims. In the meantime, however, the cross-training would continue and, if scheduling permitted, a different trainer (someone other than Cervantes) would be assigned. Halvorson then took medical stress leave for four weeks. He was not trained by Cervantes when he returned to work.

HR Director Peter testified that it took time to secure the services of an outside investigator. Halvorson was interviewed by the investigator in October 2014. Around that time, Halvorson reported incidents of harassment against him by fellow employees to HR and the investigator, noting that someone had put cheese in his locker, an apparent reference to him being a "rat," and had taped to his locker a gay pornographic advertisement with Halvorson's radio call sign written on it. Two PSOs had also given Halvorson a "gay nickname."

On May 15, 2015, Halvorson was informed in a memorandum from HR Director Peter that the investigator had concluded that none of the hazing complaints were substantiated and

therefore the matter was considered closed. There is no information in the record regarding the resolution of the other harassment complaints raised by Halvorson in October 2014.

Regarding the assignment of overtime after the merger, Lead PSO Paez admitted that it was not done in an equitable manner at first. Paez acknowledged that overtime is supposed to be more or less equally distributed to employees under the MOU. Former DSOs, rather than former Rangers, were receiving the bulk of overtime opportunities as PSOs, however. Paez said this was done at the direction of PSO Supervisor Lopez. PSO Supervisor Lopez denied that former DSOs received more overtime than former Rangers, stating that not everyone wants it. Halvorson testified that the manner in which overtime was approved for PSOs also differed between the former DSOs and the former Rangers. Former DSOs could simply slip their time cards with overtime hours under PSO Supervisor Lopez's door, whereas former Rangers had to have a watch commander sign off that the overtime hours had actually been worked before the time card was submitted to PSO Supervisor Lopez.

PSO Out of Class Grievance

On September 10, 2014, CEA representative Orchid[17] submitted a grievance to the Department alleging that PSOs were working outside of their job description. A few days later, according to Halvorson, Paez told him that the Chief was tired of grievances regarding PSOs and any grievances would simply be denied from that point. Paez also told Halvorson that PSO Supervisor Lopez wanted to know the names of employees who were involved in the submission of this grievance.[18] Paez did not testify about either conversation with Halvorson. On September 18, 2014, a grievance meeting was held. Lopez, Paez, and Lt. Jacob represented

[17] At that time, Orchid's last name was Vasquez.

[18] At this point in time, Lopez was acting as Police Administrator over PSOs and Paez was the acting PSO Supervisor.

the Department. Orchid, Halvorson, Mapes, and PSO Machnov represented the grievants. On October 1, 2014, Lopez sent a letter to Orchid denying the grievance.

On October 8, 2014, Halvorson and other former Rangers received an e-mail from Lead PSO Marsh attaching a newspaper article over employees being laid off due to a reorganization plan at the City of Glendale. Marsh had received the e-mail from Lopez. Halvorson believed that this e-mail was sent only to the former Rangers, and not to the former DSOs and ASOs, because of Halvorson's and the other former Rangers' most recent grievance alleging out of class work. After the grievance was filed, rumors began swirling among PSOs that if they kept complaining about things, they would all lose their jobs. Lopez and Marsh denied that Lopez had instructed Marsh to send the e-mail to the former Rangers. Marsh explained that, at this time, the PSOs were not really a fully integrated group, and he still was using an e-mail list for former Rangers that would automatically populate in an e-mail by pressing the letter "r." Marsh said that he forwarded the e-mail to them because theirs was the employee group over which he had direct responsibility, and he routinely forwarded such information that he had received from his own supervisors regarding police work in other cities and employment issues in other jurisdictions that might be of interest.

At some point, the PSO grievance was advanced to the HR level. On February 3, 2015, Halvorson, Mapes, and Orchid participated in a level three meeting with HR Director Peter. On April 9, 2015, acting City Manager Elaine Polachek adopted the conclusions of HR Director Peter and ordered some modifications to the PSO job specification, additional training for PSOs in certain areas, and higher compensation for PSOs when they are asked to cover the absence of a higher-level classification working at the Pier. This response from the City resolved the grievance.

Halvorson Applies for the Position of Crime Prevention Coordinator

1. The City's Initial Steps for the Crime Prevention Coordinator Recruitment

Due to the impending retirement of an employee in the position of Crime Prevention Coordinator (CPC), Chief Seabrooks requested to HR on October 7, 2014, that the Department be permitted to run a recruitment for the position. HR Analyst Merle Wynn approved the Chief's request. Wynn testified regarding the City's recruitment practices. As part of those practices, an open position's job specification is reviewed by the appointing department to determine if changes are needed. In this case, Wynn sent the CPC job specification to Captain Semko for review. At this time, Captain Semko was commanding the Strategic Services Division of the Department, which included the CPC position. For this reason, Captain Semko was the Department manager primarily responsible for the recruitment process. The City has adopted Civil Service Rules and Administrative Instructions (AI) that govern recruitment and selection procedures. AI III-1-2, dated July 26, 1999, contains a "Guide to Effective Selection Interviews," (Guide) that should be reviewed by "all employees who interview and select employees for any City job[.]" Wynn testified that she did not send the Guide to Captain Semko for the CPC recruitment and that she does not normally issue the Guide to the hiring department.

The recruitment for the CPC position was to be promotional, meaning the position would be open only to current City employees. Captain Semko testified that the Department decided to open the position to all current *City* employees, rather than limit it to only current *Department* employees, because there is very little turn over in the CPC positions, the Department considers the positions to be very important, and therefore it wanted the widest pool of qualified candidates. Captain Semko worked with Wynn on changes to the CPC job

specification. The only slight change was in the required experience section from "one year of recent, paid, *related* work experience" to "one year of recent, paid, *public contact* work experience." (Emphasis added.) SMMEA approved the proposed revised job specification. The City's Personnel Board approved the revision on December 7, 2014. The City opened the CPC recruitment the following day.

2. The Job Announcement

The CPC job announcement under, "Minimum Qualifications," included the following in relevant part:

> Knowledge of:
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> Crime prevention principles and practices; crime-related terminology; contemporary issues affecting law enforcement and the community; emerging technologies; effective training and coordinating techniques; public relations principles and practices, including mass media, publicity, community relations and governmental relations to law enforcement; methods and/or techniques used to develop brochures, posters, slides and other informational material; effective customer service techniques; media utilization to include social media.
>
> Ability to:
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> Develop and coordinate comprehensive and effective crime prevention programs; organize and present crime prevention educational programs to the public; interpret crime data; train and develop volunteer leaders; write clear and concise reports and presentations; maintain accurate records; identify areas to utilize outreach resources; create, maintain, and access database files; communicate effectively both orally and in writing; provide effective customer service; establish and maintain effective and cooperative working relationships with the community, members of the media, City employees and the general public; conduct effective training programs; speak at public forums.

Under the heading "Education, Training and Experience," the job announcement stated:

> Graduation from an accredited college or university with a Bachelor's degree in Public Administration, Administration of

> Justice, Communication, or a closely related field. One year of recent, paid public contact work experience compiling and disseminating information, providing instruction, public speaking, or similar public contact with groups. Experience presenting educational or law enforcement programs is desirable. Bilingual experience is desirable. *Additional relevant work experience may be substituted for the required degree on a year for year basis. (One year of the additional required work experience is equal to the completion of 30 semester units.)*

(Emphasis added.)

The job announcement instructed applicants to submit a supplemental application, including their college transcripts, if applicable, and the answers to three questions. The questions instructed applicants to describe: (1) their recent, paid public contact work experience; (2) their work experience presenting community based educational programs; and (3) how they have promoted activities and services and what software systems or tools were used in developing outreach materials.

On December 16, 2014, Halvorson submitted a cover letter, résumé, application, and supplemental application to HR requesting to be considered for the CPC position. Regarding his answers to the questions above, Halvorson focused the first question on his daily work interacting with the public in his current position as a PSO and his work during special events at the City, such as the Los Angeles Marathon. Halvorson also noted his previous assignment on the Crime Reduction Team and its requirement to attend daily briefings and review data regarding crime statistics in the City. For questions two and three, Halvorson's answers described his positions as a Youth Worker in Seattle before college in 1990-1991, and his work from 2000-2001 at the National Liberty Museum designing press materials and creating short publicity films.

3. HR's Screening of Applications and the Initial (Outside) Interview

Wynn screened the applications for the CPC position to determine the applicants who met the minimum qualifications. Nineteen applicants, including Halvorson, were deemed to have done so. On January 2, 2015, Wynn notified Halvorson by letter that he had successfully passed the "application review process" and was therefore invited to an oral interview on January 15, 2015, at 1:00 p.m. The initial interview for the CPC position was conducted by an external panel of volunteer interviewers from other jurisdictions, consisting of three police officers at the ranks of sergeant and lieutenant and one crime prevention officer. Because there were 19 candidates to interview in a single day, the external interviewers were separated into two panels each consisting of two persons. Before the interviews commenced, Wynn and Captain Semko briefed the external interviewers on the requirements of the CPC position and the qualities that the Department was looking for in an ideal candidate, emphasizing the need for a "vibrant, energetic, and articulate" individual. Wynn and Captain Semko also reviewed the interview questions and rating instructions with the panelists and provided them with the candidates' application materials.

