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 Request for Reconsideration PERB Decision No. 2635-M PERB Decision No. 2635a-M January 22, 2020

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

Before Banks, Krantz, and Paulson, Members.

DECISION

KRANTZ: This case involves an unfair practice charge filed with the Public Employment Relations Board (PERB or Board). Among other allegations in the charge, Christopher Halvorson (Halvorson) alleged that his employer, the City of Santa Monica (City), declined to promote him in retaliation for exercising rights protected by the Meyer-Milias-Brown-Act (MMBA).[1] A PERB Administrative Law Judge (ALJ) issued a proposed decision dismissing Halvorson's claims. The ALJ

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

found that Halvorson failed to demonstrate a prima facie retaliation case, and, even if he had, the City had met its burden to show that it would have taken the same action even in the absence of his protected activity.

Halvorson filed exceptions with the Board, challenging many of the ALJ's factual findings and legal conclusions. The City filed no exceptions and urged the Board to affirm the proposed decision. On March 27, 2019, the Board issued a decision affirming the proposed decision, *City of Santa Monica* (2019) PERB Decision No. 2635-M. Thereafter, Halvorson moved for reconsideration, contending that one of the assigned Board Members should have been recused.

In an abundance of caution, the Board has assigned a new panel to consider Halvorson's exceptions afresh. We express no opinion on any procedural or substantive aspects of Halvorson's arguments regarding recusal. We deny the motion for reconsideration as moot, vacate Decision No. 2635-M, and replace it with this decision. Having reviewed the record in this matter and considered it in light of applicable law, we affirm the ALJ's conclusion that the City did not violate the MMBA, for the following reasons.

FINDINGS OF FACT[2]

The City is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a).[3] Halvorson is a public

[2] For the most part, we find no basis to disturb the ALJ's factual findings, including but not limited to those based upon credibility determinations. Our factual findings do reflect small adjustments to the proposed decision, to the extent warranted based on our review of the record.

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

employee within the meaning of MMBA section 3501, subdivision (d). Halvorson and other civilian employees of the Santa Monica Police Department (Department) are included in a "general" bargaining unit of City employees. The Santa Monica Municipal Employees Association (SMMEA) exclusively represents the general bargaining unit. At all relevant times, SMMEA and the City were parties to a memorandum of understanding (MOU) setting forth terms and conditions of employment for the general bargaining unit.

Halvorson's Employment History

Halvorson holds a bachelor's degree in writing and professional history from the University of North Alabama and a master's degree in film and writing from Columbia University. He began working for the Department in August 2002, as a Park Ranger (Ranger). Rangers were primarily assigned 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. As discussed more fully below, Halvorson continued working as a Ranger until 2014, when the Department merged three different classifications together.

In October 2006, Halvorson filed his first unfair practice charge against the City (Case No. LA-CE-324-M), alleging discipline in retaliation for protected activity. Halvorson alleged that his protected activity had been submitting a grievance complaining about his supervisor—Lieutenant Alfonso Venegas (Venegas), who later was promoted to Deputy Chief. After submitting the grievance, Halvorson received

discipline alleging that he was insubordinate. The parties resolved Case No. LA-CE-324-M through a settlement agreement negotiated 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 an action by Venegas against Halvorson. The parties resolved Case No. LA-CE-454-M through a settlement agreement negotiated 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 (Seabrooks). Seabrooks began her tenure in the Department in May 2012. By that time, 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 a single new classification, which the City ultimately titled Pubic Services Officer (PSO). According to 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, merging these classifications into a single classification would provide the Department with greater staffing flexibility. Management also sought to provide employees with career

advancement opportunities, and to that end the reorganization created 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 classification with ASOs and DSOs. A Ranger, Robert Mapes (Mapes),[4] 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 arisen during negotiations between SMMEA and the City. The union was awaiting a proposed job description from the City and expected further discussions over the issue.

Rangers had ongoing complaints about their pay being insufficient given what they perceived as increasing dangers in the performance of their job duties. Furthermore, some Rangers contended they had worked out-of-class on a Crime Reduction Team. That assignment was supposed to have lasted only 30 days, but the Department thereafter extended it. In Halvorson's view, the assignment also involved training that touched on Police Officer duties. Halvorson also contended that Rangers were the lowest paid out of the civilian classifications. The Rangers' primary concern about the merger was that their duties would increase and become more dangerous,

[4] Mapes was initially a charging party in this matter. However, he did not appear at the administrative hearing, and the ALJ dismissed his allegations for failure to prosecute. Mapes did not except to the dismissal.

especially due to assignments downtown, where more crimes are committed, and their duties would involve enforcement more than public outreach. The Rangers believed that their pay was inadequate for such assignments.

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

2013 Merger Negotiations and the Rangers' Out-of-Class Grievance

On September 10, 2013, the City and SMMEA held an initial meeting regarding the proposed merger. Gaskins, Halvorson, and Ranger Emma Alvarez (Alvarez) met with Venegas and HR Director Donna Peter (Peter). Venegas noted that the three classifications were paid roughly the same wages, with DSOs making around eight or nine cents more per hour than the other classifications. He offered that the Ranger and ASO classifications should receive increases to match the DSO wage level. Venegas also stated that employees in the existing classifications would all need to be cross-trained, but since their duties were so similar, extra pay for the training was not warranted.

At some point—possibly in this initial meeting—Venegas stated that another option for the new PSO classification was to make it promotional. This meant that employees could elect to stay in their current ASO, DSO, or Ranger positions, or apply for the new PSO positions. Under this alternative, 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. On September 20, 2013, Gaskins submitted a grievance, on behalf of all Rangers, to Ranger Supervisor Don Williams (Williams). Halvorson was part of the grievance, but he 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 it raised safety concerns. The remedy sought was "appropriate compensation" for "higher level" duties, or removal of those duties. Halvorson testified that shortly after this grievance was submitted, he passed Venegas while walking in a hallway, and Venegas commented, "Chris, you really turned up the heat." Halvorson understood him to be referring to the grievance. Halvorson asked Venegas if he wanted to talk about it, but Venegas replied, "I better not." Venegas did not testify about this exchange.

On October 1, 2013, Halvorson, Mapes, and Gaskins attended a meeting with Department management to discuss the Rangers' out-of-class grievance. Williams and Lieutenant Pasquale Guido (Guido) represented the Department. Either in this grievance meeting or at some contemporaneous time, Guido bragged that he "loved confrontation." Also around this same time, Guido stated in a meeting that some of the Rangers were "organizational terrorists." A few days after the grievance meeting, Williams and Lead Ranger Gregory Marsh (Marsh)[5] criticized Mapes and Halvorson

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

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 Alvarez. 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 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 Venegas directly about an issue; thus, Halvorson concluded that if Rangers were being told to send e-mails to Venegas, management must have approved this encouragement. Marsh testified that Guido had told him "something like that," regarding allowing Rangers to e-mail Venegas about their thoughts on the grievance or merger issues. Venegas testified that he did not believe that he ever received any e-mails from Rangers about those issues.

