STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OWEN CLIFF SNIDER, Charging Party, v. CITY OF SOUTH PASADENA, Respondent.	Case No. LA-CE-1180-M PERB Decision No. 2692-M January 30, 2020

Appearances: Woodley & McGillivary, by Diana Nobile and William W. Li, Attorneys, for Owen Cliff Snider; Liebert Cassidy Whitmore, by T. Oliver Yee and Kevin J. Chicas, Attorneys, for City of South Pasadena.

Before Banks and Krantz, Members.

DECISION[1]

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by City of South Pasadena (City) to the attached proposed decision of an administrative law judge (ALJ). The ALJ found that the City violated the Meyers-Milias-Brown Act (MMBA)[2] by terminating Owen Cliff Snider (Snider) in retaliation for his protected activities. The City asserts that it terminated Snider, then President of the South Pasadena Firefighters' Association (Association),

[1] Pursuant to Government Code sections 3509, subdivision (a), and 3541.3, subdivision (k), the Board has delegated this case for decision to a two-member panel. Unless otherwise specified, all further statutory references herein are to the Government Code.

[2] The MMBA is codified at Government Code section 3500 et seq.

solely for participating in an obstacle course race while on medical leave for an industrial injury and then allegedly covering up his participation.

Based on our review of the proposed decision, the entire record, and the parties' arguments in light of relevant legal authority, we conclude that the record supports the ALJ's factual findings and that his legal conclusions are well reasoned and in accordance with applicable law. Therefore, we adopt the proposed decision as the decision of the Board itself, subject to the discussion below.

BACKGROUND

The ALJ's procedural history and findings of fact can be found in the attached proposed decision. We briefly recapitulate the pertinent facts here to provide context for our discussion.

The City is a "public agency" within the meaning of MMBA section 3501, subdivision (c). At all times relevant herein, Snider was a "public employee" within the meaning of MMBA section 3501, subdivision (d). Snider worked for the City as a firefighter/paramedic from 2004 to 2014 and as an engineer from 2014 to 2016. The Association represents non-management employees in the City of South Pasadena Fire Department (Fire Department). Over the course of Snider's employment with the City, he held various executive roles within the Association, including two terms as President, in 2009, and from 2011 until his termination. Mario Rueda (Rueda) was Fire Chief from January 2016 to July 2017.[3] During the same time period, Paul Riddle (Riddle) was Deputy Chief and Chris Szenczi (Szenczi) was Captain.

[3] From 2014 until 2017, the City, the City of San Marino, and the City of San Gabriel were parties to a tri-city agreement to share their fire department command

Snider suffered multiple industrial injuries during the course of his employment with the City. Each time, Snider reported his injury to his captain, who then directed Snider to see a doctor at St. George's Medical Clinic (St. George's), a medical facility the City contracts with for treatment of its employees' work injuries. In each instance prior to the events at issue, Snider's attending doctor provided him with documentation restricting him to "light duty," meaning he was to limit certain physical activities while at work. Snider then provided the paperwork to the City, and each time management responded in the same manner: Instead of giving Snider a light duty assignment, the City placed Snider on Injured on Duty (IOD) status, the term the Fire Department uses for paid medical leave following a work injury.[4] Snider did not receive any work assignments until he was fully cleared to return to work. The City never provided specific instructions to Snider about what activities were permissible or impermissible while on IOD. Rather, the City always directed Snider to follow his doctor's instructions and report back for duty when his doctor fully cleared him to do so. Snider did not receive any directives from the City to update it about his condition while he was on IOD.

In October 2014, Snider injured his back at work while responding to an emergency call. He notified Szenczi of his injury, and Szenczi instructed Snider to visit St. George's. A doctor at St. George's restricted Snider to light duty and provided him with paperwork that he then submitted to Szenczi. Rather than offering Snider a

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structures. In accordance with this arrangement, Rueda was the tri-city Fire Chief, and each city employed its own Deputy Chief and Captain.

[4] IOD status is the City's terminology for temporary total disability (TTD) status pursuant to Labor Code section 4850.

light duty assignment, Szenczi placed him on IOD. Snider saw the same doctor at St. George's about a month later, and was cleared to return to work without any restrictions. He provided the release paperwork to Szenczi and returned to active duty. Meanwhile, Snider awaited authorization to have an orthopedist evaluate his back injury. Snider eventually received authorization in March 2015, and he saw Dr. Costigan, a back specialist.

In December 2015, Snider reinjured his back while at work. Szenczi again instructed Snider to see his doctor, and Snider returned to Dr. Costigan. According to Snider, Dr. Costigan said, "I'll take you off work. Come back in six weeks. And when you start to feel better, increase your exercise." Dr. Costigan did not testify and the City did not move to admit any of Snider's medical records into evidence at the formal hearing. Snider provided the paperwork he received from Dr. Costigan to the City. As with all of Snider's previous work injuries, no one from the City instructed Snider to limit his physical activities while on IOD or to notify the City if his condition improved before his next appointment with Dr. Costigan, which was scheduled for February 2, 2016.

On January 30, 2016, Snider and his wife both participated in the Spartan Race, an obstacle course race spanning approximately eight miles. Snider's wife registered both of them for the event in October 2015, before Snider reinjured his back. Snider testified that he initially did not feel as though he could complete the race following his back injury, but eventually felt well enough to resume his regular activities at some point during his leave.

After the race, Snider's wife posted photos of herself from the race on a social media website. None of the photos featured Snider and Snider did not post any photos from the race. Snider's wife did not alter the photos to delete Snider's image or remove any photos after posting them, nor did Snider ask her to do so. The race sponsor later posted the finishing times for both Snider and his wife on his wife's social media account.

On January 31, 2016, Szenczi also participated in the Spartan Race with his wife. Szenczi was not aware that Snider had participated in the race until that evening, when he saw a photo posted on Snider's wife's social media account. Szenczi thought that the photo was oriented in a manner that suggested Snider's wife may have intentionally edited Snider out of the photo. The next day, Szenczi's wife showed Szenczi the posting that listed Snider's finishing time. Szenczi testified that, by that point, he felt it was "pretty clear" that Snider had done the race and that it was a serious matter because Snider was on IOD.

On February 2, 2016, Szenczi and Riddle attended a conference together. Riddle was on IOD at the time and said his doctor instructed him to walk as part of recovery for his own condition. Szenczi told Riddle that he suspected Snider had participated in the Spartan Race, based upon the photos and finishing time he had seen. Neither Riddle nor Szenczi took further action. The same day, Snider went to his scheduled appointment with Dr. Costigan and told him that he felt ready to return to work. Snider delivered the required paperwork from his doctor to the City and resumed active duty.

On March 2, 2016, Szenczi and Snider met to discuss Snider's 2015-2016 performance evaluation. Szenczi gave Snider an overall rating of "excellent," the highest possible score, and ratings of "very good" or "excellent" in almost every category. Szenczi made no mention of his belief that Snider had participated in the Spartan Race, either in the written evaluation or during the meeting, and in fact recommended that Snider start training to take the test to promote to captain. At the hearing, Szenczi testified that he did not broach the subject of the race because he lacked "actual knowledge" that Snider had participated in it.

In March or April 2016, Snider injured his knee and went on IOD status again. While on leave, Snider heard from colleagues that Szenczi was telling others it looks bad when employees are on IOD multiple times. On April 27, 2016, Snider called Riddle to express his concern that Szenczi was making statements about Snider's off-duty conduct. Neither of them raised the subject of the Spartan Race. Riddle then called Szenczi and told him to stop making any unwarranted comments. Around the same time, Snider received text messages from his colleagues stating that Szenczi was telling others Snider could be fired for participating in the Spartan Race.

In late April or early May 2016, Snider called Szenczi. Snider acknowledged running the Spartan Race and asked Szenczi whether he had told others that doing so would get him fired. Szenczi denied making any comments. Szenczi reported this conversation to Riddle, who in turn reported it to Rueda in early May 2016. During the same time frame, Rueda asked Riddle about whether the City had a light duty policy for employees on IOD. Riddle stated that the City had a light duty policy, although the

Fire Department had not been using it. Snider was the only Fire Department employee on IOD at this time.