After the interviews concluded, the external panelists turned over to Wynn their candidate rating forms and notes. Captain Semko did not receive any of these materials, nor did he communicate with the external interviewers regarding their scores of the candidates. Wynn tallied the panelists' scores from the rating sheets and adjusted them with a seniority credit to arrive with a final score and rank for each candidate. The highest possible score is 100. For a promotional position, the top three candidates are included on a "promotional eligibility list," and thus move on in the selection process to a second interview with the hiring department. Halvorson and another candidate, Benjamin Steers, tied with a score of 100 and

rank of number 1 after the external interview and thus took the first two spots on the promotional eligibility list. The final candidate on the promotional eligibility list was Myesha Morrison, with a score of 98.8 and rank of number 3. In separate letters, Halvorson was informed of his score and rank and that he would be contacted by the Department for another interview. The letter informing of the score noted that there were three top candidates, one of whom would be selected for the positon. Once Wynn had determined the promotional eligibility list, she contacted the Department's Administrative Services staff with the names of the final three candidates. Consistent with City policy, the Department is given the promotional eligibility list with the candidates' names in alphabetical order. The Department is not, however, informed of the scores or rank of the persons on the list.[19]

4. The Second (Inside) Interview

After receiving the above information from Wynn, Department Administrative staff prepared a packet containing each candidates' application materials for Captain Semko. At this stage of recruitment, the hiring department takes over the selection process. Captain Semko was not provided with or aware of the candidates' scores and rankings after the external interviews. Captain Semko wrote a set of standard questions for the internal interviews. He also wanted another captain to participate. He asked Captain Daniel Salerno to sit in with him on the interviews, and Captain Salerno agreed.[20] Captain Salerno was also not aware of the candidates' scores or rankings after the external interviews. Captain Salerno did not clearly recall whether he the reviewed the candidates' application packets before the interview but said

[19] Wynn asserted in a 2011 deposition regarding the Department's promotional practices in 2009 that the highest ranked candidate from the promotional eligibility list was usually selected for the open position. Wynn testified during the instant hearing that that was no longer the usual case.

[20] At the time of the hearing, Captain Salerno had retired from the Department.

he would have done so in his ordinary practice if they were available. Captain Semko confirmed that the candidates' application packets were in the interview room. At the time of the internal interviews, Captain Semko had never had supervisory authority over Halvorson. Captain Salerno had been included in Halvorson's chain of command about five years before the interview took place, when Captain Salerno had been a lieutenant. The candidates' annual performance reviews were not reviewed or considered during the selection process.

The interviews took place on February 3, 2015. They opened by Captains Semko and Salerno asking the candidates to give a mock introductory statement to a community group. After that, the candidates were asked the following questions:

- What experience do you have in the planning of large events? Give us an example of something you have learned during this experience.
- What has your experience been working in a team environment? How do you feel about taking direction from your peers while working on a team project?
- Describe a problem brought to your attention by a member of the community (or other city employee) and what you did to address the issue. What was the outcome?
- What role does the CPC play in the Department's mission to fight/reduce crime?
- Describe your experience working with social media. How would you boost the effectiveness of the Department's use of social media?
- Why are you the right person for this position?

Both Captains Semko and Salerno stated that they did not remember taking many notes during the interviews and if they did take some, they did not keep them.[21]

[21] Neither Captains Semko nor Salerno reviewed the Guide before the interviews. The Guide states that taking notes during or after interviews is a "matter of preference" for the

A. Halvorson's Interview

Captains Semko and Salerno both described Halvorson's appearance at the interview as a bit "disheveled." Captain Semko elaborated that Halvorson's tie and jacket were crooked and that it looked as if he had "jumped out of a car or something and ran to the interview." Halvorson disputed those accounts, saying his appearance that day was "impeccable," and that he was looking his best with a freshly pressed suit and new tie.[22] Halvorson did admit that immediately before the job interview on February 3, 2015, he had come from the PSO grievance meeting with HR Director Peter with "not much time" in between.

Captain Semko testified that Halvorson's mock introduction statement failed to show enthusiasm and energy for the CPC position and was not what Captain Semko was looking for in a successful candidate. Halvorson said he felt that Captains Semko and Salerno were trying to rush him into making the statement and that Salerno jammed a pen in his direction as if to say just "go." Halvorson was trying to ask follow up questions to them about the specific type of community audience that he was to address, for example, a group of children or adults, because his style would have differed based on his target audience. Halvorson said the interviewers seemed annoyed by his requests for clarification and finally Halvorson said he would just assume an adult audience since they were all adults in the room.

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interviewers. The Guide also includes a form where interviewers are to "record [the interviewer's] final evaluation and decision." The form states that the interviewer's comments "should completely summarize [the interviewer's] evaluation of each candidate, based on all predetermined job factors, and should record [the interviewer's] reasons for…the final decision." The Guide states "*if [the interviewer] decide[s]* to use this form, a copy should be returned to the personnel department." (Emphasis added.) Neither Captains Semko nor Salerno recorded a written evaluation of the candidates.

[22] Halvorson did not provide detailed testimony during his case in chief regarding the substance of his internal interview for the CPC position. Halvorson described the substance of it during rebuttal.

Regarding the question over recent, large event planning experience, Captains Semko and Salerno both recalled that none of Halvorson's experience in that regard was contemporary or recent, and that he was not able to speak to anything he had done along those lines during his employment with the Department. Halvorson admitted that his event planning experience in his previous jobs was "years ago," but disputed that he not been able to cite similar experience during his Department tenure, testifying as follows:

> I also referred to specific events with Santa Monica Police Department, including Relay for Life, which I worked with Captain Semko and Captain Salerno on, which they were obviously aware of. That was, I even volunteered to do that. That's an event to raise money for cancer.
>
> And I also talked about just things in the PSO job that, where we dealt with large public events, as we talked about, like, Glow and the marathon and things where we were really PR people, and I can't -- You know, this interview is almost a year ago. I can't remember everything specific, but I know I touched on past and present for sure and gave some very good examples, which I did have prepared, as I was ready for this interview.

Captain Semko testified in surrebuttal that he was the chairperson of the Relay for Life event for two years, and although Halvorson was a volunteer team captain on the day of the event, Halvorson had no role in its organizing and did not serve on the 20-person planning committee or attend planning committee meetings. Earlier, during Halvorson's testimony in his case in chief, he admitted that he had never been tasked with organizing a special event during his Department employment.

Regarding the question about a problem being brought to the attention of the candidate by a member of the community, Captain Semko could not remember exactly the answer that Halvorson had given, but he did remember being surprised that it was not better, describing it as "uneventful." Captain Semko testified that he thought, given Halvorson's experience as a

Ranger and PSO, that it would have been a great question that Halvorson should have "hit out of the park," however, Halvorson "just didn't." Halvorson disagreed, noting that he had described a situation where a City store owner had stopped him one day to complain about refuse the homeless were leaving in front of his property. Halvorson explained during the interview that he took the owner's information and followed up with an e-mail to one of the Department's Homeless Liaison Officers, who in turn responded and addressed the owner's issues. According to Halvorson, Captain Salerno had responded positively to that example. Captain Salerno did not recall Halvorson's answer to that question during the hearing.

Halvorson's answer to the question regarding the CPC's role in crime prevention was memorable to Captain Semko because it was off topic. Captain Semko explained that the CPC position was created to engage the community in the Department's crime fighting efforts and to instill in the community a sense of shared responsibility with the Department to that end. He said that Halvorson's answer to the question focused on Halvorson's knowledge of the inner workings of the Department and its staff and how Halvorson could improve morale within it, but did not mention the community, and "really went off on a tangent about personnel issues within the…Department." Captain Salerno also noted that, in general, Halvorson's answers to the questions did not relate to the position for which the Department was hiring. Halvorson responded to this testimony as follows:

> I felt like I needed to address the fact that I was involved in negotiation and it seemed to upset some people, you know, like, the Deputy Chief and Chief, and so I felt like I should offer an olive branch *without spelling out what the issue was. So what I said was something to the effect of, I know you guys are, I know you guys know that I've been involved in some things that might have upset some people here, and, you know, personally, I'm ready to move forward and that, you know, I'm willing to set aside my ego, and I hope that others can as well* and that not only do I want to bridge relations between PD and the community, I

> would also like to bridge relations within the Department, because obviously the merger created some animosity.
>
> *But I didn't use the word merger*. *I think I said, I just referred to it as, it was more vague, because I didn't want to, I didn't want to spell that out*. Knowing that I had a pending PERB charge, I thought that would be in poor taste.

(Emphasis added.)

In sum, Captain Semko described Halvorson's overall interview performance as "very poor," which surprised him, given Halvorson's long tenure in the Department. Captain Salerno agreed, saying that Halvorson's performance in the interview was "way in the background," as compared to the others, but he stopped short of saying that Halvorson failed the interview. During his direct testimony, when Halvorson was asked to explain why he believed that he was a better candidate than the person who was ultimately selected for the CPC position, he mentioned being tasked as the Department's point person on dealing with the media during a bomb threat at the City, and another time when he had been asked to give a presentation on crime prevention to the public at the opening of a new park because he was known as the Department's "go-to guy" for public relations. During cross-examination, Halvorson acknowledged that he had failed to include either of those experiences in his application materials or discuss them during his interview with Captains Semko and Salerno, and said that he was "kicking [him]self" about that after the interview.