On October 5, 2013, Guido provided a written response to the Rangers' out-of-class 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 in their MOU negotiations. On October 9, 2013, Gaskins sent a letter to Seabrooks requesting that she review the grievance. Gaskins wrote that Mapes and Halvorson were the Rangers' representatives for the issue. Halvorson testified that he asked Gaskins to identify them as representatives for several reasons: some of the Rangers did not support the grievance, management already knew that he and Mapes were active with the grievance and had labeled them

as troublemakers, and taking a more open leadership position would allow other Rangers a chance to distance themselves from the grievance.

On October 15, 2013, Halvorson sent an e-mail to all 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 Seabrooks 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."

On October 23, 2013, Seabrooks and Captain Kenneth Semko (Semko) met with Gaskins and Ranger John Michalski (Michalski) regarding the Rangers' out-of-class grievance. Earl and SMMEA board member Suzie Kim-Lockwood (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 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. Seabrooks did not testify at the hearing. Michalski did not recall that 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.

Sometime within the next two weeks, Seabrooks addressed the merger during a regular staff meeting. Halvorson did not attend this meeting, as Seabrooks scheduled it for a time prior to when Halvorson and Mapes were scheduled to be working.[6] 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 (Davis) and Roger Gray (Gray) testified about Seabrooks' statements in the meeting. Seabrooks referred to "someone" who had tried to bully employees in an e-mail and said that the person would be "dealt with." 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, Seabrooks provided a written grievance denial to Gaskins. On November 11, 2013, Gaskins submitted an appeal of the denial to Earl and requested review at the City Manager level of the grievance procedure. In December 2013, SMMEA agreed to table the Rangers' out-of-class grievance, as the City agreed to resume negotiations with SMMEA over the proposed merger. This occurred after Halvorson learned from 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 Williams told him that Seabrooks had

[6] We need not determine whether this scheduling was intentional, as it would not impact the outcome of the case.

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 and 28, and February 5, 2014, SMMEA and the City met to negotiate the proposed merger of the ASO, DSO, and Ranger classifications. Halvorson attended each of these sessions. Also present on behalf of SMMEA, at most or all of these meetings, were Kim-Lockwood, Gaskins, Mapes, and DSO Carlton Palmer (Palmer). Earl and 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 for the new positions, and pass a new probationary period, if the PSO classification was made promotional.

At the session on January 15, 2014, the City offered a 2.5 percent wage increase for the PSO positions. According to 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. Halvorson testified that at one of the January sessions, Mapes presented Venegas with a petition signed by 18 out of 19 Rangers stating their support for “increased wages” for the PSO classification and no application or probationary period being required. According to Halvorson, Venegas was “miffed” and “flustered” when he received it. Venegas testified that he did not remember ever seeing a petition that pertained only to Rangers.

At the bargaining session on January 28, 2014, SMMEA dropped its wage increase proposal to 6 percent. The record does not reflect that the City made any counterproposal that day.

The final bargaining session was on February 5, 2014. Earl informed SMMEA that the City's final offer was a 4 percent increase for the new PSO positions. SMMEA rejected the City's 4 percent offer. The parties caucused. After the caucus, Earl and Venegas briefly reentered the meeting. Venegas said that the merger was off the table and the PSO positions would therefore be promotional. According to Halvorson, Venegas was quite angry and stormed out of the room at this time. Halvorson also stated that everyone was surprised that negotiations had ended so abruptly. None of the other witnesses who testified about this session described Venegas's demeanor the way Halvorson did.

Events Leading Up to an Employee Vote Over the Merger

The next day, Halvorson and Mapes discussed the final bargaining session with Lieutenant Mike Beautz (Beautz). According to Halvorson, Beautz asked them what they had done to make Venegas so angry and stated that Venegas had called the employees "greedy." Beautz testified that he did not recall making those statements about Venegas. He testified that he and 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." Beautz responded that the employees were not greedy, but simply seeking parity among the civilian classifications.

Beautz helped Halvorson and Mapes craft a new proposal that sought to expand the merger to include Animal Control Officers, Traffic Services Officers, and

Jailers in addition to the other three classifications already under consideration. Beautz testified that he had been thinking about the merger for a long time and thought his plan would be beneficial to both civilian employees and the Department. Halvorson sent the new proposal to Venegas, Gaskins, and Kim-Lockwood, by e-mail, on or about February 6, 2014. The e-mail did not mention Beautz's participation in drafting this proposal. Venegas responded that the Department had made its position clear at the previous bargaining meeting. 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 the Department had suggested for merger. Thus, the proposal was not acceptable to the Department.

Shortly thereafter, Kim-Lockwood informed ASOs, DSOs, and Rangers 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. Seabrooks spoke briefly about the reorganization plan in broad strokes and then left the room as Police Officers also exited. 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. Venegas stated that the PSO position would be promotional, meaning that employees would have to apply for it, pass a background check, and then pass a probationary period. As a promotional position, per the MOU, the pay increase would be 5 percent.

Venegas said that PSO seniority would be based on employees' scores in their interviews.[7] 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 according to Halvorson. A Ranger asked if they would lose their jobs if they did not apply for the PSO positions, and 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. According to Halvorson, 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. Halvorson also testified that once another Ranger raised the issue that "Rob [Mapes] and Chris [Halvorson]" were supposed to bring an offer for the employees to vote on, Venegas replied, "you mean those two guys weren't speaking for everyone in this room after all?" At some point, Gaskins left the meeting. Halvorson described Venegas's anger as going "from one level of anger to, I'd say it was almost unleashed completely at that point." Venegas said, referring to Gaskins, "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.

Venegas testified differently, though with certain overlaps. He said that he probably had a Ranger job description in his hand during the staff meeting. He

[7] 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.

recalled saying that PSO duties would not be anything more than employees were currently doing, and the Department would hold all employees responsible for their current duties. He admitted that he might have been exhibiting a certain level of frustration in the meeting, but he denied that he ever yelled.

Other attendees testified about the same meeting. Kim-Lockwood was only asked whether Seabrooks spoke first and whether Venegas stayed behind to address ASOs, DSOs, and Rangers, which she affirmed. Rangers Gray and Davis corroborated Halvorson's account that 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 descriptions. Gray testified that he "didn't think [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 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 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 Venegas's demeanor during the meeting as being angry or threatening.

Sometime in the following week, Kim-Lockwood and 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. According to Kim-Lockwood, Gaskins suggested that the affected employees vote over whether they favored merger and elimination of the current classifications or having the PSO positions 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 workstation. Some employees raised concerns over privacy, and it was then decided to have the vote take place in person on February 26, 2014.[8] 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 affected employees voted to proceed with the merger and eliminate their current classifications in favor of a single PSO classification. Venegas testified that he was aware of these voting statistics, but he was not aware of how any specific employees voted, including Halvorson. Kim-Lockwood, who was responsible for tallying 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

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

they were counted. The City approved the new PSO, Lead PSO, and Police Administrator positions between February 27 and March 3, 2014.