Subsequent to their conversation, Riddle contacted Snider and ordered him to report to work for a light duty assignment. Although Snider agreed to appear for work, he said he wanted to consult with the Association's legal counsel because the parties' memorandum of understanding did not contain a light duty policy. Snider was preparing to return to work when Riddle called to tell him that he no longer needed to immediately report for duty.

On May 11, 2016, the Association's legal counsel sent a letter to the City's Human Resources Manager, Mariam Ko (Ko). The letter asserted that the City did not have an established light duty policy for employees represented by the Association and demanded that the City bargain over the negotiable effects of such a policy before implementation. Ko responded the next day, asserting that City policy had provided for light duty assignments since June 1999. Ko and the Association's counsel then exchanged another round of letters. Snider and Ko also discussed the light duty policy around the same time. Ko maintained that the City would not bargain the issue. Snider responded, "Then I guess we'll leave it up to the attorneys."

In or about May 2016, after learning that Snider had run the Spartan Race, Rueda met with Ko to discuss how the City would investigate Snider. On June 5, 2016, in accordance with City protocol for investigations, Ko hired an outside investigator to determine whether Snider had engaged in misconduct. The record does not clearly indicate whether the City informed Snider of its decision to investigate him, but we infer from various testimony that it did not do so. The investigator's report

described the scope of the investigation specifically as whether Snider "may have participated in a rigorous and physically demanding sporting event while off work on Temporary Total Disability (TTD) for a recurring back injury before being cleared to return to full duty or participate in such an event."

On June 9, 2016, at Snider's direction and on behalf of the Association, the Association's legal counsel filed an unfair practice charge, case number LA-CE-1106-M, alleging that the City violated the MMBA by refusing to bargain the effects of its decision to implement a light duty policy.[5] On June 16, 2016, the City put Snider on administrative leave pending the results of the investigation. Riddle was involved in compiling a list of potential witnesses for the investigator; however, Rueda and Ko made the final determinations as to who should be included on the list. The investigator interviewed Snider but did not contact Dr. Costigan or seek Snider's permission to do so.

Both Snider and Riddle testified that the City and the Association had a history of resolving matters involving potential employee misconduct "in house," and that they had a positive working relationship in that regard. Riddle occasionally contacted Snider, in his capacity as Association President, about instances of suspected employee wrongdoing, rather than initiating formal discipline. Snider would then discuss the matter with the employee. Snider testified about incidents involving two different employees who were suspected of engaging in conduct that violated City policies, one of which involved misuse of sick leave. Daniel Dunn, a Fire Department

[5] On September 29, 2016, PERB's Office of the General Counsel issued a complaint in connection with the effects bargaining charge. The Association later withdrew that charge while Snider was on leave pending termination.

employee, confirmed Snider's account of one employee who reportedly abused his sick leave. Although the City had knowledge of both employees' suspected misconduct, it did not discipline either of them.

The investigator eventually issued a report of his findings regarding Snider's alleged misconduct. Rueda asked Riddle to provide examples of other instances in which the City had taken corrective action on similar misconduct. Riddle provided two occasions where employees had been fired for dishonesty, but he did not mention the employee who had misused sick leave.

On October 3, 2016, Rueda issued Snider a "Notice of Intent to Terminate," which accused Snider of dishonesty, abusing sick leave, violating City policies, and willful acts of bad faith. In or around November 2016, Snider attended a *Skelly* hearing at which Rueda served as the City's officer.[6] Rueda ultimately upheld the charges against Snider and issued him a "Notice of Termination, Accusation and Statement to Respondent" on December 2, 2016. Snider's termination became effective on December 7, 2016.

Snider filed the instant unfair practice charge on May 26, 2017. On April 10, 2018, following a formal hearing and after receiving post-hearing briefs from both parties, the ALJ issued the attached proposed decision finding that the City terminated Snider because of his protected activities.

[6] The term *Skelly* hearing refers to a pre-disciplinary procedure that complies with the due process requirements set forth in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, in which public employees may challenge the sufficiency of the evidence in certain levels of discipline.

The City excepts to the ALJ's finding that it retaliated against Snider because of his protected activities, arguing that Snider did not satisfy various elements of PERB's retaliation test. The City also contends that, even if Snider had established that the City retaliated against him for his protected activities, it established its affirmative defense by proving that it had a non-discriminatory reason for terminating Snider and would have done so even absent his protected activities. Snider argues that the ALJ correctly found ample evidence of the City's unlawful motive in terminating him and urges the Board to uphold the proposed decision.

DISCUSSION

To demonstrate that an employer discriminated or retaliated against an employee in violation of MMBA section 3506, a charging party must prove that: (1) the employee exercised rights under the MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action *because of* the exercise of those rights. (*City of Sacramento* (2019) PERB Decision No. 2642-M, p. 19; *Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-7 (*Novato*).)

Although the Board reviews exceptions to a proposed decision de novo, we need not revisit arguments the proposed decision appropriately addressed. (*Hartnell Community College District* (2018) PERB Decision No. 2567, p. 3.) The Board also need not address alleged errors that would not affect the outcome. (*Ibid*.) Here, the ALJ addressed the City's arguments that could have impacted the decision. We focus our discussion on augmenting the ALJ's discussion of two elements, protected activity and unlawful motivation.

I. Protected Activity

The proposed decision found that Snider engaged in several forms of protected activity: authorizing the Association's filing and pursuit of an unfair practice charge, enforcing the Association's meet and confer rights with respect to the light duty policy, and communicating to Riddle and Ko that he intended to seek the assistance of the Association's legal counsel regarding the light duty issue. In addition, we find Snider engaged in protected activity by serving as Association President.

The MMBA prohibits employers from subjecting employees to "punitive action" in their "exercise of lawful action as an elected, appointed, or recognized representative of any employee bargaining unit." (MMBA, § 3502.1.) The Board has interpreted this prohibition against retaliation to include, variously, an employee's service as an executive officer of a union, membership on an exclusive representative's bargaining team, and participation in a joint-labor management committee. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 15; *City of Torrance* (2008) PERB Decision No. 1971-M, p. 14.) In *Santa Clara Valley Water District*, we examined the scope, history, and purpose of MMBA section 3502.1. Finding that section 3502.1 clarifies the MMBA's existing protections against retaliation and discrimination, we stated that our decisional law "has long emphasized the likely 'chilling effect' that may reverberate throughout the bargaining unit when one of the employees' leaders has been the victim of a threat or reprisal." (*Santa Clara Valley Water District*, *supra*, PERB Decision No. 2349-M, p. 26.)

As Snider testified at the hearing, he took an "aggressive" stance with respect to labor-management issues in his role as Association President, in contrast to what

he perceived as the passivity of previous officeholders. In 2012, he directed the Association's legal counsel to file an unfair practice charge against the City for breaching an agreement to institute raises for Fire Department employees. According to Snider, the City was "extremely upset" about the charge, particularly the City Manager. The City was ultimately required to pay the employees backpay plus interest. During his tenure as President, Snider was also involved in a "legal action"[7] against the City for an alleged unilateral change to the collective bargaining agreement between the City and Association. Snider believed that the filing of unfair practice charge case number LA-CE-1106-M had a negative impact on relations between the Association and the City because it was the third such charge he authorized during his presidency. We find that, in all the aforementioned activities, Snider was taking "lawful action as an elected . . . representative" of the Association (MMBA, § 3502.1), and that his vocal and vigorous activism was exactly the type of activity section 3502.1 was intended to protect. As Association President, Snider thus enjoyed "explicit statutory protection against retaliation in certain employment decisions." (*Santa Clara Valley Water District*, *supra*, PERB Decision No. 2349-M, p. 27.)

II. Unlawful Motivation

Unlawful motive is the causal connection, or nexus, between the adverse action and protected activity. (*Novato*, *supra*, PERB Decision No. 210, p. 6.) A charging party may establish motive by direct or circumstantial evidence. (*Palo Verde Unified*

[7] Though it is unclear from Snider's testimony, this "legal action" appears to have been an unfair practice charge.