B. Morrison's Interview and Qualifications

At the time of the CPC recruitment, Morrison held the position of Zero Waste Assistant in the City's Resource, Recovery, and Recycling (RRR) division and had worked for the City since 2008. The "major duties" of the position's job specification states in part that the Zero Waste Assistant:

> Collaborates, develops and disseminates community outreach, public participation, and special event materials to inform residents, businesses and schools about recycling, composting and zero waste programs and initiatives. Conducts meetings and makes public presentations.

Morrison testified about her experience in RRR, stating that while in her previous position she developed the division's community outreach and education programs; planned and organized 90 percent of its special events, including a large City-wide yard sale to encourage reuse and recycling of materials; created and managed the all of the division's social media accounts; and worked with the Department regarding alleged Municipal Code violations. Morrison explained that she had completed approximately 230 units of college work at UC Santa Barbara and UC Irvine, that her degree status was "in dispute," and she had not yet been awarded her Bachelor's degree.

Captain Semko testified at length about Morrison's performance in the interview. Regarding her opening statement and her answers to the initial questions, Captain Semko stated:

> [F]rom the onset, she provided a phenomenal opening statement, stood up, used the board, moved around the room a little bit, spoke directly to Captain Salerno and I as we would be community members and providing her introduction, was very engaging, made us really want to hear what else she was going to say, immediately got our attention.
>
> And when she moved into the second question regarding experience and planning and large events, she started talking about a vast amount of experience she'd had over the past several years in planning the events for RRR, and those events which I was aware of, I did not know that she was the person behind those events and that she had really created those from the loincloth. You know, she developed them. She advertised them. She put them on. She got the personnel. She did the logistics. She did everything regarding those events, and I know that several of those events were very successful.

> Experience working in a team environment, she really, you know, hit that one out of the park, as she emphasized all the different departments, the other 13 departments in the City that she worked with in order to make those events successful on occasions and how she saw not only the City's departments working together but also a team environment of incorporating the community into those successful events and into the recycling effort as a whole.

Captain Semko was also impressed by the fact that Morrison had created the social media presence for her division. She answered the question regarding the CPC's role in the Department's mission of crime prevention by highlighting the importance of community engagement. Of the hundreds of job interviews that Captain Semko had participated in as a Department manager, he ranked Morrision's interview as being in his "top five."[23]

5. The Selection of Morrison for the CPC Position

Immediately after the inside interviews concluded, Captains Semko and Salerno had a brief conversation over their impressions of the CPC candidates. They agreed that Morrison, by far, had the best performance in the interview and was the most suitable candidate for the position given her community outreach experience in RRR, with Steers a distant second from Morrison, and Halvorson being their least favorite candidate. Captain Salerno's participation in the selection process ended at that point. He testified that he never had any conversations with Lt. Guido, Deputy Chief Venegas, or Chief Seabrooks about the candidates or the interview process for the CPC position. At the time of the interviews, Captain Salerno did not know that Halvorson had been involved with SMMEA. Captain Salerno was aware of some grievances that had been filed related to the merger of the DSO and Ranger positions, but he did not, at that time, know that Halvorson was involved in those grievances and he did not participate in them himself, as they did not involve his division. Captain Salerno was not

[23] The parties did not develop the record regarding details of Steers's interview.

aware of Halvorson's then-pending unfair practice charge. None of the allegations in the charge pertained to him. Captain Salerno testified that he had never heard either Deputy Chief Venegas or Chief Seabrooks say anything negative about Halvorson during weekly executive staff meetings, which included the Chief, Deputy Chief, captains, and executive officer, or at any other time.[24] Captain Salerno also confirmed that, although the Chief is the ultimate decision-maker for hiring decisions, management employees at the captain's level are tasked with managing the candidate selection process and making a hiring recommendation to the Chief after the internal interview is completed. Captain Salerno stated that, in his experience, the Deputy Chief did not sit in on interviews for civilian employees of the Department, leaving that task to the captains. The Deputy Chief did, however, participate in interviews for police officers.

Captain Semko testified that, sometime in the next week after the interviews were completed, he had a conversation with Chief Seabrooks in her office about what had occurred. Captain Semko told the Chief that Steers's interview was "okay," and that Halvorson had not done a very good job. Captain Semko told Chief Seabrooks that he thought Morrison was "fantastic," talked a bit about Morrison's background, and said he was recommending Morrison be hired for the CPC position. Chief Seabrooks agreed and told Captain Semko to proceed with Morrison's selection process. Neither during that discussion or at any other time did Chief Seabrooks tell Captain Semko that Halvorson should not be selected for the CPC position.

[24] Deputy Chief Venegas acknowledged that it was probable that Halvorson's name "may have come up" in the weekly executive staff meetings as the Ranger kind of "leading the charge" and speaking for employees regarding merger issues.

On February 11, 2015, Captain Semko sent an e-mail to Deputy Chief Venegas, requesting to move Morrison into the background check process. Captain Semko did not remember having any specific conversation with the Deputy Chief regarding his recommendation to hire Morrison for the CPC position, but acknowledged that such communication would have been typical in the chain of command. Deputy Chief Venegas remembered having such a conversation with Captain Semko. Deputy Chief Venegas said that Captain Semko told him he was pleased by Morrison, because she was energetic and was already performing in her current position many of the duties the CPC would be tasked with performing.

Also on February 11, 2015, Captain Semko placed a telephone call to each of the CPC candidates to inform them of the Department's decision. Halvorson testified that he appreciated that Captain Semko made a personal phone call instead of sending an e-mail. Halvorson asked whether he failed to receive the position because of the second interview, and Captain Semko said it was "a factor of many things that had been discussed and reviewed." Captain Semko said if Morrison "fell out of backgrounds" then Halvorson would be interviewed again as he was still on the eligibility list. Later, Halvorson sent an e-mail to Captain Semko for clarification over the potential for another interview. Captain Semko responded, informing Halvorson that if Morrison failed to pass her background check, then Halvorson, the other remaining candidate, and the next highest scoring person from the initial interviews would compose a new promotional eligibility list and another round of internal interviews would take place. Captain Semko testified that every new employee of the Department undergoes an extensive background check by independent investigators. The

process can take three to nine months and it is not uncommon for people to fail it.[25] Captain Semko also testified that, when Chief Seabrooks took over the Department, she instituted a policy of holding an executive-level interview with her and another manager, after a candidate had passed the background check. This final interview is a getting-to-know-you type of meeting, with no standard questions, and provides an opportunity to address any issues that might have come up in a candidate's background investigation before the candidate starts work.

Deputy Chief Venegas confirmed Captain Salerno's testimony that for the civilian hiring process, unlike that for police officers, the Deputy Chief does not sit in on the interviews. For civilian recruitments, the Deputy Chief's role is to receive the hiring recommendation from the captain overseeing the recruitment, forward that recommendation to the Chief, and move the recommended candidate into the background investigation phase, which he did in the case of the CPC recruitment for Morrison. The only other discussion that Deputy Chief Venegas recalled having with Captain Semko regarding the CPC recruitment was in the beginning of the process, and involved the procedural steps that would be taken by HR in compiling a promotional eligibility list as previously discussed herein. Deputy Chief Venegas learned, through the regular "rumor mill" in the Department, the names of the final candidates who were heading into the internal interviews for the CPC. Deputy Chief Venegas did not discuss the candidates with Captain Semko before the interviews or tell him that Halvorson should not be hired for the position, however. Deputy Chief Venegas said that he had no role in making a hiring recommendation for the position. Deputy Chief Venegas and

[25] Ultimately, Morrison passed her background check. Chief Seabrooks and HR Director Peter signed Morrision's hiring paperwork and Morrison then assumed the CPC position in April 2015.

Lt. Calisse Lindsey performed the final executive-level interview of Morrison after the background investigation was finished. Deputy Chief Venegas did not have any specific memory of doing that, but said that he regularly performs the majority of those interviews for the Chief. Captain Semko confirmed that the formal offer of employment is not made to the candidate until after that final interview.

Halvorson testified about running into a Neighborhood Resources Police Officer, Steven Erik Milosevich, sometime shortly after he had received word from Captain Semko about not being selected for the CPC position. According to Halvorson, Milosevich said that he and the other police officers in his division had been pulling for Halvorson, but they did not think Halvorson would get the CPC position because of Halvorson's role in the merger negotiations. Milosevich was called as a witness by the City and provided a different version of the conversation. According to Milosevich, Halvorson was upset at the Department's decision during their exchange. Halvorson said to Milosevich that "it was kind of BS" that he had not been chosen as the new CPC. Milosevich said that he was trying to offer support to Halvorson and told Halvorson that he was sorry that Halvorson did not get the job. Milosevich was shown a statement in the second amended unfair practice charge, the same as Halvorson testified about, stating that Milosevich had told Halvorson that Halvorson's role in negotiations hindered Halvorson's chances at being selected for CPC. Milosevich testified that he had not made such a statement to Halvorson, but it was possible that Halvorson himself made that statement during their conversation. When asked whether it was common knowledge in the Department that Halvorson had been involved in the merger negotiations, Milosevich said that he "had heard about it." Milosevich testified that he suggested to his own supervisor that Halvorson would be a good fit for the CPC position.