Halvorson was one of the Rangers who voted against the merger. According to Halvorson and Rangers Jeanne Roccapriore (Roccapriore) and Jasmin Brown (Brown), who also voted "no" regarding the merger, it was "common knowledge" which Rangers had voted "no."

PSO Compensation Grievance

The City granted former ASOs, DSOs, and Rangers in the new PSO positions a 4 percent wage increase. On April 2, 2014, Gaskins filed a grievance on behalf of newly-appointed PSO employees. The grievance alleged that the City violated the MOU by failing to provide a 5 percent salary adjustment for promotions. Relying on Venegas' statement at the February 12 staff meeting, employees believed that voting "yes" on the merger meant they would receive a 5 percent pay increase. Halvorson was not specifically named as filing or being associated with this grievance.

The City provided a written response on April 15, 2014, contending SMMEA was acting in bad faith by filing the grievance and that the City Manager had authorized filing an unfair practice charge against SMMEA. The City noted that its last wage offer for the PSO classification 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 a PSO position, and so it was not considered "promotional." On April 23, 2014, SMMEA sent a letter to Peter

requesting review of the grievance denial. There is no other information in the record regarding this grievance.

Cross-Training Issues, and Hazing and Harassment Complaints

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, cross-training should have occurred first on a volunteer basis and then starting with the lowest seniority employees. He was surprised, therefore, given his higher seniority than other former Rangers, that he was scheduled third for cross-training. Lead PSO Stanley Paez (Paez), who was partially responsible for developing the cross-training schedule, testified that there was no rule linking seniority to cross-training. Paez also testified that he and his PSO Supervisor, Art Lopez (Lopez), never discussed Halvorson's position on the cross-training schedule. Lopez, who had the final say over the cross-training schedule, stated that management asked for volunteers first and took seniority into account, while also considering the trainers' schedules.

After the merger vote, there was some tension between former ASOs, DSOs, and Rangers regarding the negotiations that had occurred. During negotiations, Palmer had shared with Halvorson that the DSOs were afraid that if employees pushed too hard for pay increases that the City would simply eliminate their positions and they would be laid off. Brown testified that, during the negotiations period, she overheard DSO Maria Cervantes (Cervantes) speaking loudly in the locker room that

Rangers were "sticking their nose[s] in everybody's business."[9] 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 that Cervantes tried to force her to have a car towed, 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 Lieutenant Darrick Jacob (Jacob) and 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 Peter on or about May 29, 2014. 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 stating 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 others, saying 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.,

[9] Neither Palmer nor Cervantes testified.

Venegas—because Venegas was still angry with Mapes and him for their part in the negotiations. Halvorson also said that he feared further retaliation by Venegas because of their history. Halvorson requested that the City investigate and that he not be cross-trained by Cervantes.

On June 10, 2014, Peter informed Halvorson and the other complainants that, in consultation with the City Attorney's office and Seabrooks, the City had decided to hire an outside investigator to investigate the hazing claims. 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.

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, to HR and the investigator, incidents of harassment against him by fellow employees. For instance, he noted 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 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.

Overtime Assignments

Paez admitted that overtime was not assigned in an equitable manner at first. Paez acknowledged that overtime is supposed to be more or less equally distributed to employees under the MOU. However, former DSOs, rather than former Rangers, were receiving the bulk of overtime opportunities as PSOs. Paez said this was done at the direction of Lopez, though Lopez denied that former DSOs received more overtime and stated 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 Lopez's door, while former Rangers needed a watch commander's sign off on overtime hours before the time card was submitted to Lopez.

PSO Out-of-Class Grievance

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

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

another PSO 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 Marsh attaching a newspaper article about City of Glendale employees being laid off due to a reorganization. Marsh had originally 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 the 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 he had direct responsibility over them, and he routinely forwarded such information that he had received from his supervisors regarding police work in other cities and employment issues in other jurisdictions.

On February 3, 2015, Halvorson, Mapes, and Orchid participated in a level three meeting regarding the PSO out-of-class grievance. On April 9, 2015, acting City Manager Elaine Polachek ordered some modifications to the PSO job specification, additional training for PSOs in certain areas, and increased compensation for PSOs in certain specified circumstances in which they cover for a higher classification. This response from the City resolved the grievance.

Halvorson Applies for the Position of Crime Prevention Coordinator

1. Initial Steps for the Crime Prevention Coordinator Recruitment

On October 7, 2014, due to the impending retirement of a Crime Prevention Coordinator (CPC), Seabrooks asked HR to recruit for the position. HR Analyst Merle Wynn (Wynn) approved the Chief's request. Wynn testified regarding the City's recruitment practices. As part of those practices, the appointing department reviews an open position's job specification to determine if changes are needed. Wynn sent the CPC job specification to Semko for review. Semko was commanding the Strategic Services Division of the Department, which included the CPC position, and Semko was primarily responsible for the recruitment.

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" (Selection Guide) that notes it should be reviewed by "all employees who interview and select employees for any City job[.]" Wynn testified that she did not send the Selection Guide to Semko for the CPC recruitment and that she does not normally issue this document to hiring departments.

The recruitment for the CPC position was promotional, meaning the position would be open only to current City employees. 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 turnover in the CPC positions, the Department considers the positions to be very important, and therefore it wanted the widest pool of qualified candidates. Semko worked with Wynn on changes to the CPC job specification. The only 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, and 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:
>
> “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:
>
> “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 included a supplemental application. According to the City's Handbook on Human Resources Policies and Procedures (Handbook), "[s]upplemental applications may be used to more specifically identify key skills, knowledge or abilities." The CPC supplemental application asked applicants to describe their public contact work experience, their work experience presenting community based educational programs, and how they have used software systems or other tools for promotional purposes. It also included a question prefaced with a statement that the CPC position "requires graduation from an accredited college or university," followed by a request to indicate whether candidates met this "requirement." Wynn and Peters testified that the City intended that candidates would be minimally qualified if they either had attained a bachelor's degree or sufficient work experience.

On December 16, 2014, Halvorson submitted a cover letter, resume, application, and supplemental application. Halvorson answered the first supplemental question by focusing on his daily work interacting with the public in his PSO position and his work during special events such as the Los Angeles Marathon. Halvorson also noted his previous assignment on the Crime Reduction Team required him to attend daily briefings and review data regarding crime statistics. For questions two and three, Halvorson described his position as a Youth Worker in Seattle before college in 1990-1991, and his work designing press materials and creating short publicity films at the National Liberty Museum in 2000-2001.