School District (2013) PERB Decision No. 2337, p. 10.) The proposed decision found that the City was unlawfully motivated by Snider's protected activities when it terminated him. In addition to the evidence cited by the ALJ, the record contains additional indicia of unlawful motive that bear recognition.

The Board has recognized a number of factors that may be relevant in establishing a discriminatory intent or motive. One of the factors we have considered in establishing an unlawful motive is an employer's disparate treatment of an employee. (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S, p. 6.) Here, the weight of the evidence suggests that Snider's termination was inconsistent with the City's historical use of a progressive discipline policy on both informal and formal levels. At the informal level, Snider and Riddle both testified that the City and Association had a practice of trying to resolve issues relating to alleged employee misconduct at the lowest level, in the interest of avoiding escalation to the extent possible. Snider detailed several occasions on which the City relied on informal counseling, rather than discipline, for employees who appeared to have violated City policies, including abuse or misuse of sick leave.[8] The City did not rebut these examples and instead referred to other instances in which it had terminated employees for dishonesty; but the City did not show those instances to be comparable to the instant one.[9]

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[8] At the formal level, the City's Personnel Rules and Regulations also outline a range of disciplinary actions ranging from written reprimand to dismissal "commensurate with the offense."

[9] Rueda had a short tenure in the Fire Department as of 2016. Rueda asked Riddle about comparators (practices in similar cases), and Riddle provided examples

In Snider's case, the City did not avail itself of any progressive discipline measures and instead resorted directly to the most severe sanction, based on alleged misconduct for which it could marshal only problematic proof. Rueda characterized termination as a "death penalty" that would eradicate any prospects of Snider working for the Fire Department again. According to Snider, this termination also made it "almost impossible" to get another job elsewhere. The City's decision to proceed directly to termination is also striking when considered against the background of Snider's good standing in the Fire Department. As recently as March 2016, after Szenczi and Riddle knew of Snider's participation in the Spartan Race, Szenczi gave Snider an overall rating of excellent in his performance evaluation, and encouraged Snider to test for the rank of captain. Under these circumstances, Snider's "death penalty" was disproportionate both with the discipline imposed on other employees and his alleged misconduct.[10]

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that were vague and/or dissimilar—including one instance involving a driving under the influence charge—while not mentioning any examples in which lesser or no penalty was issued.

[10] The proposed decision addresses the City's inadequate investigation. Because PERB assesses all facts and circumstances relevant to an employer's motivation (*City of Sacramento*, *supra*, PERB Decision No. 2642-M, p. 21), we may also consider, as part of the overall set of facts, whether the employer's departure from the law or its own *Skelly* practices contribute to evidence of unlawful motivation.

A basic requirement of any *Skelly* hearing is that it is presided over by a "reasonably impartial and noninvolved reviewer who possesses the authority to recommend a final disposition of the matter." (*Titus v. Civil Service Com.* (1982) 130 Cal.App.3d 357, 362; *Coleman v. Dept. of Personnel Administration* (1991) 52 Cal.3d 1102, 1121; *Linney v. Turpen* (1996) 42 Cal.App.4th 763, 771; *Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 736-737; but see *Flippin v. Los Angeles City Bd. of Civil Service Commissioners* (2007) 148 Cal.App.4th 272 (*Flippin*) [no due process

The ALJ correctly concluded that the City terminated Snider in retaliation for his protected activities, and that the City did not prove its affirmative defense that it acted for an alternative, non-discriminatory reason.

REMEDY

The Board has broad powers to order remedies necessary to effectuate the purposes of the MMBA. (MMBA, § 3509, subds. (a), (b); PERB Reg. 32325.) The City has been found to have violated Government Code sections 3506 and 3506.5. The appropriate remedy is to order appropriate make-whole relief including backpay, reinstatement, and a cease and desist order. (*County of Lassen* (2018) PERB Decision No. 2612-M, pp. 11-12.)

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violation where manager who initiated the underlying discipline held a pre-deprivation hearing, since employee received an additional pre-deprivation review by a different manager, as well as two additional levels of review at the post-deprivation stage].)

Although we express no opinion and make no finding as to whether the City violated constitutionally-mandated pre-deprivation safeguards required under *Skelly*, as that issue is not before us, we note the following facts: Rueda initiated the underlying investigation into Snider, was substantially involved in determining which witnesses the investigator should interview, issued the Notice of Intent to Terminate, served as the *Skelly* officer without any other manager reviewing the matter at the pre-deprivation stage, and ultimately issued the Notice of Termination. In conjunction with all the other evidence available, these facts undermine certain of the City's arguments. For instance, the fact that the City relied so heavily on Rueda at every pre-deprivation stage—rather than involving a second official as in *Flippin*—is relevant in considering whether to infer additional evidence of unlawful motivation given the fact that Rueda had a short tenure in the Fire Department and was dependent on Riddle to learn of comparators, but apparently did not inquire about the details when presented with vague and/or inapposite comparators.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the City of South Pasadena (City) violated the Meyers-Milias Brown Act (MMBA), Government Code section 3500 et seq. The City violated the MMBA by terminating Owen Cliff Snider's (Snider) employment in retaliation for engaging in statutorily protected activities. We adopt the ALJ's remedy with one modification to include electronic posting to the notice posting requirements.

Pursuant to MMBA Section 3509, subdivision (b), it hereby is ORDERED that the City, its governing body, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against Snider because of his protected activities.

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

1. Rescind Snider's termination.

2. Expunge from its records, including Snider's personnel file: (1) the October 3, 2016 Notice of Intent to Terminate; (2) the December 2, 2016 Notice of Termination, Accusation and Statement to Respondent; (3) the investigative report upon which the above documents were based; and (4) all references to those documents.

3. Offer Snider immediate reinstatement to his former position or, if that position no longer exists, then to a substantially similar position as of December 7, 2016.

4. Make Snider whole for any financial losses suffered as a direct result of his termination, including back pay, augmented by interest at a rate of 7 percent per annum.

5. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations in the City of South Pasadena Fire Department (Fire Department), where notices to Fire Department employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that the City will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with Fire Department employees in the bargaining units represented by the Association. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

6. Within 30 workdays after this decision is no longer subject to appeal, notify the General Counsel of PERB, or his or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or his or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on Snider and the Association.

Member Krantz joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-1180-M, *Owen Cliff Snider v. City of South Pasadena*, in which all parties had the right to participate, it has been found that the City of South Pasadena violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by terminating Owen Cliff Snider's (Snider) employment in retaliation for engaging in statutorily protected activities.

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

A. CEASE AND DESIST FROM:

1. Retaliating against Snider because of his protected activities.

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

1. Rescind Snider's termination.

2. Expunge from our records, including Snider's personnel file: (1) the October 3, 2016 Notice of Intent to Terminate; (2) the December 2, 2016 Notice of Termination, Accusation and Statement to Respondent; (3) the investigative report upon which the above documents were based; and (4) all references to those documents.

3. Offer Snider immediate reinstatement to his former position or, if that position no longer exists, then to a substantially similar position as of December 7, 2016.

4. Make Snider whole for any financial losses suffered as a direct result of his termination, including back pay, augmented by interest at a rate of 7 percent per annum.

Dated: _____ CITY OF SOUTH PASADENA

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

OWEN CLIFF SNIDER, Charging Party, v. CITY OF SOUTH PASADENA, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-1180-M PROPOSED DECISION (April 10, 2018)

Appearances: Woodley & McGillivary, LLP, by Diana J. Nobile and William W. Li, Attorneys, for Owen Cliff Snider; Liebert Cassidy Whitmore, by Oliver Yee, Attorney, for City of South Pasadena.

Before Eric J. Cu, Administrative Law Judge.

INTRODUCTION

In this case, a former public agency employee asserts that his employment was terminated in retaliation for engaging in activities protected under the Meyers-Milias Brown Act (MMBA).[1] The employer denies any violation.