Captain Semko testified that, at the time of the CPC selection, he had not been involved in the merger negotiations and he was not aware of Halvorson's participation those negotiations. He knew that some of the Rangers had not been happy with the proposed merger, but he did not know specifically who they were. When questioned about whether the topic of the merger came up during the weekly executive staff meetings, Captain Semko noted that the merger was a small part of the Department's larger reorganization plan. He stated:

> I'm sure there were discussions. It was not in my division at the time, and I was juggling six sections and about 150 employees. So it was mildly interesting, but it had nothing to do with my division. So I don't remember any facts regarding that.

Captain Semko also denied that, at the time of the CPC selection, he was aware of Halvorson's grievance activity or that Halvorson had filed any unfair practice charges against the Department. Neither the grievances nor the allegations of unfair practices, at the time of Halvorson's CPC interviews, involved any conduct by Captain Semko.

ISSUE

Did the City fail to award the CPC position to Halvorson in retaliation for his protected activities?

CONCLUSIONS OF LAW

To demonstrate that an employer discriminated or retaliated against an employee in violation of MMBA 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, pp. 6-8 (*Novato*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131

Cal.App.3d 416, 424.) The charging party bears the initial evidentiary burdens of production and persuasion. (*City of Oakland* (2014) PERB Decision No. 2387-M, pp. 16-17.)

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.) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. PERB* (1987) 189 Cal.App.3d 293, 304.)

Turning to the facts here, the City does not dispute and there is no question that Halvorson engaged in multiple protected activities under the MMBA by participating in negotiations and grievances, and filing unfair practice charges with PERB.[26] (*Santa Clara*

[26] Halvorson's hazing complaint to HR on behalf of other employees was not alleged in the PERB complaint as protected activity. (See *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246, pp. 18-19, fn. 8 [employee complaints to employers are protected when those complaints are a logical continuation of group activity].) It is appropriate to consider additional protected activities not specifically alleged in the complaint when (1) adequate notice and opportunity to defend has been provided to the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged issue has been fully litigated; and (4) the parties have had an opportunity to examine and cross-examine on the issue. (*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241, p. 8.) All of those elements are met here, as the hazing complaint was alleged in the underlying unfair practice charge in this case, the parties discussed the issue in their briefs, and relevant witnesses were fully examined over these facts. Thus, consideration of Halvorson's group hazing complaint as protected activity is appropriate.

Valley Water District (2013) PERB Decision No. 2349-M, adopting proposed dec., p. 26 (*Santa Clara Valley*).) The City also does not dispute that its failure to promote Halvorson constituted an action that was adverse to Halvorson's employment interests. (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S, p. 12.) Thus, Halvorson has satisfactorily met the requirements of showing protected activity and adverse action under the test established in *Novato*.

The City disputes, however, that the primary decision-makers for the Department's promotion decision, Captains Semko and Salerno, had knowledge of Halvorson's protected activities at the time of the hiring recommendation. The City also disputes that Halvorson has met his burden of showing that the City's action was unlawfully motivated. These disputed *Novato* elements are discussed below.

The Decision-Makers' Knowledge of the Employee's Protected Acts

In order to satisfy the knowledge element of the prima facie case there must be evidence that the "individual(s) who made the ultimate decision to take adverse action against the employee" knew of the employee's protected acts. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129, p. 7.) The following cases are illustrative of how the Board views this element in situations where, like the present one, multiple agents of an employer were involved in the decision that resulted in adverse action. In *Oakland Unified School District* (2009) PERB Decision No. 2061 (*Oakland USD*), an employee consulted with her union regarding a desire to transfer to another work location and informed a human resources manager about her contact with the union. The human resources manager then informed the employee's supervisor of the employee's request to transfer, but did not tell the supervisor of the employee's union activity. (*Id.* at p. 3.) Later, the employee complained to

her supervisor that she was not qualified to perform certain duties at the new work location and ultimately stopped showing up to work. (*Id.* at p. 4.) The supervisor informed the human resources manager that the employee had abandoned her job, which prompted the human resources manager to inform the employee that she was considered separated from employment. (*Id.* at p. 5.) The Board found that although the supervisor who had initiated the adverse action against the employee was unaware of the employee's protected conduct, since the human resources manager was aware of it and "was a participant in the decision to issue disciplinary action" to the employee, the knowledge element was established. (*Id.* at p. 9.)

Similarly, in *Escondido Union Elementary School District* (2009) PERB Decision No. 2019 (*Escondido UnESD*), a supervisor, who was unaware of an employee's pending PERB matter, prepared a letter of reprimand against an employee and requested input over the letter from a human resources manager, who did know about the PERB charge. (*Id.* at p. 16.) The Board held that the employer's knowledge of the employee's protected activity was shown because "one of the [employer's] disciplinary agents…was involved in the issuance of [the discipline]" and knew of the employee's protected acts. (*Ibid.*) In contrast, in *Santa Clara Valley*, *supra*, PERB Decision No. 2349-M, the Board upheld an ALJ's conclusion that, at the time of the denial of an employee's request for position reclassification, neither the ultimate decision-maker nor another manager, who had provided the decision-maker with advice and input, had knowledge of the employee's protected conduct. They also had not received or relied on biased or incomplete information from other lower-level supervisors (who may have harbored union animus) in making the decision at issue. (*Id.* at pp. 36-37.)

In this case, the City acknowledges that both Deputy Chief Venegas and Chief Seabrooks were aware of most of Halvorson's protected activities, but minimizes their roles in

the hiring selection process.[27] The City argues in its closing brief that the decision to hire Morrison instead of Halvorson was made solely on the independent recommendation of Captain Semko, in which only Captain Salerno also participated, and which Chief Seabrooks simply accepted and approved. Deputy Chief Venegas's participation was limited to initiating the background check process at Captain Semko's request. The City points out that there is no evidence that Chief Seabrooks, Deputy Chief Venegas, Lt. Guido, Lt. Jacobs, PSO Supervisor Lopez, Ranger Supervisor Williams, or Lead Marsh gave any input to Captains Semko and Salerno over whom should be selected for the CPC recruitment, and thus these individuals had nothing to do with the Captains' recommendation of Morrison over Halvorson. The City asserts that the record clearly demonstrates that neither of the Captains involved in the hiring decision were aware of Halvorson's participation in the merger negotiations, grievances, or unfair practice allegations against other Department managers at the time the decision was made. Thus, the prima facie case is defeated.

Halvorson argues in his closing brief that Captain Semko's testimony that he was unaware of Halvorson's various protected activities should be discredited for at least two reasons. First, because Captain Semko "was present during the entire hearing in this matter and thus heard John Michalski and Michael Earl testify that he [Captain Semko] was present at a meeting in the Chief's office on October 23, 2013, regarding the Rangers working out of

[27] Much evidence was taken regarding alleged statements of Chief Seabrooks, who did not testify. Because of her status as the head of the Department, a party admissions exception to the hearsay rule applies to her out of court statements. (Evid. Code, § 1220; PERB Regulation 32176; *Chula Vista Elementary School District* (2011) PERB Decision No. 2221.) The City argues that the record does not explicitly show that Chief Seabrooks was aware of Halvorson's hazing complaint, but HR Director Peter testified that Chief Seabrooks was involved in the decision to hire an outside investigator for the issue. Thus, Chief Seabrook's knowledge of that issue is established.

class grievance[.]"[28] And second, because Deputy Chief Venegas admitted that Halvorson's name "probably might have come up" regarding merger negotiations in the weekly executive staff meetings that Captain Semko admitted he attended. Halvorson similarly argues that Captain Salerno must have known about Halvorson's protected conduct, despite Captain Salerno's denial of such, by virtue of Captain Salerno's attendance at the same weekly executive staff meetings. Halvorson states that an adverse inference is especially warranted because the City's key witnesses "repeatedly attempted to conceal [their] knowledge." Finally, Halvorson argues that since Chief Seabrooks is the Department's ultimate hiring authority and she had knowledge of Halvorson's various protected activities, the knowledge element is amply demonstrated.