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

Wynn screened the CPC applications to determine which applicants 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. 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, conducted the initial interviews. Because there were 19 candidates to interview in a single day, these external interviewers were separated into two panels, each consisting of two persons. Before the interviews commenced, Wynn and 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 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. 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 at a final score and rank for each candidate.

Halvorson and another candidate, Benjamin Steers (Steers), tied with a score of 100 and rank of number 1 after the external interview, and they took the first two spots on the promotional eligibility list.[11] The final candidate on the promotional eligibility list was Myesha Morrison (Morrison), with a score of 98.8. Halvorson was informed of his score and rank and that he would be contacted by the Department for another interview. The letter informing Halvorson of his score noted that there were three top candidates, one of whom would be selected for the position. 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 received the promotional eligibility list with the candidates' names in alphabetical order and did not receive the scores or rank of the persons on the list.

[11] The highest possible score is 100. For a promotional position, the top three candidates are included on a "promotional eligibility list," and move on in the selection process to a second interview with the hiring department.

4. The Second (Inside) Interview

After receiving the above information from Wynn, Department Administrative staff prepared a packet containing each candidate's application materials. At this stage of recruitment, the hiring department takes over the selection process. Semko received the application materials but was not provided the candidates' scores and rankings after the external interviews. Semko wrote a set of questions for the internal interviews.

Semko asked Captain Daniel Salerno (Salerno), who testified that he had previously served on over one hundred interview panels, to sit in with him for the second round of interviews for the CPC position. Salerno agreed. Salerno was also not aware of the candidates' scores or rankings after the external interviews. Salerno did not clearly recall whether he reviewed the candidates' application packets before the interview but said he would have done so in his ordinary practice if they were available. At the time of the internal interviews, Semko had never had supervisory authority over Halvorson. Salerno had been included in Halvorson's chain of command about five years before the interview took place, when 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 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 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.[12]

A. Halvorson's Interview

Semko and Salerno both described Halvorson's appearance at the interview as a bit "disheveled." 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

[12] Neither Semko nor Salerno reviewed the Selection Guide before the interviews. The Selection Guide states that taking notes during or after interviews is a "matter of preference" for the 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 Semko nor Salerno recorded a written evaluation of the candidates.

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. Halvorson did testify that immediately before the job interview, he had come from the PSO grievance meeting with HR Director Peter, with "not much time" in between.

Semko testified that Halvorson's mock introduction statement failed to show enthusiasm and energy for the CPC position and was not what Semko was looking for in a successful candidate. Halvorson said he felt that 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 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.

Regarding the question about recent, large event planning experience, Semko and Salerno both recalled that none of Halvorson's experience was 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."

In response, Semko testified that he was the chairperson of the Relay for Life event for two years, and although Halvorson was one of the approximately 50 volunteer team captains 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. 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, Semko could not remember exactly the answer that Halvorson gave, but Semko did remember being surprised that it was not better, describing it as "uneventful." Semko testified that he thought, given Halvorson's experience as a Ranger and PSO, that it would have been a 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 addressed the owner's issues. According to

Halvorson, Salerno had responded positively to that example. 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 Semko because it was allegedly off topic. 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. He said that Halvorson's answer to the question focused on Halvorson's knowledge of the inner workings of the Department 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." 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.)

Semko described Halvorson's overall interview performance as "very poor," which surprised him, given Halvorson's long tenure in the Department. 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. In his 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. Halvorson acknowledged that he had failed to include either of those experiences in his application materials or discuss them during his interview with Semko and Salerno, and Halvorson said that he was "kicking [him]self" about that after the interview.

B. Morrison's Qualifications and Interview

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 she had worked for the City since 2008. The "major duties" of the Zero Waste Assistant included the following, according to the job specification:

> "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 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. Morrison also testified that after learning about the open CPC position, she researched some of the City's crime prevention programs and techniques before ultimately submitting her application to the City.

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

Semko was also impressed 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 Semko had participated in as a Department manager, he ranked Morrison's interview as being in his "top five."[13]

5. The Selection of Morrison for the CPC Position

Immediately after the inside interviews concluded, Semko and Salerno had a brief conversation about their impressions. 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.

[13] The record reveals scant information about Steers's interview.

Salerno's participation in the selection process ended at that point. He testified that he never had any conversations with Guido, Venegas, or Seabrooks about the CPC candidates or the interview process. At the time of the interviews, Salerno did not know that Halvorson had been involved with SMMEA. 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. Nor was Salerno aware of Halvorson's then-pending unfair practice charge. None of the allegations in the charge pertained to him. Salerno testified that he had never heard either Venegas or 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.[14] 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. 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.

Semko testified that, sometime in the next week after the interviews were completed, he had a conversation with Seabrooks in her office. Semko told Seabrooks that Steers's interview was "okay," and that Halvorson had not done a very

[14] 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.

good job. Semko told Seabrooks that he thought Morrison was "fantastic," talked a bit about Morrison's background, and said he was recommending that Morrison be hired for the CPC position. Seabrooks agreed and told Semko to proceed with Morrison's selection. Neither during that discussion nor at any other time did Seabrooks tell Semko that Halvorson should not be selected for the CPC position.

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

Also on February 11, 2015, 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 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 Semko said it was "a factor of many things that had been discussed and reviewed." Semko said if the results of Morrison's background check disqualified her, then Halvorson would be interviewed again as he was still on the eligibility list. Halvorson sent an e-mail to Semko, asking for clarification about the potential for another interview. Semko responded, informing Halvorson that if Morrison failed to pass her background check, management would hold another round of internal interviews.

Venegas confirmed Salerno's testimony that in 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 Venegas did in the case of the CPC recruitment for Morrison. The only other discussion that Venegas recalled having with Semko regarding the CPC recruitment was at the beginning of the process, and involved the procedural steps that HR would take in compiling a promotional eligibility list. 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, but he did not discuss the candidates with Semko before the interviews or tell him that Halvorson should not be hired for the position. Venegas testified that he had no role in making a hiring recommendation for the position.[15]

Halvorson testified about running into a Neighborhood Resources Police Officer, Steven Erik Milosevich (Milosevich), shortly after he had received word from

[15] Morrison passed her background check, but still faced one more standard step before starting in the new position. When Seabrooks became Department Chief, she instituted a policy of holding an executive-level interview, 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. In this case, Venegas and Lieutenant Calisse Lindsey performed the final executive-level interview of Morrison after the background investigation was finished. Venegas did not have any specific memory of doing that but said that he regularly performs the majority of those interviews for the Chief. Semko confirmed that the formal offer of employment is not made to the candidate until after that final interview. Morrison assumed the CPC position in April 2015.

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.

Semko testified that he had not been involved in the merger negotiations and when he led the CPC recruitment process, he was not aware of Halvorson's participation in 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, 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."

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 Semko.