PROCEDURAL HISTORY

Owen Cliff Snider filed the instant unfair practice charge (UPC) against the City of South Pasadena (City) on May 26, 2017, with the Public Employment Relations Board (PERB or Board). Snider claimed that the City terminated his employment in retaliation, first for demanding that the City bargain before implementing a light-duty policy, and then for filing UPC case number LA-CE-1106-M after the City refused. On August 22, 2017, the PERB Office of the General Counsel issued a complaint alleging that the City terminated Snider's

[1] The MMBA is codified at Government Code section 3500 et seq.

employment, effective December 7, 2016, because Snider filed the UPC. The City filed its answer to the PERB complaint on September 18, 2017.

The parties participated in an informal settlement conference on September 21, 2017, but did not resolve their dispute.

As the Administrative Law Judge assigned to the case, I conducted a formal hearing on January 22 and 23, 2018. On the first day of hearing, I took official notice of the content of PERB's files in UPC case number LA-CE-1106-M, with no objection from the parties.

The parties submitted closing briefs on March 23, 2018. The City's brief referenced an administrative decision addressing Snider's discipline even though those references were not supported by evidence, stipulation, or request for official notice. On April 4, 2018, Snider requested the opportunity to file a reply brief to address the administrative decision. Later that day, I issued an order denying Snider's request and also stating that the City's references to the administrative decision would not be considered because the decision was not part of the official record. At that point, the record was considered closed and submitted for decision.

FINDINGS OF FACT

The Parties

The City is a "public agency," within the meaning of MMBA section 3501, subdivision (c). Prior to his termination from employment in late 2016, Snider was a "public employee" within the meaning of MMBA section 3501, subdivision (d). He worked for the City as a Firefighter/Paramedic and most recently as a Fire Engineer.

The South Pasadena Firefighters Association

Non-management employees in the City's Fire Department (Department) are represented by the South Pasadena Firefighters' Association (Association). Snider served as

President of the Association in 2009 and then again from 2012 until his termination. He served in other official capacities with the Association before that.

The Tri-City Agreement

From March 2014 until July 2017, the City, and nearby cities San Marino and San Gabriel were parties to an agreement to share aspects of their Fire Department command structure. Under this Tri-City Agreement, a single person acted as the Chief for all three Fire Departments. Each Fire Department had its own Deputy Chief who, among other responsibilities, advised the Chief on local policies, practices, and customs for their individual departments. Captains report directly to the Deputy Chief in the City's chain of command. Each Captain leads a crew of six, consisting of two Engineers, three Firefighter/Paramedics, and the Captain.

Mario Rueda began his tenure as Chief under the Tri-City Agreement in January 2016. Rueda served in that capacity until the Tri-City Agreement was terminated in 2017. Paul Riddle was a the Deputy Chief during Rueda's tenure as Chief. Riddle succeeded Rueda as Chief after the Tri-City Agreement terminated.

Snider's Back Injury

In October 2014, Snider injured his back trying to lift a patient during an emergency call. He notified his supervisor, Captain Chris Szenczi, of the injury. Snider initially felt well enough to remain on duty, but soon afterwards suffered a severe back spasm that required a visit to the Emergency Room. A few days later, Szenczi directed Snider to visit St. George's Clinic, which is the medical office Department personnel report to when hurt at work. According to Snider, a physician at St. George's gave him "light duty" restrictions, meaning he placed limitations on the types of physical activities Snider could perform at work. Snider

received paperwork from the clinic describing his restrictions and provided it to Szenczi. Szenczi did not give Snider a light duty assignment. Instead, Snider was placed on Injured on Duty (IOD) status, which refers to the time Fire Department personnel are on paid leave due to an injury on-the-job.[2] Around a month later, Snider saw a doctor again and was cleared to return to work without any restrictions. He provided paperwork from the doctor to Szenczi and he returned to active duty.

Snider had been on IOD status in the past due to unrelated work injuries. Each time, Snider reported his injury to his Captain and was directed to see a physician at St. George's Clinic. Each time, Snider says he was given light duty restrictions from a physician, but received no work assignments until he was fully cleared to return to work.

Snider has never received specific instructions from the City about what activities are permissible or impermissible while on leave. Rather, Snider was always directed to follow his physicians' instructions and report back for duty when cleared to do so by a doctor. No one ever directed Snider to update the Department about his condition while on leave.

Snider's December 2015 Back Injury

Snider aggravated his earlier back injury in December 2015 while observing a demonstration from another Firefighter. At hearing, Snider explained that standing still for extended time periods can cause his back to spasm and that he could not stand up the day after the demonstration. Szenczi instructed Snider to see his back doctor to assess his condition.

Snider visited Dr. Costigan, the back specialist he had been seeing ever since his earlier injury. According to Snider, Dr. Costigan said "I'll take you off work. Come back in six

[2] The income source for employees on IOD was not made clear in the record. In addition, witnesses occasionally referred to "Temporary Total Disability" or "TTD" status, without describing in detail what this status means in City parlance or when, if ever, Snider was on TTD.

weeks. And when you start to feel better, increase your exercise." Dr. Costigan did not testify and none of Snider's medical records were admitted as evidence at the PERB hearing.

Snider provided the paperwork he received from Dr. Costigan to the Department. As before, no one from the City instructed Snider about limiting any physical activities while on IOD. Nor did anyone direct him to notify the Department if his condition improved before his next appointment with Dr. Costigan.

The Spartan Race

On Saturday, January 30, 2016, Snider and his wife both participated in a southern California Spartan Race, which is an approximately eight-mile run over varied terrain with obstacles. Snider's wife registered both of them for the event in October 2015, before Snider re-injured his back. At hearing, Snider said that he did not feel as though he could complete the race immediately after re-injuring his back, but that he eventually felt well enough to resume his regular activities at some point while on leave.

After the race, Snider's wife posted photos of herself from the race on a social media site. None of the photos featured Snider and Snider himself did not share any photos about the race. Snider's wife did not delete Snider from any of any of those photos and did not remove any photos after posting them. Snider did not ask his wife to remove or delete any photos from the race. The company that operates the Spartan Race later posted the finishing times for both Snider and his wife on his wife's social media account.

Captain Szenczi also participated in the Spartan Race with his wife on the following day, Sunday January 31, 2016. At the time, he was not aware that Snider had run the race. However, that night, Szenczi's wife showed him online pictures of Snider's wife at the race. Szenczi thought that one of those photos was oriented in an unusual way and suspected that

Snider's wife may have intentionally edited Snider's face out of the picture. The next day, Szenczi's wife showed Szenczi the social media postings detailing Snider's race finish time. Szenczi testified that, by that point, he felt it was "pretty clear" that Snider had done the race and that it was a serious matter because Snider was on IOD.

On Tuesday, February 2, 2016, Szenczi and Deputy Chief Riddle attended a firefighting conference together. Riddle was also on IOD at the time and said his doctor instructed him to walk as part of the recovery for his own condition. Szenczi told Riddle about participating in the Spartan Race. Szenczi also shared his suspicion that Snider had done the race based on seeing Snider's race time and photos of his wife. Neither Szenczi nor Riddle took further action regarding Snider and the race at the time.

That same day, Snider went to his scheduled appointment with Dr. Costigan and said that he felt able to return to work. Snider delivered the required paperwork from his doctor to the City and returned to active duty for the Department. Snider testified that multiple Department employees appeared to know that Snider had done the race after he returned.

Snider's 2015-2016 Performance Evaluation

On March 2, 2016, Captain Szenczi met with Snider to discuss Snider's 2015-2016 performance evaluation. Szenczi gave Snider an overall rating of "Excellent," which is the highest possible score. Szenczi rated Snider as either "Very Good" or "Excellent" in almost every category in the evaluation. Szenczi recommended that Snider start training to obtain the rank of Captain. Szenczi did not mention his belief that Snider had done the Spartan Race either in Snider's written evaluation or during the meeting about the evaluation. At hearing, Szenczi said that he did not mention the race because he lacked "actual knowledge" that Snider had run the race.

Snider's Subsequent Knee Injury

Around late March or early April 2016, Snider tore the meniscus in his right knee, causing him to be placed on IOD status again. While on leave, Snider began hearing rumors from Department employees that Szenczi was telling others that it looks bad when employees are on IOD multiple times.