Halvorson's arguments urging a finding that Captains Semko and Salerno did not testify truthfully about their knowledge of Halvorson's protected conduct at the time of the hiring recommendation are rejected. I find no reason to doubt the veracity of the whole of the testimony of either witness. Halvorson's first argument, regarding Captain Semko's testimony being untruthful because he was privy to the testimony given by other witnesses at the hearing in this case, is specious. Captain Semko was not asked what he knew about Halvorson's activities at that present time, on the day he testified. He was asked if he knew of Halvorson's various protected activities *when he made his recommendation to Chief Seabrooks*. Captain Semko did not remember being at the grievance meeting regarding the Rangers allegedly working out of class on October 23, 2013. This is not particularly surprising, given that the grievance had nothing to do with his own division and, by the time of his testimony, the

[28] Halvorson's argument regarding HR Manager Earl's testimony is inaccurate. Earl testified that he had no memory of being at the October 23, 2013 grievance meeting. Earl did not make any statements regarding Captain Semko's presence in that same meeting.

grievance meeting had occurred more than two years earlier.[29] It is noteworthy that Halvorson also *was not present* at that grievance meeting. The testimony of the witnesses who were there do not even clearly indicate that Halvorson's name ever actually came up during the meeting, notwithstanding that former Ranger Michalski assumed the Chief had referred to an e-mail authored by Halvorson.[30] Thus, there is no compelling reason why Captain Semko should have associated this meeting with Halvorson. The fact that Captain Semko listened to the testimony of Michalski describing that Captain Semko attended the meeting does nothing to cast doubt over Captain Semko's assertion that when he made his recommendation to hire Morrison over Halvorson in February 2015, he was unaware of Halvorson's exercise of rights under the MMBA.[31]

Deputy Chief Venegas's admission that Halvorson's name probably came up at some point during the merger negotiations at weekly executive staff meetings also does not call into question Captains Semko's and Salerno's assertions about what they knew of Halvorson's protected activities at the relevant time. As already noted, neither Captains Semko nor Salerno

[29] Captain Semko testified on January 27, 2016. Also notably, at the time of Halvorson's interview for the CPC position, the grievance meeting in question had occurred more than one year and three months earlier. There is no information in the record why Captain Semko attended a grievance meeting that did not involve employees under his command.

[30] Even CEA representative Gaskins could not remember this grievance meeting, despite reviewing his own detailed summary of it in an e-mail that he wrote afterward (Charging Party Exh. 23). In the summary e-mail, Gaskins wrote that the Chief had discussed an e-mail by "Chris H." that she considered intimidating to employees. However, with no independent memory of the meeting, Gaskins could not confirm that the Chief Seabrooks had verbally referred to Halvorson by name. Likewise, Michalski could not recall that Chief Seabrooks had actually named Halvorson during the meeting.

[31] Halvorson's admittedly purposefully vague statements during his interview regarding his having been "involved in some things that might have upset some people," also were not specific enough to show that Captain Semko or Captain Salerno should have known he was referring to his negotiation or grievance activities.

were within Halvorson's chain of command during the merger negotiations or various grievance activity involving Rangers and PSOs. Captain Semko credibly testified that, although he had heard that some Rangers were not happy with the proposed merger, he did not know who those Rangers were, and that while the merger negotiations likely were discussed during executive staff meetings, he found those discussions only "mildly interesting" because the issue did not involve his division. Captain Salerno provided similar credible testimony on this point. The proposed merger of three civilian positions was just one part of the Department's broader reorganization scheme. Notably, Captain Semko's division alone at the time involved his oversight of 150 employees. Thus, the Department is large. While the issues raised in the proposed merger of civilian classifications were of obvious import to Halvorson and the other affected employees, there is no cause to presume that the details of the merger held the same level of importance for all Department staff. Accordingly, I do not doubt the assertions of the Captains that the discussions over the merger did not stick out in their minds.

However, even without the direct knowledge of the Captains, under the holdings of *Oakland USD*, *supra*, PERB Decision No. 2061 and *Escondido UnESD*, *supra*, PERB Decision No. 2019, there is enough to persuasively demonstrate employer knowledge in this case because Chief Seabrooks and Deputy Chief Venegas were both "involved in" the decision to select Morrison over Halvorson and each of them were aware of most of Halvorson's protected activities. Chief Seabrooks clearly knew of Halvorson's role in the merger negotiations, two grievances, and the hazing complaint. The record does not show, however, that Chief Seabrooks was aware of the Halvorson's then-pending unfair practice charge in the instant matter or that Halvorson had filed two other unfair practice charges against the Department years before her tenure as Chief. Chief Seabrooks approved Captain Semko's request to select

Morrison instead of Halvorson for the CPC position and signed off on Morrison's final hiring paperwork. As was the factual situation in *Oakland USD,* the employer's agent who initiated the adverse action here (Captain Semko) was unaware of the employee's protected activities, but another manager (Chief Seabrooks), who was aware, also participated in the decision that led to the adverse action being taken against the employee. This is sufficient to establish employer knowledge. (*Id.* at p. 9.)

Deputy Chief Venegas also played more than a superficial role in the CPC selection. Although the City argues that Deputy Chief Venegas's part in Morrison's selection over Halvorson was limited to initiating Morrison's background check, that is not correct. He also conducted Morrison's final interview, which, according to Captain Semko, occurred *before* a formal offer of employment was extended to Morrison. Deputy Chief Venegas participated in the merger negotiations with Halvorson. Although Deputy Chief Venegas did not testify directly about his involvement in the Department's responses to the PSO and Ranger grievances, his role in running the Department's day-to-day operations and other witnesses' testimony show it is more likely than not that he was aware of Halvorson's participation in those grievances.[32] Thus, Deputy Chief Venegas also had enough participation in the decision that led to adverse action against Halvorson, with requisite knowledge of Halvorson's protected activity, to demonstrate the knowledge element of the prima facie case.

Nexus Between the Employee's Protected Activity and the Adverse Action

[32] The record does not establish, however, that Deputy Chief Venegas was aware of Halvorson's then-pending unfair practice charge or the hazing complaint. The City filed one position statement in response to the unfair practice charge in July 2014. The document was signed by Deputy City Attorney Meishya Yang and copied to HR Director Peter. The position statement did not note the Deputy Chief or the Chief as recipients of the document and neither of them were referred to in it. Deputy Chief Venegas was not questioned about the hazing complaint.

A causal connection between an employee's protected activity and the respondent's adverse action is the final element of the charging party's prima facie case. Evidence of a respondent's unlawful motive can be shown by direct or circumstantial evidence, or a combination thereof. (*Los Angeles Unified School District* (2016) PERB Decision No. 2479, adopting proposed dec., p. 25.) Because direct evidence of unlawful motivation is relatively rare, the existence or absence of nexus is usually established circumstantially after considering the record as a whole. (*Ibid*; *Moreland Elementary School District* (1982) PERB 26 Decision No. 227, p. 11 (*Moreland*).) Nexus evidence should not be viewed piecemeal or in isolation, but in the proper context of the entire record. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 2479, adopting proposed dec., p. 26.) Evidence that is unconnected to the adverse action at issue is not necessarily probative of unlawful intent. (*Id.*, adopting proposed dec., p. 29.),

In order to aid the assessment of circumstantial evidence, PERB has developed a set of nexus "factors." The first of these factors is about the timing of the employer's decision to take adverse action. If the time between the employee's protected conduct and the adverse action is suspiciously close, this evidence is important (*North Sacramento School District* (1982) PERB Decision No. 264, pp. 9-10), but alone is not determinative of unlawful intent. Rather, timing goes to the strength of the inference of unlawful motive. (*Regents of the University of California (UC Davis Medical Center)* (2013) PERB Decision No. 2314-H, p. 12 (*Regents*); *Moreland*, *supra*, PERB Decision No. 227, pp. 13-14.)[33]

[33] Here, Halvorson's participation in negotiations and the Rangers' out-of-class grievance took place more than one year before the adverse action at issue. Halvorson first raised the hazing complaint with HR about eight months before the adverse action. PERB has found that even gaps of five or six months between protected activity and adverse action were not close enough to suggest an inference of unlawful motivation. (*Los Angeles Unified School*

In addition to close timing between protected conduct and adverse action, one or more other factors demonstrating unlawful motivation are typically required to persuasively show a connection between them: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S, p. 6); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104, p. 20); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation), supra*, PERB Decision No. 328-S, p. 15); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M, p. 19; (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529, p. 10) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786, pp. 13-14); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M, pp. 15-16;); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District, supra*, PERB Decision No. 264, p. 22).

District (1998) PERB Decision No. 1300, adopting dismissal ltr., p. 1.) Thus, this protected activity that was remote in time from the adverse action at issue does not strongly infer a connection between them. Halvorson's participation in the PSO out-of-class grievance was, however, close in time to the adverse action at issue, which could suggest a connection. However, as discussed below, other persuasive evidence of nexus is missing. Thus, the closeness in time between Halvorson's pursuit of the PSO grievance and the adverse action is insufficient to demonstrate the City's unlawful motive. (*Regents, supra*, PERB Decision No. 2314-H, p. 12.)

All of Halvorson's arguments regarding evidence of the City's unlawful motive have been considered and rejected, though not all of those arguments warrant serious discussion.[34] I focus here on Halvorson's main arguments regarding animus toward his protected activities by Chief Seabrooks, Deputy Chief Venegas, and other lower-level managers and supervisors, various alleged departures from the City's hiring procedures, and conflicting justifications offered to Halvorson for the Department's selection decision. For the reasons that follow, the evidence does not demonstrate that the decision not to select Halvorson for the CPC position was taken because of Halvorson's protected activity.