DISCUSSION

To establish a prima facie case of retaliation, the charging party has the burden to prove, by a preponderance of the evidence, that (1) one or more employees engaged in activity protected by a labor relations statute that PERB enforces; (2) the respondent had knowledge of such protected activity; (3) the respondent took adverse action against one or more employees; and (4) the respondent took the adverse action "because of" the protected activity, which has been interpreted to mean that the protected activity was a substantial or motivating cause of the adverse action. If the charging party meets its burden to establish each of these factors, certain fact patterns nonetheless allow a respondent the opportunity to prove, by a preponderance of the evidence, that it would have taken the same action even absent protected activity. This affirmative defense is most typically available when, even though the charging party has established that protected activity was a substantial or motivating cause of the adverse action, the evidence also reveals a non-discriminatory motivation for the

same decision. In such "mixed motive" or "dual motive" cases, the question becomes whether the adverse action would not have occurred 'but for' the protected activity. (*NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, 395-402; *McPherson v. PERB* (1987) 189 Cal.App.3d 293, 304; *Martori Brothers Distributors v. Agricultural Labor Relations Bd*. (1981) 29 Cal.3d 721, 729-730; *San Diego Unified School District* (2019) PERB Decision No. 2634, pp. 12-13; *Omnitrans* (2010) PERB Decision No. 2121-M, pp. 9-10; *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 22; *Palo Verde Unified School District* (1988) PERB Decision No. 689, pp. 7-8; *Novato Unified School District* (1982) PERB Decision No. 210, pp. 56; *Wright Line* (1980) 251 NLRB 1083, 1086-1089.)

In this case, no dispute remains regarding the first three elements of Halvorson's prima facie case, as the City did not file exceptions to the ALJ's findings that Halvorson engaged in protected activity, the City knew of that activity, and the City took adverse action against him when it chose another candidate for the promotion he sought. The questions before us mainly relate to the fourth element of Halvorson's prima facie case (commonly referred to as the "nexus" factor) and the City's affirmative defense. In the below discussion, we agree with much of the ALJ's analysis on these issues, though we depart from the ALJ's analysis in several respects.

I. Nexus Analysis

"To establish the final element of the prima facie case, the charging party must show that the employee's protected activity was a motivating factor in the employer's decision to impose the adverse action." (*Omnitrans*, *supra*, PERB Decision No. 2121-

M, p. 9.) PERB considers direct evidence, circumstantial evidence, or a combination. (*Id*. at p. 10.) Direct evidence is rarely attainable, and in any event, there is no hierarchy between direct and circumstantial evidence, as we consider all evidence for its persuasive value. (*Id*. at pp. 9-10; *Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 20, fn. 13.)

While PERB considers all relevant facts and circumstances in assessing an employer's motivation, we have identified the following factors as being the most common means of establishing a discriminatory motive through circumstantial evidence: (1) timing of the employer's adverse action in relation to the employee's protected conduct; (2) disparate treatment; (3) departure from established procedures and standards; (4) an inadequate investigation; (5) a punishment that is disproportionate based on the relevant circumstances; (6) failure to offer a contemporaneous justification, or offering exaggerated, questionable, inconsistent, contradictory, vague, or ambiguous reasons; (7) employer animosity towards union activists; and (8) any other facts that might demonstrate the employer's unlawful motive. (See, e.g., *City of Sacramento* (2019) PERB Decision No. 2642-M, p. 21; *San Joaquin Delta Community College District* (1982) PERB Decision No. 261, pp. 5-9.)

We join the ALJ in finding that Semko did not offer an inconsistent reason for Halvorson's non-selection when he told Halvorson over the phone that the City did not base its decision solely on the second interview and instead discussed and reviewed many factors. The record does not persuade us that the City neglected to consider the departmental interview when it decided between the candidates, nor does the

record reveal that Semko mischaracterized the relevant factors. Semko's explanation to Halvorson matches the fundamental justification the City has consistently offered for not promoting Halvorson: its belief that Morrison was a better overall candidate. Halvorson has not pointed to, and we cannot find, any indication that the City has presented a reason for its decision substantively different than that which Semko expressed during his call with Halvorson.

Similarly, we agree with the ALJ in finding that the City did not contravene established procedures when Semko and Salerno failed to review the City's Selection Guide before interviewing the final three CPC candidates and failed to take notes about the interviews. The City does not normally distribute the Selection Guide to hiring departments when they are recruiting for new positions, and there is no evidence that the City departed from its actual note-taking practices in this case. Salerno had never heard of the Selection Guide, despite participating in over 100 interviews. Even if the City departed from its written policies, as expressed in its Selection Guide, the record shows that such divergence was frequent and ongoing well before the events of this charge. Such a pre-existing inconsistency does not necessarily supply evidence of unlawful motive, and here we find that it does not. (See *City of Yuba City* (2018) PERB Decision No. 2603-M, p. 16.)

Halvorson challenges the ALJ's conclusion that the City did not have a practice of promoting the highest ranked candidate from the initial interview, and the resulting conclusion that there was no departure when the City chose Morrison even though she ranked third after the initial interviews. In support of his argument, Halvorson cites to a 2011 declaration from Wynn stating that in "the Police Department, the person

who receives the highest score on a Eligibility List is typically selected for the vacancy." Even were this statement credited, it would not establish that it was the Department's practice to fill open positions solely on account of applicants' ranking at the close of the initial interview, before the departmental interview. Moreover, Wynn clarified at hearing that it was now her belief that the highest ranked initial candidates are not necessarily selected in the end, and Peters explained that the City follows a "rule of three," in which the hiring department must consider each of the top three initial candidates. Semko testified that the City had passed him over for a promotion in an instance where he was the top ranked initial candidate. This evidence undercuts the argument that the Department's practice was always to choose the candidate who had been ranked highest after the initial interview. Halvorson also ignores that he tied with Steers for rank one at the initial stage, and that Steers, who apparently had not engaged in similar protected activity, also failed to get the promotional position.

Furthermore, the record reflects that the City had a policy of not disclosing the final three candidates' initial rankings to the hiring department. Such a policy would make it essentially impossible for the City to have had the practice Halvorson alleges. Halvorson challenged whether the City's practice was in fact to provide a list of the final three candidates in alphabetical order rather than by their initial rankings. However, Halvorson has marshalled insufficient evidence to support his challenge. Halvorson points to an exemplar in the Selection Guide, which lists the final three candidates for a position in non-alphabetical order. As noted already, however, the record does not reveal that the Department normally refers to the Selection Guide when filling vacant positions. Moreover, the Selection Guide does not suggest that the

names of the final three candidates should be sent to the hiring department in ranked order. An exemplar in the Selection Guide, while helpful to Halvorson, does not overcome credible testimony regarding the City's actual practices.