On April 27, 2016, Snider called Deputy Chief Riddle and expressed his concern that Szenczi was making statements about Snider's off-duty conduct. They did not discuss the Spartan Race. After that conversation, Riddle contacted Szenczi and directed him to cease making any unwarranted comments. Szenczi denied saying anything about Snider in particular. Around this time, Snider received messages from Department employees stating that Szenczi was telling others that Snider could be fired for doing the Spartan Race.

In late April or early May 2016, Snider called Szenczi. Snider acknowledged running in the Spartan Race and asked whether Szenczi had told others that doing so would get him fired. Szenczi denied making those comments. Szenczi reported the details of this conversation to Riddle. Riddle reported this to Chief Rueda sometime in early May 2016.

The City's Request to Assign Snider Light Duty While on IOD

In either April or the early part of May 2016, Rueda approached Riddle about giving Department personnel light duty assignments while on IOD. Rueda felt that there was work available and that returning to duty in some form helps employees stay connected to the Department which might motivate them to return to service sooner. Riddle said that the City has a general light duty policy but the Department had not been utilizing it. At the time of this conversation, Snider was the only Department employee on IOD.

Sometime after this conversation, Riddle contacted Snider and directed him to report to the Department for a light duty assignment. Snider agreed to report for duty but said he wanted to consult with legal counsel because there was no light duty policy in the negotiated agreement between the City and the Association. As Snider was preparing to return to work, Riddle contacted him again saying that the Department changed its mind and that he would not need to immediately report for duty.

The Association's Bargaining Demands and the UPC

At Snider's direction, on May 11, 2016, counsel for Association sent a letter to City Human Resources (HR) Manager Mariam Ko, asserting that the City has no established policy of assigning light duty to employees represented by the Association and demanded that the City bargain over the negotiable effects of such a policy before implementation. The Association sent a copy of this letter to Riddle. Ko responded the next day, asserting that City Administrative Policies have allowed for light duty assignments since June 16, 1999. Copies of her letter were sent to both Riddle and Rueda.

On May 19, 2016, the counsel for the Association reasserted its demand to bargain over the effects of assigning light duty to represented employees. Counsel further stated that "[s]hould the City continue to fail and refuse to bargain, the Union will be forced to explore all legal avenues to enforce its rights and the rights of its members." The Association again sent a copy of this letter to Riddle.

On May 23, 2016, the City responded, asserting that the decision to give light duty assignments was not subject to impacts or issue bargaining. Copies of this letter were sent to Riddle and Rueda. At the time the City and the Association were exchanging these letters, Ko understood that filing a UPC is one possible legal option to address violations of the duty to

bargain in good faith. Snider spoke to Ko directly about the light duty policy around the same time. When Ko continued to assert that the City would not bargain over the matter, Snider said words to the effect of "then I guess we'll leave it up to the attorneys."

On June 9, 2016, the Association filed UPC case number LA-CE-1106-M with PERB alleging that the City violated the MMBA by refusing the Association's demand to bargain over the impacts of its decision to implement a light duty policy. Ko, Riddle, and Rueda all acknowledged knowing that the Association filed this UPC. On September 29, 2016, the PERB Office of the General Counsel issued a complaint in that case, alleging that the City began giving light duty assignments to Fire Department employees without giving the Association the opportunity to bargain over the decision and/or effects of that decision.[3]

The Investigation Into Snider's Participation in the Spartan Race

Sometime in May 2016, after hearing that Snider had done the Spartan Race, Rueda discussed the Department's options with Ko. Under City protocol, sometime between June 5 and 8, 2016, Ko hired an outside investigator to look into whether Snider had engaged in misconduct. On June 16, 2016, the City placed Snider on paid administrative leave during the investigation. Riddle testified that he was partially involved in arranging which witnesses the investigator would interview, but that Rueda and HR were the primary decision-makers on that issue. Riddle said that those discussions focused on interviewing people from a variety of different ranks in the Department. Snider was interviewed as part of the investigation. Neither the investigators nor anyone from the City contacted Dr. Costigan or requested Snider's permission to contact his doctors.

[3] The Association eventually withdrew UPC case number LA-CE-1106-M on November 17, 2016, while Snider was on leave pending termination.

Evidence of Resolving Disciplinary Matters Informally

Snider testified that the City and the Association had a history of resolving matters involving employee misconduct "in house," meaning without proceeding with formal discipline. Snider said that Riddle sometimes contacted him, in his capacity as Association President, about instances where Riddle suspected an employee of wrongdoing. Then, Snider would speak directly to the employee to correct the behavior.

Snider testified in particular about an employee who in 2015 announced to his crew that he no longer wanted to work on Fridays or Saturdays and that he would call in sick if he was ever assigned to work during one of those shifts. That employee, in fact, began calling in sick more often during those times. Another Department employee, Daniel Dunn, corroborated Snider's testimony about this employee. No contrary evidence was presented. At Riddle's request, Snider contacted the employee about his conduct and the employee ceased using his sick leave in that manner afterwards. There is no evidence that the employee was disciplined and he continued to work for the Department as of the time of the hearing.

The Decision to Terminate Snider's Employment

The investigator produced a report of his findings about Snider's conduct.[4] After reviewing that report, Rueda concluded that Snider had engaged in misconduct. He asked Riddle to provide examples of other times that the City had taken corrective action on similar or related misconduct. Riddle provided two instances where employees were terminated for dishonesty. Riddle did not mention the employee who misused his sick leave in 2015. On

[4] The investigator's report, without attachments, was offered as an exhibit at hearing (Respondent's Exhibit 104) by the City for the limited purpose of examining Snider's understanding of the investigator's findings. It was not offered or admitted to establish that the investigator's conclusions were accurate or that any person's statements described in the report was true.

October 3, 2016, Chief Rueda issued Snider a "Notice of Intent to Terminate," that accuses Snider of dishonesty, abusing sick leave, violating City policies and willful acts of bad faith.[5] In particular, the notice states that Snider knew that he not supposed to be doing anything physically strenuous while on leave, that he failed to notify his supervisors that he felt well enough to return to duty earlier, and that he attempted to hide his participation in the race.

In or around November 2016, Snider attended a *Skelly* meeting[6] to discuss the charges against him. Rueda served as the City's *Skelly* officer. After the meeting, Rueda sustained the charges against Snider and the City issued a "Notice of Termination, Accusation and Statement to Respondent" on December 2, 2016. This document largely mirrored the charges and conclusions from the Notice of Intent to Terminate. Snider's termination became effective on December 7, 2016. He has since appealed that decision under the City's appeal process.

ISSUE

Did the City terminate Snider's employment in retaliation for protected activity?

CONCLUSIONS OF LAW

To demonstrate that an employer discriminated or retaliated against an employee in violation of MMBA Section 3506 and PERB Regulation 32603, subdivision (a), the charging party must show that: (1) the employee exercised rights under the MMBA; (2) the employer

[5] In the Notice of Intent to Terminate, Rueda describes a statement from Firefighter Justin Furtado, asserting that he heard another Firefighter, Mike Larkin, describe a conversation between himself (Larkin) and Snider. According Rueda's description of Furtado's statement, Larkin said that Snider admitted to attempting to remove online postings showing that he had done the Spartan Race. Neither Furtado nor Larkin testified at the PERB hearing. Rueda also did not testify specifically about this section of the Notice of Intent to Terminate.

[6] The term *Skelly* meeting refers to a pre-disciplinary procedure that complies with the due process requirements set forth in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, in which public employees may challenge the sufficiency of the evidence in certain levels of proposed discipline.

had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action *because of* the exercise of those rights. (*County of Riverside* (2009) PERB Decision No. 2090-M, p. 25, citing *Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8, other citations omitted.)[7] If the charging party establishes all of these elements, then the burden of proof shifts to the respondent to establish that it would have taken the same actions even if the employee had not engaged in protected activity. (*Id*. at pp. 38-39.)