1. Animus Against Union Activities By Lower-Level Managers and Supervisors

It is possible for the unlawful motive of lower-level supervisors or other officials to be imputed to decision-makers who possess no ill will toward an employee's protected activities. Under the theory of "subordinate bias liability," the unlawful motive of a lower-level official may be imputed to the employer's agent who is responsible for the action at issue when: (1) the lower-level official's recommendation, evaluation, or report was motivated by the employee's protected conduct; (2) the lower-level official intended for his or her conduct to result in adverse action; and (3) the lower-level official's conduct was a motivating factor or

[34] For example, some of Halvorson's arguments regarding nexus are so out of bounds that they are difficult to decipher. Halvorson argues that the City changed the language of the CPC position specification to specifically exclude current Department employees from qualifying for the position. Halvorson also attaches strange significance to a statement by Morrison that she researched the Department's crime statistics before the interview to imply that the Department had specifically reached out to her before the CPC position was publicly announced in order to give her some sort of advantage. Regarding the latter assertion, it is completely speculative. Regarding the former one, Halvorson met minimum qualifications for the position specification as modified. In any event, there is no evidence that Halvorson told anyone before he applied for the CPC position on December 16, 2014, that he intended to do so. Since the language was changed well before that, it is not clear how the Department would have been motivated by anything Halvorson had done when deciding to that.

proximate cause of the decision to take adverse action against the employee. (*Santa Clara Valley, supra*, PERB Decision No. 2349-M, p. 33, citations omitted.)

Halvorson argues that there was hostility to his advocacy on behalf of the Rangers by Lt. Guido, Lt. Jacobs, Supervisors Williams and Lopez, and Lead Marsh. He claims that the animus of these lower-level managers and supervisors was displayed in various ways—in anti-union comments and the forwarding of threatening e-mail news stories regarding layoffs; unwarranted reprimands of Halvorson and his partner; unfair treatment of Halvorson and the other former Rangers after the merger by condoning hazing during cross-training, distributing overtime unfairly, and requiring different overtime approval procedures—among other things. However, even if the evidence reflects anti-union sentiments by some of these individuals, Halvorson did not present evidence that *any of them* provided a recommendation, evaluation, or report to Captains Semko or Salerno, Deputy Chief Venegas, or Chief Seabrooks regarding whom should be selected for the CPC position. Where the record does not include sufficient facts to support an inference that the relevant decision-makers *actually relied on* incomplete or inaccurate information by a subordinate employee, even assuming anti-union hostility by the subordinate, there can be no liability under a subordinate bias liability theory for lack of showing that the decision making process was tainted by the subordinate's animus. (*Santa Clara Valley, supra*, PERB Decision No. 2349-M, pp. 34-36.) Accordingly, this evidence does not shed light on the decision-makers' true motivation and therefore does not support Halvorson's nexus requirement.

2. Alleged Animus Against Union Activities By the Decision-Makers

Halvorson does not argue and there is no evidence that Captains Semko or Salerno harbored any animus toward his own protected activities or union activities in general. Halvorson's arguments focus in this regard on Deputy Chief Venegas and Chief Seabrooks. He believes that their hostility toward his union activities primarily grew because of his pivotal role in the merger negotiations. He argues that the City was forced to negotiate over the proposed merger only because he sought help from CEA representative Gaskins who forced the issue with HR Director Peter, and that these actions threatened to delay Chief Seabrooks's reorganization plan, which incensed her. He also asserts that if not for his pushing the negotiations issue, the City would not have had to give a 4 percent salary increase to the PSO position, where Deputy Chief Venegas had initially only offered an increase of nine cents per hour. Halvorson also argues that, without the approval of a majority of the Rangers, the merger plan would have failed, and since he was against it, management resents him for this.

These arguments are unsupported by both the factual record of the case and the law. The most glaring weakness in them stems from Halvorson's inflated view of his own importance in the merger negotiations. SMMEA is the exclusive representative of the bargaining unit and is therefore privileged to negotiate for *all* terms and conditions of employment for the bargaining unit with the City. (See, e.g., *Oxnard Union High School District* (2012) PERB Decision No. 2265, adopting dismissal ltr., p. 3; *Orange Unified School District* (2004) PERB Decision No. 1670, p. 2 [noting that the bargaining obligation only flows between employer and exclusive representative and not to individual employees].) As such, if, as Halvorson testified based on Supervisor Williams's assertions, Chief Seabrooks actually sought and received approval *from the SMMEA executive board* to proceed with the PSO

merger in December 2013, then that could have gone forward without a bargaining violation and without further input from employees, even if some of them may not have liked it.[35] In any event, there are no facts suggesting that the Department was "forced" back to the bargaining table by HR Director Peters. There is no evidence that anyone from the Department or HR even knew that Halvorson had asked Gaskins to contact HR to arrange further negotiations in January 2014.[36] Even if Halvorson is justified in the belief that absent his pressing the issue with Gaskins, the City may have simply been able to move ahead with the merger without any further input from SMMEA, since there is no indication that the City had any reason to believe that Halvorson was the one pressing the issue, this fact does nothing to shed light on the City's underlying motivation for its later adverse action against him. There are also no persuasive facts suggesting that Chief Seabrooks had any particular deadline for the proposed merger to be completed or that the negotiations that occurred caused any significant delay in the Department's reorganization plan.

The record demonstrates that it was SMMEA that suggested to the City, and the City agreed, to allow the affected employees to decide whether the merger should go forward or if the existing classifications would remain and a new promotional PSO position would be

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[35] Halvorson argued that at the time of the proposed merger, the current, zipped MOU between the City and SMMEA prevented the City from making their desired changes. This is correct, as far as *unilateral* changes go; however, SMMEA and the City could *agree* to open negotiations at any time and on any subject they wish.

[36] Halvorson points to a letter that Gaskins wrote to HR Manager Earl threatening an unfair practice charge before the parties' returned to negotiations in early 2014. That letter says nothing about Halvorson. Gaskins's testimony in the hearing was basically limited to authenticating documents that he had written. He provided no testimony about the negotiations themselves, regarding his discussions with HR or the Department, or about his consultation with the Rangers or Halvorson regarding the merger negotiations. Based on these scant facts, I am unwilling to conclude that the City or the Department had a reason to connect Halvorson with a return to bargaining over the proposed merger.

created. Thus, the idea that the ultimate success of Chief's Seabrooks's reorganization plan hinged on the acquiescence of a majority of the Rangers is incorrect. It appears that the Department/City was unconcerned with the outcome of the vote and would have been satisfied with either result, otherwise they would not have agreed to let the employees to decide the issue. It also unclear why, if the merger was what Chief Seabrooks and Deputy Chief Venegas wanted and that is what occurred, they would harbor prolonged resentment against Halvorson since he was unsuccessful in thwarting anyone's plan.

A. Alleged Union Animus by Deputy Chief Venegas

Halvorson asserts that Deputy Chief Venegas's angrily "storming out" of the final negotiations session and his hostile comments about Halvorson and union negotiations during the staff meeting on February 12, 2014, show the City's unlawful motive. Generally, public employers subject to the MMBA may express or disseminate their views, arguments, or opinions, which "shall not constitute, *or be evidence of, an unfair labor practice*…unless such expression contains a threat of reprisal, force, or promise of benefit" or "express[es] a preference for one employee organization over another employee organization." (*City of Oakland, supra*, PERB Decision No. 2387-M, pp. 25-26, emphasis in original; citations omitted.) An employer is also not required to remain neutral on employment matters, particularly in the context of bargaining or concerted activities. (*Bellevue Union Elementary School District* (2003) PERB Decision No. 1561, adopting proposed dec., p. 38.) Thus, the fact that a public agency's manager or representative reacts negatively, or expresses his or her views on collective bargaining issues in an apparently unfiltered, emotional manner, does not by itself constitute a threat of reprisal or force. (*City of Oakland*, p. 26; *Culver City Unified School District* (1990) PERB Decision No. 822, p. 4.)

However, employer statements that disparage protected activity or the collective bargaining process itself, by suggesting that unionization will result in loss of pay or benefits, or that use of the representative's grievance procedure is futile, have been found to reasonably tend to discourage participation in protected activity and thereby interfere with the rights of employees and/or employee organizations. (*City of Oakland, supra*, PERB Decision 2387-M, pp. 26-27, citations omitted; *County of Riverside* (2010) PERB Decision No. 2119-M, pp. 19-20.)

Halvorson solicited the testimony of percipient witnesses to both the merger negotiations and the February 12, 2014 staff meeting. Some of them were considered adverse witnesses, but most were not. Halvorson was the only witness who described that Deputy Chief Venegas was angry and stormed out of the final day of negotiations. Lt. Beautz also did not corroborate Halvorson's account of their conversation after negotiations where Lt. Beautz had supposedly asked Halvorson what he had done to make the Deputy Chief so angry. Halvorson was also the only witness who described Deputy Chief Venegas's demeanor as being angry and threatening during the staff meeting.[37] Likewise, only Halvorson said the Deputy Chief made disparaging comments that day about union negotiations, Gaskins, and "those two guys" (referring to Halvorson and Mapes). This seemed to be a general pattern where Halvorson remembered things a bit differently than other witnesses.[38] A good example of this was the testimony by both participants regarding the conversation between Halvorson

[37] The Deputy Chief himself said he was probably slightly frustrated during the meeting. The other former Rangers testified that he seemed "a little irritated," and not "real happy."