Halvorson also relies on a portion of the City's Handbook stating that "[f]or a promotional examination, and after the scores have been adjusted to include the appropriate credit for seniority, the employees will be listed in the rank order of their scores." This excerpt is not persuasive evidence that the City's policy was to report candidates for departmental interviews by their initial rankings. Notably, this portion of the Handbook does not state that this list must be conveyed to the hiring department, and there was no testimony to support such an interpretation. In light of the consistent testimony from Semko and Salerno that the hiring department does not learn the rank of the final three candidates for an opening, we find Halvorson has not shown that the City departed from established procedures when it delivered the list of the final CPC candidates in alphabetical order.

There are two nexus factors that we assess differently from the ALJ. We turn now to those factors.

A. Timing

One important circumstantial factor when assessing the presence or absence of an unlawful motive is the relative timing of a charging party's protected activities and a respondent's adverse action. (*Adelanto Elementary School District* (2019) PERB Decision No. 2630, p. 13.) We have repeatedly noted that adverse action taken shortly after an employee's protected activities tends to suggest more strongly that the two are linked, and this inference weakens as the gap in time grows. (*Ibid.*) However,

irrespective of whether the timing evidence is strong or weak, timing alone is typically not determinative (*ibid*), and when assessing the relative strength of timing as a factor, there is no "'bright line' rule for determining how close in time the protected activity must be to the retaliatory conduct." (*Regents of the University of California (UC Davis Medical Center)* (2013) PERB Decision No. 2314-H, p. 12.) Thus, while a charging party typically needs more than just timing evidence to prevail, if the timing evidence is weak then a charging party will normally need to marshal a stronger array of other, non-timing evidence. (See, e.g., *id.*, pp. 12-13 ["[P]roximity in time between the protected activity and the adverse action goes to the strength of the inference of unlawful motive, but is not determinative by itself."]; *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2066-M, p. 12 ["[C]loseness in time (or lack thereof)" is "not determinative in itself"]; *Regents of the University of California* (1998) PERB Decision No. 1263-H, adopting proposed decision at p. 68 [one year gap between protected activity and later adverse action is "some evidence" supporting a retaliatory motive, "but it is weak."].)

We therefore continue to reject any bright line finding that certain time lags are so remote that timing alone could defeat a retaliation claim, irrespective of the other evidence. Indeed, even where an employee engages in protected activity for "a long period of time without incident," such timing does not necessarily undercut the employee's claim. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221, p. 17.) This may be true, for instance, because there may not be "a single triggering event" (*ibid*.), and animus may instead build over time. (See also *Alisal Union Elementary School District* (2000) PERB Decision No. 1412 [significant gap in

time did not aid employer given lengthy history of PERB litigation between parties].) More to the point in these circumstances, management had no opportunity to choose between Halvorson and other promotional candidates until well after he began engaging in protected activity. Where a realistic possibility of discrimination does not arise soon after protected activity, the timing factor has less relevance. (*American Thread Co, v. NLRB* (4th Cir. 1080) 631 F.2d 316, 322 [timing of discharge years after protected activity did not provide the employer with a meritorious defense, because employee had a flawless record for those years, and employer was therefore "lacking a pretext to discharge him" until much later].) In this case, then, we do not find timing to be a particularly probative factor one way or the other.[16]

B. Manager Statements as Evidence of Animus

Halvorson relies heavily upon alleged management statements suggesting that unlawful animus could have been present at a sufficient level for such animus to

[16] Although PERB precedent protects representational rights to a greater extent than corresponding precedent under federal law governing private sector labor relations, we consider relevant federal precedent for its persuasive value when it is consistent with California authority. (*Contra Costa Community College District* (2019) PERB Decision No. 2652, p. 27, fn. 17.) Here, we decline Halvorson's request that we follow the reasoning in *Marcus Mgmt.* (1989) 292 NLRB 251, primarily because the facts there are distinguishable. In that case, the employer initially resolved to terminate an employee a few days after he exercised protected activities but was then advised that it should wait six months before taking action, in order to mitigate litigation risks. Subsequently, the employer implemented a "game plan" to remove this employee for superficially non-retaliatory reasons, which it did around six months later. (*Id*. at pp. 260 & 262.) On those facts, the National Labor Relations Board held that the "considerable amount of time [that] passed between union activity on [the employee's] part and the discharge" did not detract from a showing of unlawful motive because "the only thing that prevented his discharge from taking place immediately was fear of a lawsuit." (*Id.* at. p. 262.) Here, there are no facts suggesting that the City sought to delay or obscure an earlier decision to retaliate against Halvorson.

qualify as a motivating or substantial factor behind the City's promotion decision. In discussing this issue, the proposed decision cited *City of Oakland* (2014) PERB Decision No. 2387-M (*City of Oakland*) for the proposition that PERB cannot consider manager statements as evidence of animus unless such statements are themselves a threat or reprisal. Specifically, the ALJ cited *City of Oakland*'s recitation of statutory provisions declaring that an employer's expression of views, arguments, or opinions "shall not constitute, *or be evidence of an unfair labor practice* . . . unless 'such expression contains a threat of reprisal, force, or promise of benefit.'" (*City of Oakland*, *supra*, PERB Decision No. 2387-M, p. 26, citing the National Labor Relations Act (NLRA)[17], 29 U.S.C. § 158, subd. (c), and the Higher Education Employer-Employee Relations Act (HEERA)[18], Gov Code § 3571.3, emphasis in original.)

However, we do not believe that *City of Oakland* categorically prohibits us from considering employer statements in context, as part of a nuanced evaluation of an employer's motive. For instance, *City of Oakland* explicitly noted that "expressions of anti-union sentiment by an employer or one of its agents may support an inference of unlawful motive in a discrimination or retaliation case," citing PERB precedent for that proposition. (*City of Oakland*, *supra*, PERB Decision No. 2387-M, p. 32.) Moreover, while *City of Oakland* repeatedly found decisions interpreting the NLRA to be persuasive (see, e.g., *id*. at p. 26), such NLRA precedent supports the interpretation we clarify in today's holding: "[A]n employer's expression of views or opinions against a union, which cannot be deemed a violation in and of itself, can nonetheless be used

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

[18] HEERA is codified at Government Code section 3560 et seq.

as background evidence of antiunion animus on the part of the employer." (*CSC Holdings, LLC* (2017) 365 NLRB No. 68, p. 17.)