1. Protected Activity

The PERB complaint alleges that Snider engaged in protected activity by causing the Association to file UPC case number LA-CE-1106-M, in which the Association claims that the City failed to meet and confer over before implementing a light duty policy. Filing and pursuing a UPC is protected activity under the MMBA. (*Golden Gate Bridge Highway & Transportation District* (2011) PERB Decision No. 2209-M, warning ltr., p. 5.)

Snider's efforts to enforce the Association's meet and confer rights under the MMBA are also protected. (See *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, p. 424.) The same is true of Snider's statements to Deputy Chief Riddle and HR Manager Ko about his intent to seek the assistance of Association counsel in resolving the meet and confer issue. (See *Hartnell Community College District* (2015) PERB Decision No. 2452, pp. 38-41, citations omitted [holding an employee's good faith statement of intent to engage in protected activity was itself protected]; *California State Employees Association (Hutchinson)* (1999) PERB Decision No. 1355-S, warning ltr., p. 6 [holding that a statement of

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

intent to pursue legal remedies is protected speech].)[8] The first element of Snider's prima facie case is therefore satisfied.

2. The City's Knowledge

In this case, Ko, Riddle, and Chief Rueda were the City agents primarily involved in Snider's termination from employment. It is undisputed that all three of these individuals were aware of both UPC case number LA-CE-1106-M and the broader efforts from Snider and Association to meet and confer over the light duty issue. This satisfies the second element of Snider's prima facie case.

3. Adverse Employment Action

The Board applies an objective test when deciding whether an action in question is adverse to employment. (*County of Contra Costa* (2011) PERB Decision No. 2174-M, p. 7.) The central question is "'whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.'" (*Id*. quoting *Newark Unified School District* (1991) PERB Decision No. 864 (*Newark USD*), pp. 11-12.) Without question, termination from employment is an adverse employment action. (*Los Angeles Unified School District* (2015) PERB Decision No. 2447, proposed dec., p. 18, citing

[8] The PERB complaint does not specifically allege that earlier efforts by Snider and/or the Association to enforce the Association's meet and confer rights were protected under the MMBA. However, I find it appropriate to consider this conduct as part of this case because those earlier conversations were part of the same course of conduct that lead to filing UPC case number LA-CE-1106-M, which was the alleged protected act in the complaint. Both parties, moreover, explored these issues extensively through witnesses and documentary evidence. For instance, all of the City's witnesses testified to the full extent of their knowledge about all the communications regarding the light duty dispute. Multiple exhibits, including joint exhibits, also refer to these communications. Those communications were also described in detail in Snider's UPC in this case. Therefore, consideration of these additional protected acts is warranted here. (See *Los Angeles Unified School District* (2014) PERB Decision No. 2390, p. 5, fn. 3, citing *Lake Elsinore Unified School District* (2012) PERB Decision No. 2241 and *San Diego Unified School District* (1991) PERB Decision No. 885.)

Klamath-Trinity Joint Unified School District (2005) PERB Decision No. 1778; *County of Contra Costa*, p. 8.) Thus, this element of the prima facie case is satisfied.

4. Unlawful Motive

The final element of Snider's prima facie case for retaliation is whether the termination decision was based in whole or in part on Snider's protected activity. Motive may be established through either direct or circumstantial evidence. (*Omnitrans* (2010) PERB Decision No. 2121-M, p. 10, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89.)

a. Timing as Circumstantial Evidence of Retaliatory Motive

The timing between protected activities and the adverse action is an important circumstantial factor when determining the presence or absence of an unlawful motive. (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento SD*), proposed dec., p. 23) PERB may infer an unlawful motive from adverse actions taken concurrent with or shortly after an employee's protected activities. On the other hand, this inference is weakened by the passage of time. (*Los Angeles Unified School District* (1998) PERB Decision No. 1300, dismissal ltr., p. 1.) In either case, timing alone is typically not determinative and other evidence is required to establish a prima facie case. (*Ibid*.)

Here, the City contends that the timing of events does not support Snider's retaliation claim because UPC case number LA-CE-1106-M was filed on June 9, 2016, almost four months before October 3, 2016, when the City issued Snider's Notice of Intent to Terminate. The City also points out that it started its investigation around June 8, 2016, before the UPC was filed. PERB rejected a similar argument in *Coachella Valley Unified School District* (2013) PERB Decision No. 2342. There, the employer's adverse act occurred around six

months after the employee's protected act of filing a UPC. PERB still found circumstantial support for the employee's retaliation claim because the adverse actions took place just a few weeks after PERB issued its complaint in that UPC. (*Id*. at proposed dec., p. 20; see also *County of Riverside*, *supra*, PERB Decision No. 2090-M, p. 35 [finding support for a retaliation claim where complaints about working conditions occurred long before the adverse action, but continued and "came to a head" during a meeting shortly before the adverse actions].)

In this case, the City's arguments ignore important contextual details. For instance, the City hired its investigator less than a month after Snider and the Association began asserting that the contemplated light duty policy required negotiations before implementation. The investigation started on June 16, 2016, just one week after the Association filed UPC case number LA-CE-1106-M. The City issued the Notice of Intent to Terminate less than a week from September 29, 2016, when PERB issued its complaint in LA-CE-1106-M. These facts show that the City took important steps towards terminating Snider's employment soon after significant developments in either the light duty dispute or in UPC case number LA-CE-1106-M. I find that this strongly supports Snider's retaliation claim.

b. The City's Cursory Investigation

Snider contends that the City conducted only a superficial investigation before deciding to terminate his employment. An employer's cursory or inadequate investigation may be evidence of unlawful motive. (*North Sacramento SD, supra*, PERB Decision No. 264, p. 26.) However, merely lacking "just cause" for employee discipline does not equate to animus towards protected activity. (*Moreland Elementary School District* (1982) PERB Decision No. 227, pp. 14-15.) Employers are not always obligated to undergo a formal investigation

before making decisions adverse to employees' employment. (See e.g. *City of Santa Monica* (2011) PERB Decision No. 2211-M, p. 15.) But, once an employer undergoes an investigation into alleged misconduct, it must conduct itself in a fair and impartial manner. (*Woodland Joint Unified School District* (1987) PERB Decision No. 628, p. 6, fn. 3.)

In *County of Riverside, supra*, PERB Decision No. 2090-M, the Board found that an employer's "less than thorough investigation" suggested a retaliatory motive. There, the employer failed to produce any evidence supporting its claim that the accused employee had been dishonest. It also failed to explore fairly obvious sources in its investigation such as examining whether there was security camera footage of disputed events or listening to a recording where the employee allegedly made threatening statements. (*Id*. at pp. 37-38.) In *Jurupa Unified School District* (2015) PERB Decision No. 2450, the Board inferred animus from the fact that the employer's investigator only included statements corroborating an employee's alleged misconduct. The investigator declined to examine any positive comments it heard about the accused employee. (*Id*. at pp. 23, proposed dec., pp. 31-32; see also *City of Alhambra* (2011) PERB Decision No. 2161-M, pp. 10, 16 [holding employer's failure to speak with people with first-hand knowledge of the alleged misconduct supported employee's retaliation claim].)

In this case, Chief Rueda wrote in the termination documents that Snider knew that he was not supposed to be doing physically strenuous activities while on IOD. Rueda also accused Snider of dishonesty by failing to notify the Department that he felt well enough to return to duty before doing the race and also trying to hide his participation in the race.

The City hired a private investigator to examine the allegations against Snider. In its closing brief, the City describes this investigation as both independent and thorough.