[38] However, it did not appear to me that Halvorson was intentionally lying. I had the impression by the level of detail that he provided and his general demeanor while testifying that he genuinely believed his own version of these events.

and Officer Milosevich after Halvorson was not selected for the CPC position. Halvorson testified that Milosevich told him that he and other officers had been pulling for him, but that they did not think Halvorson would get the job because of his role in the merger negotiations. Milosevich denied that those words came from him, saying it was possible that Halvorson himself had said that. Halvorson argues that Milosevich's denial should be discredited, because Milosevich's demeanor showed he "felt pressured to deny the statement." I disagree. Milosevich did not appear to be uncomfortable and he testimony was unfaltering. Since Halvorson has a distinct interest in the outcome of the case and his testimony about Deputy Chief Venegas's conduct was more exaggerated than the disinterested witnesses who observed and described the same events, the other witnesses' testimony is credited over Halvorson's.

Nothing in Deputy Chief Venegas's behavior during the merger negotiations or afterward suggested that he was hostile to the process or to Halvorson's participation in it. The fact that the negotiations may have ended earlier than Halvorson thought they should have is not enough to show union animus, especially since the Deputy Chief and SMMEA representative Kim-Lockwood communicated shortly thereafter, which led to the City and SMMEA agreeing to an alternative procedure for resolving the merger issues. Deputy Chief Venegas's comments and demeanor regarding the Rangers' performance of the duties in their job description in the February 2014 staff meeting, even if he admittedly was exhibiting some frustration, does not rise to the level of a threat of reprisal that could reasonably infer an unlawful motivation in the adverse action at issue in this case. (*City of Oakland, supra*, PERB Decision No. 2387-M, pp. 25-26.) There are also no facts suggesting that Deputy Chief Venegas was holding a grudge over Halvorson's having accused him of unfair labor practices in 2006 and 2008. And such a large gap in time between protected activity and adverse action

is too attenuated to persuasively infer unlawful motivation. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 2479, p. 20 [more than a year is too long to provide a strong inference that protected activity and adverse action were connected]; *Garden Grove Unified School District* (2009) PERB Decision No. 2086 [a two year gap did not show nexus].)

B. Alleged Union Animus by Chief Seabrooks

Halvorson alleges that the Chief's animus toward his protected conduct is demonstrated by her description of his e-mail to fellow Rangers regarding the grievance and merger as an attempt to bully people into his position against the merger, and by her threats to discipline him for it in an October 23, 2013 grievance meeting and in a staff meeting shortly afterward. None of these arguments hold weight. First of all, Halvorson was never disciplined over the e-mail and no manager ever even discussed it with him. Secondly, everyone who testified about the grievance and staff meetings just assumed that Chief Seabrooks had referred to Halvorson's e-mail. No one testified that she mentioned Halvorson as being the person responsible for the e-mail in question. The record showed that Mapes sent a contemporaneous e-mail to all of the Rangers around the same time of Halvorson's. She could just as easily have been referring to Mapes's e-mail as Halvorson's. These facts make it difficult to connect her statements about an e-mail to Halvorson. But even giving Halvorson the benefit of the doubt here and assuming that she was threatening to reprimand him for his protected communication with fellow employees, this happened more than one year and three months before the adverse action at issue.[39] Again, this is too much time in between to infer that there was a connection

[39] Halvorson's e-mail was of legitimate concern to employees' employment interests. His reference to his fellow employees as being "weak individuals" in it was not nearly rude enough to cause the communication to lose its protected status. (See, e.g., *Rancho Santiago Community College District* (1986) PERB Decision No. 602, p. 13.)

between these events. (*Los Angeles Unified School District, supra*, PERB Decision No. 2479, p. 20.)

Halvorson also testified that Lead PSO/Acting Supervisor Paez told him, shortly after the PSO out of class grievance was filed in September 2014, that the Chief was tired of grievances from these employees and all grievances would simply be denied from that point. Halvorson's representative questioned Paez about his knowledge of that particular grievance but did not give him the opportunity to confirm or deny Halvorson's account of Paez's statements about the Chief's comments in that regard. Notably, Paez provided other testimony that was favorable to Halvorson on the issue of overtime distribution. Given that Halvorson had a shaky track record, at best, of providing reliable testimony about what other people said to him, I do not credit Halvorson's testimony regarding the Chief's comments about grievances being summarily denied.

Finally, Lt. Beautz testified that Chief Seabrooks described the Rangers and other employees who were to be affected by the proposed merger as being "greedy" in what they were seeking in negotiations. As discussed previously, an employer's agents have free speech rights under the MMBA and are not required to remain neutral on bargaining issues. Even unfiltered, negative expressions over what unions are seeking in negotiations do not provide compelling evidence of an unfair practice unless they are accompanied by threats of force or disparagement of the system of collective bargaining. (*City of Oakland, supra*, PERB Decision 2387-M, pp. 26-27; *Saddleback Valley Unified School District* (2013) PERB Decision No. 2333, adopting proposed dec., p. 29.) The fact that Chief Seabrooks thought that the Rangers were being greedy in negotiations does not, by itself, show any evidence of unfair practices here or retaliatory motive.

Alleged Departures From the City's Hiring Procedures

As discussed above, an employer's departure from established procedures and standards when dealing with the employee can be an indicator of unlawful motive. (*Santa Clara Unified School District, supra*, PERB Decision No. 104, p. 20) However, where an action alleged to be a departure from procedures does not substantively affect the outcome of the adverse action at issue and does not result in other harm to the charging party, the Board has refused to view the procedural defect as supporting a nexus finding. (*Los Angeles Unified School District, supra*, PERB Decision No. 2479, adopting proposed dec., p. 29, citations omitted.)

Halvorson argues that several departures from the City's relevant AI over hiring procures is persuasive evidence of a nexus between his protected conduct and adverse action. Halvorson notes that Captains Semko and Salerno did not review the Guide before the interviews, as they are required to do, and did not take and retain notes of the interviews, an examination of which may have shown retaliation against him. Halvorson also argues that according to the relevant AI, the requirement that the "Personnel Director shall certify to the appointing authority the names of the three highest candidates on the eligible list for such position," means that the Department should have been informed of the rank and score of each candidate prior to the internal interviews, rather than simply receiving a list of the top three in alphabetical order. For the reasons that follow, these arguments are unpersuasive because none of these alleged departures had any bearing on the outcome of the selection process and thus do not support a theory of nexus.

Wynn testified that she did not normally provide the Guide to the hiring department. Captain Salerno, who testified to taking in part in well over 100 interviews during his

Department employment, had never heard of the Guide. Thus, even if there was a departure from the City's hiring procedures, it does not appear that the Department regularly adhered to them in this regard; accordingly, there would be no specific procedural deviation shown in the way that the CPC recruitment was handled. Furthermore, note-taking by interviewers and completion of a written evaluation of candidates is discretionary even under the Guide, so the fact that Captains Semko and Salerno did not do that here does not show a departure from procedures. This evidence does not illustrate unlawful motive.

Finally, Halvorson's interpretation of the AI language quoted above does not show that a hiring department is required to be informed of the score and rank of the candidates before the internal interview. The City provided credible evidence that the hiring department is not regularly informed of the top three candidates' rankings and may make its hiring selection from any of the top three candidates. Thus, the fact that the Department was not aware of the scores and ranks of the CPC candidates was of no consequence to the hiring decision. Moreover, Wynn's deposition testimony regarding the usual hiring outcome in 2009, i.e. the top scoring candidate usually being selected, does not establish a *practice* of the highest scoring and ranked candidates from the external interview process being automatically selected. Such a practice would also be nonsensical, as there would be no point in even conducting an internal interview. The result in a situation such as this one, where there was a tie for top score and rank between two candidates, would be unclear.

3. Alleged Inconsistent Reasons for the City's Action

Halvorson argues that the City has offered "different and conflicting reasons" for the promotion decision, because Halvorson states that that Captain Semko responded when asked for the reason that Halvorson was not selected that it was not because of the second interview,

but rather "a factor of many things that been discussed and reviewed." Even if Captain Semko made the "factor of many things," comment during his phone call with Halvorson, it is rather doubtful that Captain Semko also denied to Halvorson that the second interview played a role in the factors considered. For the reasons previously discussed, Halvorson's testimony on that point is not credited. I do not find that the City gave inconsistent reasons for its action.

Conclusion

Because of the absence of convincing evidence regarding the City's unlawful motivation, Halvorson has failed to meet his burden of demonstrating a prima facie case of retaliation under the MMBA. However, for purposes of discussion, even if Halvorson had successfully met his burden, the City demonstrated that it had and acted because of non-discriminatory reasons in its hiring selection. Thus, Halvorson's charges of retaliation would fail in any event.

The City's Defense

The respondent proves its defense to a retaliation claim by showing 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, supra*, PERB Decision No. 2337, p. 31.) In assessing the evidence, PERB's task is to determine whether the respondent'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; see also *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 23.) Further, PERB "weighs the respondent's justifications for the adverse action against the evidence of the respondent's retaliatory motive." (*Baker Valley Unified School District* (2008) PERB Decision No. 1993,

p. 14.)