Furthermore, we note that the ALJ wrote without the benefit of the Board's more recent decisions applying *City of Oakland* and explaining that an employer's statements may or may not be evidence of an unlawful motivation, depending on the circumstances, irrespective of whether they qualify as threats or promises. In *City of Arcadia* (2019) PERB Decision No. 2648-M, p. 30, for instance, we applied *City of Oakland* and noted that "a manager's remarks may or may not constitute persuasive evidence of animus in a discrimination case, depending on all the relevant circumstances." Likewise, in *State of California (Department of Correctional Health Care Services)* (2019) PERB Decision No. 2637-S, pp. 15-16, we noted that *City of Oakland* did not exclude an employer's "embittered response" to protected activity from constituting evidence of nexus.[19]

[19] While we consider all management statements, among many other factors, in assessing nexus (and in assessing the employer's affirmative defense in mixed motive cases), the persuasive value of particular management statements will vary depending on differing contexts. In *City of Oakland*, for instance, a manager was responding to a personal attack against him, and we noted that mitigating factor as part of our finding that his statements were not particularly persuasive proof of the charging party's allegations. (See *City of Arcadia*, *supra*, PERB Decision No. 2648-M, p. 30 [discussing *City of Oakland*, *supra*, PERB Decision No. 2387-M, pp. 22-26]; *State of California (Department of Correctional Health Care Services)*, *supra*, PERB Decision No. 2637-S, pp. 15-16, [discussing *City of Oakland*, *supra*, PERB Decision No. 2387-M, pp. 22-26, and distinguishing circumstances where manager's "embittered response" to protected activity was not in the context of a personal attack against the manager].) In the instant case, the alleged manager statements showing animus were not in response to personal attacks. This constitutes a further basis for departing from the ALJ's reliance on *City of Oakland*.

The Board's fullest explanation of this interpretation arose in another case that post-dated the proposed decision in this matter, *California Virtual Academies* (2018) PERB Decision No. 2584. There, the Board explained:

> "We have recognized that an "employer may freely express or disseminate its views, arguments or opinions on employment matters, unless such expression contains a threat of reprisal or force or promise of benefit." (*Hartnell Community College District* (2015) PERB Decision No. 2452, p. 25 (*Hartnell*).) But we have typically applied this standard to determine whether the employer's speech interfered with employee rights. (See, e.g., *ibid.*; *Chula Vista City School District* (1990) PERB Decision No. 834, pp. 10-13.) We have never applied it to determine that an employer's hostility toward collective bargaining or other protected activity is off limits for purposes of evaluating unlawful motive. (Cf. *Sonoma County Junior College District* (1991) PERB Decision No. 895, adopting proposed decision at p. 21 [finding animus based on administrator's statements at hearing that he was "not pleased" that employees were organizing because collective bargaining would "endanger" relationship between management and employees].) Nor has the National Labor Relations Board (NLRB). (See *CSC Holdings, LLC* (2017) 365 NLRB No. 68, *17 ["[A]n employer's expression of views or opinions against a union, which cannot be deemed a violation in and of itself, can nonetheless be used as background evidence of antiunion animus on the part of the employer"].)"

(*Id*. at p. 29.)[20]

[20] *California Virtual Academies*, *supra*, PERB Decision No. 2584, is currently subject to review in the California Court of Appeal, pursuant to a writ of extraordinary relief under Government Code, section 3509.5. A pending writ, however, does not prohibit PERB from rearticulating the principles from the challenged decision while appellate litigation is ongoing. (*San Diego Housing Com. v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 1, 12; *South Bay Union School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 502, 507.) Moreover, the writ in

It is logical to treat employer statements differently in the interference and discrimination contexts. In assessing a prima facie interference case, motive is normally not at issue, and we must determine whether an employer statement is itself a violation, irrespective of motive. In such cases, a manager's statement "causes no cognizable harm to employee rights unless it contains threats of reprisal or force or promise of a benefit . . . Thus, the charging party must show that the employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights." (*County of Riverside* (2010) PERB Decision No. 2119-M, p. 17, citations and internal quotation marks omitted.) In contrast, in a discrimination case, we must determine motivation, often from circumstantial evidence. Therefore, "context is always relevant," and we look at "any other" fact or circumstance that may help us resolve the fundamentally difficult task of determining intent. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 11 and adopting proposed decision at p. 30].)

Although we depart from the proposed decision to the extent it suggested we are confined to viewing a management statement through the narrow lens of whether it involved a threat or promise, we find no need to make credibility determinations regarding any of the disputed management statements. Even assuming for the sake of argument that we were to credit most or all of the testimony about various alleged statements showing management held unlawful animus against Halvorson due to his protected activities, and that such evidence established a prima facie case of

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California Virtual Academies does not challenge our finding that statements of anti-union animus may serve as circumstantial evidence of retaliatory nexus.

retaliation, the City still ultimately proved by a preponderance of the evidence that protected activity was not a but-for cause of the City's decision. We explain below why we are persuaded that the City proved its affirmative defense.

II. Affirmative Defense Analysis

Halvorson first asserts that the ALJ relied on arguments that the City never offered. In particular, Halvorson claims that while the City tendered Morrison's purported superior qualifications to the ALJ, it did not follow through with the second aspect of its affirmative defense and show that this assessment of the candidates' relative merit was the actual reason the City chose Morrison over Halvorson. We disagree.

Once a party pleads a general theory of violation (or, as here, a defense), PERB employs a flexible approach to determining whether the evidence presented at hearing supports the parties' claims. (See e.g. *San Diego Community College District* (2019) PERB Decision No. 2625, adopting proposed decision at p. 19; *Bellflower Unified School District* (2017) PERB Decision No. 2544, pp 5-6.)[21] This is not to say that a party cannot waive arguments by failing to raise them with the ALJ. (*Colusa Unified School District* (1983) PERB Decision No. 296, p. 4.) We rather merely hold that when ALJs are analyzing unfair practice charges through well-established legal tests such as the *Novato* framework, they need not ignore legally salient facts even if a party has not specifically urged that they be considered or has failed to offer

[21] These principles certainly hold true in discrimination and retaliation cases, where "the trier of fact may consider the totality of evidence and draw inferences reasonably justified therefrom." (*California State University, Hayward* (1991) PERB Decision No. 869-H, adopting proposed decision at p. 23, fn. 13 (*CSU*); see also *Los Angeles Unified School District* (2016) PERB Decision No. 2479, pp. 29-30.)

arguments as to their relevance. This practical, fact-based approach to deciding unfair practice charges mirrors the recognition in California law that parties make arguments "largely for the convenience of the reviewing courts [as they are] empowered to decide a case on any proper points or theories, whether urged by counsel or not . . . and will exercise that authority under fair procedure in an appropriate case." (*McManis v. San Diego Postal Credit Union* (1998) 61 Cal.App.4th 547, 559.) As we recently noted, when ALJs compose proposed decisions they are "expected to base their factual findings and legal conclusions on the record before them and on current PERB precedent." (*County of Riverside* (2018) PERB Order No. Ad-469-M, p. 7.) We do not hold that an ALJ is in error for doing so.[22]

But even if we agreed with the theoretical underpinnings of this exception, we would still conclude that in this case the ALJ did not improperly look beyond the City's arguments when deciding whether it had established its affirmative defense. The record is clear that the City sought to convince the ALJ that it chose Morrison based on its legitimate belief that she was the best candidate. In both its Answer and Amended Answer, the City pleaded as an Affirmative Defense that its actions "were taken for legitimate, business-related reasons, and were not taken for a retaliatory reason or because of the Charging Parties' protected activities." The City then included a subsection in its Post-Hearing Brief entitled: "The City Had Legitimate Business Reasons for Selecting Someone Other Than Halvorson for the CPC

[22] Nothing in this decision alters PERB's unalleged violation doctrine. Nor do we alter precedent noting that a charging party may rely on indicia in a bad faith bargaining case without pleading such indicia. (See, e.g., *City of Davis* (2018) PERB Decision No. 2582-M, pp. 10-17.