However, there is reason to doubt both of those assertions. Deputy Chief Riddle testified that Rueda, City HR, and Riddle himself to a lesser extent, were involved in selecting the people the investigator interviewed. Riddle also said that the interviewee selection process only involved finding Department employees of different ranks. This is problematic because it omits people not employed at the Department who likely had valuable details about Snider's condition and the reasonableness of his actions. As one prime example, Rueda admits that neither the investigator nor the City itself made any attempt to speak with Snider's physician as part of the investigation. Rueda also acknowledges that he did not attempt to review any of Snider's medical records and does not know whether any of Snider's doctors gave instructions about exercising or limiting physical activities while on leave. Since one of the charges here is that Snider violated a prohibition against engaging in physical activities, understanding what activities, if any, Snider's doctors considered appropriate seems to be not only an obvious, but a critical, component of the City's investigation.[9] Rueda and Riddle both testified that they expect personnel on IOD to follow the instructions of their doctors. Riddle even knew from his own IOD that a doctor might suggest physical activity as part of the recovery plan while on leave. And yet, the City offers no explanation for declining to speak to Snider's physician or reviewing his medical records here. This failure suggests a lack of a detailed investigation.

The City also claims that Snider attempted to hide his participation in the race. But, as in *County of Riverside*, *supra*, PERB Decision No. 2090-M, this conclusion is suspicious because there was little in the record before PERB suggesting that Snider was dishonest about

[9] Snider himself testified that Dr. Costigan instructed him to increase his exercise as he felt better. However, since Dr. Costigan did not testify himself, Snider's account of what he said is hearsay. Hearsay evidence is admissible in PERB proceedings, but is not sufficient to establish a factual finding. (See PERB Regulation 32176; *Palo Verde Unified School District* (2013) PERB Decision No. 2337 (*Palo Verde USD*), pp. 19-20.)

doing the race. In fact, Snider testified that his having done the race was common knowledge around the Department. Snider also freely admitted doing the race to both Captain Szenczi and to the City's investigator. Snider said that he never denied doing the race to anyone, a fact that Rueda acknowledged in his own testimony.

The timing of the City's investigation is also suspicious. At hearing, Szenczi said that it was "pretty clear" to him by February 2, 2016, that Snider had done the race. He reported what he knew to Riddle. Both Szenczi and Riddle said that they considered the matter to be very serious because Snider was on IOD at the time. But neither took any actions to investigate the matter despite the fact that Snider had returned to work by then. Neither person even mentioned the race to Rueda until nearly three months later, around the same time the dispute over the light duty issue began to bubble up. In the intervening time period, Szenczi even issued Snider a favorable performance evaluation, which is inconsistent with Szenczi's claim that he suspected Snider of serious misconduct at the time. As discussed above, the City did not begin any formal investigation into Snider's conduct until after Snider and the Association demanded to bargain over the effects of the City's light duty policy. The City's assertions that Snider committed serious transgressions rings hollow when it took no action to investigate those transgressions until months later.[10] Accordingly, I find that the City's investigation supports Snider's retaliation claim.

[10] Both Riddle and Szenczi attempted to explain their inaction by stating that they were initially unsure about whether Snider actually participated in the race. This is inconsistent with Szenczi's testimony that he already believed that Snider had done the race soon afterwards. In the Notice of Intent to Terminate, Rueda wrote that Szenczi knew Snider did the race in February 2016. Even if it were true that Szenczi and Riddle were uncertain at the time, this does not explain why they declined to take any steps to confirm or refute their suspicions until months later, even though Snider was already back at work.

c. Disparate Treatment/Disproportionate Penalty

Snider also argues that the City handled his alleged misconduct differently from other employees and this this is further evidence of retaliation. An employer's disparate treatment of similarly situated individuals may be evidence of an unlawful motive. (*Omnitrans* (2008) PERB Decision No. 1996-M, pp. 21-22; *City of Milpitas* (2004) PERB Decision No. 1641-M, pp. 23-25.) For example, in *Golden Plains Unified School District* (2002) PERB Decision No. 1489, two probationary teachers received parent complaints about their work performance. The employer chose not to reelect only the teacher who requested union assistance in handling the complaints. The employee who did not request assistance received a teaching position the following year. (*Id*. at p. 9.) The Board found this was evidence of disparate treatment. (*Ibid*.) On the other hand, in *County of Orange* (2013) PERB Decision No. 2350-M, the Board rejected a disparate treatment theory because the union failed to show that the adverse action at issue was different from other employees who had engaged in a similar level of misconduct, which in that case included, theft, dishonesty, and misuse of computer resources. (*Id*. at pp. 8-9.)

Regarding the severity of action taken, a significantly disproportionate penalty may be evidence of retaliation. (*San Joaquin Delta Community College District* (1982) PERB Decision No. 261, pp. 5-7.) This may include taking action against the employee based on insubstantial or trivial allegations. (*Anaheim Union High School District* (2015) PERB Decision No. 2434 (*Anaheim UHSD*), proposed dec., pp. 85-86; *California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S, p. 13.) Similarly, evidence that the employer rarely took that type of adverse action may suggest disparate treatment. (*Newark USD, supra*, PERB Decision No. 864, p. 15, citing *Pleasant Valley School District* (1988)

PERB Decision No. 708, p. 16.) However, it is not PERB's role to evaluate the appropriateness of the penalty issued by the employer. (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 23, citations omitted). PERB has accordingly found no evidence of unlawful motive where the discipline issued was "within the range" of appropriate discipline for the employee's misconduct. (*State of California, (Department of Developmental Services, Napa State Hospital)* (1984) PERB Decision No. 378-S, proposed dec., pp. 29-30; see also *Santa Paula School District* (1985) PERB Decision No. 505, proposed dec., p. 52.) The charging party must prove that the penalty differed from past similar situations. (*Riverside Unified School District* (1987) PERB Decision No. 622, proposed dec., p. 64.)

In this case, Snider contends that the City and the Association have a history of handling employee misconduct "in house" rather than through formal disciplinary proceedings. He detailed instances where employees appear to have engaged in misconduct but were not disciplined by the City. In one particular example, he described a Firefighter who publicly announced that he planned on using sick leave whenever he was assigned a Friday or Saturday shift. That employee's sick leave use increased significantly afterwards. Rather than start an investigation or any disciplinary process, Deputy Chief Riddle spoke to Snider in his capacity as Association President to address the problem. There is no evidence that the employee was disciplined[11] and that employee continues to work for the Department.

The District did not refute these facts but appears to contend that Snider's conduct was far more egregious. However, I find the two situations to be similar enough to make some useful comparisons. Both matters involve the alleged abuse of leave time and dishonesty.

[11] The employee's disciplinary record or lack thereof, was not part of the record. However, Chief Rueda testified that he asked Riddle to provide instances where the City took action against another employee for conduct similar to Snider's. Elsewhere in his testimony, Rueda said that he did not recall Riddle ever mentioning that other employee's conduct to him.

Although the City might justifiably conclude that the two situations warrant different levels of corrective action, I find it suspicious that the City did not consider the employee's actions to warrant any investigation or discipline at all given that he appeared to admit that he was intentionally misusing his leave.

The City also suggests that this employee's situation is not relevant here since it pre-dated Chief Rueda's tenure at the Department. I find this argument unpersuasive. Rueda testified that, in general, he relied heavily on Riddle to provide him insight into the past practices, customs, and rule interpretations for the Department. Rueda also asked Riddle about the Department's practice for handling similar, related misconduct when deciding what penalty to issue Snider. These facts suggest that Rueda felt that the Department's past handling of misconduct factored into his decision to terminate Snider. Riddle never mentioned that employee's misconduct to Rueda.

The timing of the City's discipline, the City's suspicious investigation practices, and the fact that the City treated Snider's leave abuse claims differently from another similar employee collectively suggest that the City's actions were motivated by Snider's protected activity. Therefore, Snider has established all of the elements of his prima facie case for retaliation.

5. The District's Burden

Once the charging party establishes all of the elements of its prima facie case, the burden of proof shifts to the employer to show that the adverse action occurred for reasons unrelated to any protected activity. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221, p. 21, citing *Novato Unified School District*, *supra*, PERB Decision No. 210; *Martori Brothers Dist. v. ALRB* (1981) 29 Cal.3d 721, p. 730.) This requires the

employer to establish: "(1) that it had an alternative non-discriminatory reason for the challenged action; and (2) that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity." (*Palo Verde USD, supra,* PERB Decision No. 2337, pp. 18-19, citations omitted; see also *County of Orange, supra,* PERB Decision No. 2350-M, p. 16.)