Even where there is direct evidence of unlawful motivation, a respondent may prove that an employee's protected activity was not the true motivation for its action, which is sufficient to defeat the prima facie case. (*Regents of the University of California, supra*, PERB Decision No. 2302-H, p. 4.) If a respondent's action was not taken for an unlawful reason, PERB has no authority to also determine whether the action was otherwise justified or proper. (*City of Santa Monica* (2011) PERB Decision No. 2211-M, p. 17.) PERB has found that an employer's stated reasons for its actions were a pretext where the evidence contradicted those reasons. (*Chula Vista Elementary School District, supra*, PERB Decision No. 2221, pp. 21-23.) However, when the adverse action is "justified by criteria wholly unrelated to the employees' protected activity" a respondent proves its affirmative defense. (*Rio Hondo Community College District* (1982) PERB Decision No. 272, p. 5)

The City maintains that it chose Morrison over Halvorson for the promotional position because she far outshined Halvorson in the internal interview with Captains Semko and Salerno and because her experience and qualifications made her the most suitable candidate for the CPC position. Halvorson argues that the City's reasons are a pretext for discrimination, because his superior education and years of experience working for the Department make him vastly more qualified than Morrison, who lacks a bachelor's degree and who had no previous experience in law enforcement. Therefore, Halvorson's argues, the City cannot point to *objective* criteria showing Morrison was more qualified than him and have relied entirely on the *subjective* opinions of Captains Semko and Salerno regarding candidate performance in the

second interview to support their decision.[40] The weight of the evidence tips in favor of the City for many reasons.

Halvorson points out that his level of education is higher than Morrison's. However, having a master's degree, as Halvorson does, is not a requirement of the CPC job specification. Neither is having a bachelor's degree. Halvorson repeatedly emphasized in his brief that Morrison lacked the *required* bachelor's degree for the CPC position. But the CPC job specification allows for the substitution of relevant work experience for the bachelor's degree on a year for year basis. At the time of the CPC recruitment, Morrison had at least seven years of work experience in community outreach and event planning in the RRR division. I find that her work experience was objectively relevant to the stated requirements of the CPC position. Thus, her lack of a degree was not a barrier to Morrison meeting the parameters for education defined in the job description and she did so. Moreover, the analysis of the candidates' education levels was taken into account by HR during the minimum qualifications screening. After the initial interviews, the Department took over the recruitment. The Department's focus, as shown by the interview questions authored by Captain Semko, was not on the candidate's educational background. None of those questions inquired into the candidate's education and Captains Semko and Salerno did not recall during their testimony what level of education the candidates had. By that stage of the recruitment, the Department did not appear to be placing considerable weight on the educational background of the candidate in their assessment of who was the most qualified. Thus, while Halvorson is rightfully proud of and

[40] The City's Civil Service Rules provide that promotion decisions should be based on merit and awarded to the best qualified applicant based on a fair consideration of criteria that include education, experience, knowledge, skill, special aptitude, and any other qualification considered necessary by the HR director.

focused on his educational achievements, those achievements did not seem very important to the Department in its determination of who was best for the position.

Halvorson also argues that because the City was successful in its motion to quash his subpoena seeking the application materials for the other CPC candidates, the only evidence in the record that the City can rely on to show that Morrison was more qualified than Halvorson for the CPC position are the subjective opinions of the Captains regarding the relative performance of the candidates in the second interview. The argument fails. As discussed previously, the job description for Morrison's previous position as a Zero Waste Assistant in the RRR division was received in evidence. Morrison also testified about her duties and experience in that position. While working for the previous seven years in RRR, Morrison regularly performed duties that were very similar to the duties of the CPC position, including being the primary organizer of large, public events, developing community outreach programs and materials, and creating and managing social media programs.

In contrast, Halvorson had no recent experience organizing large, public events. He described in his application materials that he "assisted" with event planning in one job that he held for one year. He admitted that he had never been tasked with organizing an event during his employment with the Department. His community outreach/program experience was limited and occurred many years ago, having worked for one year as a Youth Worker in 1990 and for one year at the National Liberty Museum in 2000.[41] He had no experience creating or managing social media programs and admitted that he was not a regular user of social media platforms. Halvorson did have more experience with analyzing crime statistics than Morrison, through his work as a Ranger and PSO and by working for a time on the Crime Reduction

[41] Halvorson's duties as a Ranger/PSO, while involving regular *contact* with the public, did not involve *developing* community outreach programs.

Team. Viewing these two candidates through the lens of the City's objective hiring criteria—i.e., who had more relevant experience, knowledge, and skill for the open position—Morrison was objectively more qualified than Halvorson. Thus, the evidence does not show that the City's having found Morrison to be better qualified than Halvorson for the CPC position was a pretext for retaliation.

Finally, Halvorson's own testimony did not successfully rebut the Captains' accounts of Halvorson's poor interview performance; rather, it mostly served to support their versions of the event. Halvorson admitted to going directly to the interview from a grievance meeting with very little time in between. In elaborating on what he meant by his statement that Halvorson appeared "disheveled," Captain Semko said that Halvorson looked as if he had "jumped out of a car or something and ran to the interview." Even if Halvorson had meant to look his best, given that he had multiple time commitments that morning, it is quite possible that his agreeing to participate in a meeting at HR just before his interview caused him to hurry, which affected the way he presented himself. Halvorson also admitted that he felt rushed by Captains Semko and Salerno to give his initial mock introductory statement to a community group, and his requests for clarification seemed to annoy the interviewers. Thus, Halvorson's own account of that portion of the interview does not lend the impression that it went very well, which supports Captain Semko's testimony about it.

Halvorson also corroborated the Captains' testimony that he was unable to discuss recent event planning/organizing experience or point to relevant experience in that vein while working for the previous 13 years in the Department. Halvorson admitted that most of his event planning experience was in the distant past, but then attempted to refute Captain Semko's assertion that he lacked this kind of experience while working in the Department by

noting that he had "worked with" Captains Semko and Salerno on the Relay for Life, which was a large public event. Captain Semko clarified however, that while Halvorson was a *participant* in the event since he had volunteered as a team captain, Halvorson was not at all involved in the *planning and organizing* of it, which had been the focus of that interview question. Thus, Halvorson's attempt at rebutting the City's testimony on this point only underscored Halvorson's dearth of relevant experience and highlighted that he likely fundamentally misunderstood one of the questions during his interview. Halvorson also admitted to bringing up during the interview the fact that he had "been involved in some things that might have upset some people," which supports Captain Semko's assertion that Halvorson's answer to the interview question about the CPC's role in the Department's mission to fight crime went off topic into internal Department matters. Halvorson also admitted to "kicking himself" over failing to discuss in his interview or include in his application materials work experience as a Ranger that he deemed relevant to the CPC position.

In short, the City has provided credible evidence that it selected Morrison over Halvorson because it deemed her to be more qualified than Halvorson for the CPC position and because Halvorson's performance in the internal interview was poor in comparison to Morrison's. There is no contradiction between the reasons that the City provided for its action and the evidence presented. Thus, there are no grounds to find that the City's justifications were pretextual. Rather, the City's actions were "justified by criteria wholly unrelated to the employees' protected activity," and therefore, even if the prima facie case had been met, the retaliation claim would still have failed. (*Rio Hondo Community College District*, *supra*, PERB Decision No. 272, p. 5; *Palo Verde*, *supra*, PERB Decision No. 2337, p. 31.)

The City's Request for Attorney's Fees and a Notice Posting

The City requests attorney's fees and costs and a "reverse" notice posting to inform employees that the City has been vindicated of the allegations of unfair practices by Halvorson. PERB will award attorney's fees only if the charge is without arguable merit and pursued in bad faith. (*City of Alhambra* (2009) PERB Decision No. 2036-M, p. 19.) In this context, "bad faith" includes conduct that is dilatory, vexatious or otherwise an abuse of process. (*Ibid*.) In *City of Alhambra* (2009) PERB Decision No. 2037-M, the Board upheld the award of attorney's fees against a charging party because one of its witnesses lied under oath so that the charge would survive a timeliness challenge, finding that such conduct met the two-prong standard that the charge was pursued in bad faith and was without arguable merit. (*Id.* at p. 3.) The does not cite any legal precedent for awarding a "reverse" posting and I am not aware of any.

The City argues that the above standard for awarding attorney's fees and litigation costs is met here because Halvorson's charge was "based entirely on speculation, rumor, and deceptive half-truths," and because he gave untruthful testimony. The City points to the differing versions of the conversation between Halvorson and Officer Milosevich and Halvorson's attempt to refute Captain's Semko's testimony by falsely implying that he had taken part in the organizing for the Relay for Life event. I am not persuaded. Halvorson was able to show three out of four elements of the prima facie case for retaliation. While his arguments about the existence of nexus were not successful, I do not find that they were so insubstantial as to be considered "without arguable merit." And while some of Halvorson's testimony was discredited, I find it more likely that his memory of events was colored by his subjective feelings of mistreatment by the Department rather than an intent to deceive. His conduct does not rise to the level of bad

faith demonstrated by the charging party in *City of Alhambra*, *supra*, PERB Decision No. 2037-M, that led to the awarding of sanctions. The City's request for a reverse posting is without precedent and could serve to chill employees' exercise of protected rights. Therefore, sanctions against Halvorson are not appropriate in this case. The City's request is hereby DENIED.

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. LA-CE-925-M, *Christopher Halvorson v. City of Santa Monica*, 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, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 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).)