Position, Which Were Not Pretext." There, the City argued that it "has met its burden of proof in this case" because the evidence purportedly showed that Morrison was a stronger candidate than Halvorson, this distinction became evident to the City when Salerno and Semko assessed the candidates, and Halvorson could not show that the City's decision to select Morrison was pretextual. It is evident that the City wished to persuade the ALJ that it actually selected Morrison because it believed that she would make a better CPC than Halvorson.

Halvorson also raises a series of exceptions related to the substance of the ALJ's decision to accept the City's affirmative defense. These contentions fail to provide persuasive grounds for overturning the proposed decision.

Halvorson challenges the ALJ's finding that CPC candidates could qualify for the promotion if they either had attained a bachelor's degree, or, alternatively, had enough relevant work experience. Halvorson, who holds a bachelor's degree in writing and professional history plus a master's degree in film and writing, claims that a bachelor's degree was an absolute requirement for the CPC position. He therefore asserts that the City contravened its own specifications, and/or hired a less qualified candidate. Halvorson bases this position entirely on the text of the first question of the Supplemental Application, which states that the CPC position "requires graduation from an accredited college or university with a [b]achelor's degree." Halvorson contends that this statement from the Supplemental Application should be interpreted to override the Job Announcement's allowance of substitute work experience, because the City's Handbook states that "[s]upplemental applications may be used to more specifically identify key skills, knowledge or abilities." Halvorson reads too much into

these documents. We do not agree that contradictory information in a supplemental application necessarily supersedes specifications in an original Job Announcement.

Moreover, the fact that the Handbook cursorily describes supplemental applications as specifying key requirements does not mean that information in this sort of document necessarily must predominate over specifications stated elsewhere. Indeed, the testimony received at hearing points to a different conclusion. When Wynn and Peter testified about the discrepancies between the Job Announcement and the Supplemental Application, they explained that the City intended that candidates could qualify for the CPC position if they had a relevant bachelor's degree or comparable substitute work experience. There was no contrary testimony. We thus agree with the ALJ that the CPC position did not require candidates to hold a bachelor's degree.

Halvorson asserts a related argument, claiming that his educational background made him a superior candidate. But educational background is only one relevant factor. When Semko and Salerno were conducting the second interview, they were not focused on the candidates' educational backgrounds, and the weight of the evidence does not tend to support an argument that they would have had a different focus but for Halvorson's protected activity. The fact that Halvorson had earned both a bachelor and master's degree thus does not persuade us that he was the best fit or, most importantly, that his protected activity was the but-for cause of the City's decision.

Halvorson also claims that the City could not have legitimately found Morrison to be a more qualified applicant for the CPC position, because she did not have a

background in law enforcement akin to his own background. This argument, however, ignores the qualities the City was seeking for the new CPC. In elevating law enforcement experience over other factors, Halvorson emphasizes that the Job Announcement includes various references to crime prevention when specifying the CPC's many minimum qualifications and anticipated duties, and he further argues that the placement of those references highlights their importance. However, the record does not reflect that qualities listed earlier in the job announcement are necessarily more important than qualities listed later.

We have considered the record carefully and determined it is more likely than not that law enforcement experience, even in combination with educational background, legitimately did not outweigh other qualities the City sought, such as knowledge of "emerging technologies," "effective customer service techniques," and "effective public speaking and education techniques." We specifically credit Semko's testimony that he desired a candidate who would be a "self-starter," as well as "comfortable representing their department out in front of the community, speaking to the department's mission in crime fighting, [and] leading community events." The bulk of the questions Semko composed for the departmental interview reflect a similar preference for an applicant who, above all, could deliver information to and engage with the wider community. Tellingly, none of the witnesses at hearing testified that candidates' law enforcement experience was a principal consideration for the City. Contrary to Halvorson's suggestions, the record shows that the City ultimately was more concerned with the candidates' communication skills and ability to organize large-scale public events than their law enforcement experience and educational

background. We do not find that unlawful animus caused the City to prioritize these qualities.

Of the final three candidates, Morrison best matched the qualities the City sought. At the departmental interview, Morrison informed Semko and Salerno of her recent experience as a Zero Waste Assistant planning large-scale events for the City's RRR division. Morrison further indicated that she herself had developed plans, arranged logistics, and procured personnel for these events—all of which were experiences that fit with Semko's desire for the CPC to be a self-starter. Morrison also conveyed her facility with using social media in a professional capacity, which, according to Semko, also "was very important as we were at the time and still engaged in a very proactive social media campaign within the Police Department, and we need somebody very, very strong in those skills, among other things." The job description for Morrison's former Zero Waste Assistant position supported her testimony about that role. Together, this evidence shows that before Morrison applied, she had extensive recent experience organizing and promoting community-wide educational events.

Semko and Salerno credibly testified that Halvorson's interview was less impressive. Halvorson counters that his testimony successfully rebutted these accounts of his poor interview performance. We agree with the ALJ that it did not. Indeed, Halvorson admitted to "kicking" himself after the interview for not raising prior experiences with community relations while serving as a Ranger. He also admitted that most of his event planning experience occurred well before he applied to be a CPC. Halvorson also did not aid his case by claiming that he "worked with" Semko at the City's Relay for Life. This is because Semko knew, and credibly testified, that

Halvorson's participation in the Relay for Life was confined to serving as one of the approximately 50 team captains who worked off pre-prepared informational packets when assisting with this event. The record is clear that Halvorson did not have any role in planning or organizing this event. On redirect examination, Halvorson confirmed Semko's understanding of his relatively limited role with the City's Relay for Life. Halvorson's initial attempt to inflate his experience did not help him. Like the testimony of Semko and Salerno, Halvorson's depiction of his departmental interview demonstrates that he did not present himself to be more qualified than Morrison.

Semko and Salerno consistently and credibly testified they each concluded, independently, that Morrison was by far the best of the final three candidates, and they each therefore recommended that she be selected. We weigh this evidence against the above-noted evidence of animus. Having assessed all relevant facts, we find by a preponderance of the evidence that the only but-for cause of the City's decision was Morrison's qualifications, including but not limited to her vastly superior performance at the interview. We thus conclude the City has met its burden to show that it would have chosen Morrison over Halvorson even had he not engaged in protected activity.

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.