In *Palo Verde USD, supra,* PERB Decision No. 2337, the employer asserted that it dismissed an employee due to her personality conflicts with other employees and that it would have done so even if she had not raised concerns about her working conditions or filed a UPC. (*Id*. at proposed dec., p. 20.) The employer's only support for that position was two management witnesses who described complaints they heard from other employees. The Board found that those hearsay accounts were insufficient to prove its affirmative defense, reasoning that "[w]here such alternative reason is alleged to be improper workplace conduct of the charging party, which is claimed to give the employer cause for non-discriminatory discipline or discharge, the employer must prove through independent and competent evidence both the existence of such improper workplace conduct and that this conduct motivated the employer's response." (*Id*. at p. 23.)

In *Jurupa Community Services District* (2007) PERB Decision No. 1920-M (*Jurupa CSD*), the employer claimed that it terminated an employee because of his misconduct on the job, not his protected activity. PERB rejected that argument because the claimed misconduct was unproven, exaggerated, or based solely on the hearsay testimony of managers who lacked first-hand knowledge of what actually happened. (*Id*. at proposed dec., pp. 19-21.)

In contrast, in *City of Santa Monica, supra,* PERB Decision No. 2211-M, the Board found that an employer had a non-retaliatory motive for terminating a probationary bus driver

who had been repeatedly warned about his misconduct and then received multiple complaints about his unsafe bus operation, which were corroborated by video footage. (*Id*. at pp. 17-18.) In *Anaheim UHSD, supra*, PERB Decision No. 2434, the Board found that an employer demonstrated that an employee's dismissal was not motivated by his union activities where he received substantial progressive discipline and where multiple percipient witnesses testified about how the employee committed numerous terminable offenses. (*Id*. at pp. 8-11, proposed dec., pp. 95-98.)

In this case, it is undisputed that Snider participated in the Spartan Race while on IOD. It is also undisputed that Snider did not notify the Department that he felt well enough to run the race beforehand and made no effort to return to active duty before his scheduled appointment with his doctor on February 2, 2016. The City contends that these actions were the true reason for terminating Snider's employment. Chief Rueda stated in the termination documents he authored that Snider knew he should not have been engaging in strenuous exercise while on leave. However, there was no evidence that anyone from the City instructed Snider on what level of activity it considered inappropriate while on leave. In fact, the only arguable guidance Snider had was that he should follow the instructions of his doctors. Department representatives knew at the time that a doctor might suggest exercise as part of an employee's recovery plan. And, as discussed above, the City took no steps to understand whether participating in the race conflicted with his doctor's instructions. These facts suggest that the conclusions in the termination documents were pretextual.

The City also accuses Snider of dishonesty because he failed to notify the Department that his condition improved enough that he felt he could run in the race. It maintains that dishonesty is particularly important in public safety positions, like Firefighters, because those

positions deal with the public during sensitive and vulnerable times. But, once again, there was no evidence that Snider was ever instructed to report changes in his condition ahead of his regularly scheduled medical appointments. Snider credibly testified that he did not understand that the Department expected him to update his supervisors about his health while on leave. The City does not dispute his testimony and did not explain why it considers Snider's conduct dishonest. Under the circumstances, the City did not demonstrate that Snider engaged in the misconduct alleged in the termination documents.

The City also accuses Snider of wrongfully attempting to hide his participation in the race, but no persuasive evidence supports this conclusion. Snider said he never denied or tried to conceal that he did the race to anyone. Rueda does not dispute this. Rueda testified vaguely to the fact that statements from another employee, Larkin, caused Rueda to believe that Snider had been dishonest about race. But Rueda did not specify what that Firefighter said. Even if he had, under *Palo Verde USD, supra*, PERB Decision No. 2337, Rueda's hearsay account of another person's statements are not sufficient to establish either that Snider had engaged in misconduct or that such misconduct was the true reason for the City's termination decision. (See also PERB Regulation 32176.)[12]

I conclude that the City has not met its burden of proving that it would have terminated Snider's employment even if he had not engaged in protected activities. The City did not adequately establish that Snider engaged in the misconduct he was accused of, as required under *Palo Verde USD, supra*, PERB Decision No. 2337. It also did not adequately explain

[12] The only details about what Larkin said are termination documents Rueda authored. That document describes a statement from one Firefighter which described statements from Larkin, which in turn recounts statements allegedly from Snider. Rueda's description of this statement in the termination documents contains multiple levels of hearsay. (See *Rocklin Unified School District* (2014) PERB Decision No. 2376, p. 27, fn. 10.)

the suspicious circumstances surrounding this discipline. Therefore, the City's actions violated Snider's rights under MMBA section 3506, which is an unfair labor practice under MMBA section 3506.5, subdivision (a), and PERB Regulation 32603, subdivision (a).

REMEDY

MMBA Section 3509, subdivision (b), authorizes PERB to order "the appropriate remedy necessary to effectuate the purposes of this chapter." (*Omnitrans* (2010) PERB Decision No. 2143-M, p 8.) This includes an order to cease and desist from conduct that violates the MMBA. (*Id*. at p. 9.) This remedy is warranted here as well. Therefore, the City is ordered to cease and desist from retaliating against Snider for his protected activity.

PERB's remedial authority also includes the power to order an offending party to take affirmative actions to effectuate the purposes of the MMBA. (*City of Redding* (2011) PERB Decision No. 2190-M, pp. 18-19.) In retaliatory discipline cases, PERB may order the employer to expunge all records of the retaliatory discipline and rescind all of the adverse effects of that discipline. (*County of Riverside*, *supra*, PERB Decision No. 2090-M, pp. 40-43.) Where the discipline has resulted in termination, the Board may order the employer to offer the discriminatee reinstatement to his former position or, if that position no longer exists, then to a substantially similar position, plus back pay and restoration of benefits. (*Id*.; see also *Palo Verde USD*, *supra*, PERB Decision No. 2337, p. 36; *Jurupa CSD*, *supra*, PERB Decision No. 1920-M, p. 5) This remedy is appropriate in this case. The City is found to have terminated Snider's employment in retaliation for his protected activities. The City is therefore ordered to rescind his termination, expunge its records of that discipline, and offer Snider reinstatement. The City is further ordered to make Snider whole for financial losses arising

directly from his termination, including back pay, augmented by interest at a rate of 7 percent per annum. (*County of Riverside, supra*, PERB Decision No. 2090-M, p. 43.)

Finally, it is appropriate to direct the City to post a notice of this order, signed by an authorized City representative. These remedies effectuate the purposes of the MMBA because employees are informed that the City has acted unlawfully, is required to cease and desist from such conduct, and will comply with the order. (*City of Selma* (2014) PERB Decision No. 2380-M, proposed dec., pp. 14-15.) The notice posting shall include both a physical posting of paper notices at all places where members of the Association's bargaining unit are customarily placed, as well as a posting by "electronic message, intranet, internet site, and other electronic means customarily used by the [City] to communicate with its employees in the bargaining unit." (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento* (2013) PERB Decision No. 2351-M.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the City of South Pasadena violated the Meyers-Milias Brown Act (MMBA), Government Code section 3500 et seq. The City violated the MMBA by terminating Owen Cliff Snider's employment in retaliation for engaging in statutorily protected activities, including filing and pursuing an unfair practice charge with PERB and demanding to meet and confer over matters that may be within the scope of representation.

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

A. CEASE AND DESIST FROM:

Retaliating against Snider because of his protected activities.

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

1. Rescind Snider's termination.

2. Expunge from its records, including Snider's personnel file: (1) the October 3, 2016 Notice of Intent to Terminate; and (2) the December 2, 2016 Notice of Termination, Accusation and Statement to Respondent; (3) the investigative report upon which the above documents were based; and (4) all references to those documents.

3. Offer Snider immediate reinstatement to his former position or, if that position no longer exists, then to a substantially similar position as of December 7, 2016.

4. Make Snider whole for any financial losses suffered as a direct result of his termination, including back pay, augmented by interest at a rate of 7 percent per annum.

5. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the Fire Department customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

6. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Snider.

Right to Appeal

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)