STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JURUPA COMMUNITY SERVICES DISTRICT EMPLOYEES ASSOCIATION, Charging Party, v. JURUPA COMMUNITY SERVICES DISTRICT, Respondent.	Case No. LA-CE-224-M PERB Decision No. 1920-M August 10, 2007

Appearance: Best, Best & Krieger by J. Michael Summerour and Brett A. Harvey, Attorneys, for Jurupa Community Services District.

Before Duncan, Chairman; Shek and Neuwald, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Jurupa Community Services District (District) to the proposed decision (attached) of an administrative law judge (ALJ). The unfair practice charge alleged that the District violated the Meyers-Milias-Brown Act (MMBA)[1] by terminating the employment of James Caldaronello (Caldaronello) in retaliation for his filing a grievance. The Jurupa Community Services District Employees Association alleged that this conduct constituted a violation of MMBA sections 3503 and 3506, and PERB Regulation 32603(a) and (b).[i]

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

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

The Board has reviewed the entire record in this matter, including the unfair practice charge and amended charge, the District's response, the partial dismissal letter, the parties' briefs, the ALJ's proposed decision and the District's exceptions.[3] We adopt the ALJ's proposed decision as the decision of the Board itself, except as discussed below.[4]

DISCUSSION

Whether Smith's Actions Could be Imputed to the District

The proposed decision found that Caldaronello was discharged in retaliation for his protected activity. Analyzing the case under the standard set forth in Novato Unified School District (1982) PERB Decision No. 210, the ALJ found that there was a sufficient nexus between Caldaronello's protected activity of filing a grievance and his termination. The ALJ found that the timing of his termination, less than two months after Caldaronello informed his manager about the grievance was a factor. The ALJ also found that the termination was motivated by anti-union animus, citing Smith's attempts to talk Caldaronello out of filing the grievance. Smith told Caldaronello that he must first talk to his supervisor and advised him that the District would not pay for his travel time, implying that filing the grievance would be a

[3]The Board has already considered and denied a request for oral argument in this case on January 4, 2007.

[4]In the proposed decision, the ALJ found that the testimony by Caldaronello's immediate supervisor, Steve Jaynes (Jaynes), Operations Manager Charles Smith (Smith) and General Manager Carol McGreevy (McGreevy) regarding complaints made by other employees against Caldaronello, was hearsay. While evidence of such alleged complaints may not have been hearsay because it was not necessarily offered for the truth of the matter asserted, but rather to show the District's motivation in terminating Caldaronello (see County of San Joaquin (Health Care Services) (2004) PERB Decision No. l649-M; Woodland Joint Unified School District (1990) PERB Decision No. 808), the ALJ was permitted to take into account the fact that the alleged complainants did not testify in assessing the credibility of the District's witnesses on these issues. We find that the ALJ's conclusions are supported by the record and defer to the ALJ's credibility determinations. (Beverly Hills Unified School District (1990) PERB Decision No. 789.)

waste of his efforts. Additionally, Smith found Caldaronello "insubordinate" and stated that he had a "bad attitude" when he refused to follow his "advice" about not filing the grievance.

The District excepts to the ALJ's factual determination that there was anti-union animus, arguing that even if true, Smith's actions should not be imputed to the District. However, the record is plain that at the time that Caldaronello received the notice and determination letter from Smith, Smith was a manager for the District and was acting in his capacity as an agent of the District with the authority to do so. (Inglewood Unified School District (1990) PERB Decision No. 792.)

Furthermore, the District asserts that rather than relying solely on Smith's recommendation to terminate Caldaronello, McGreevy met independently with Caldaronello at his so-called Skelly hearing[5] and personally interviewed additional witnesses regarding the incidents in the Notice of Proposed Termination. Therefore, the District argues, McGreevy's actions should be analyzed under the Board's holding in Konocti Unified School District (1982) PERB Decision No. 217 (Konocti). In Konocti the Board held that a school district superintendent's anti-union animus would not be imputed to the District, where the District conducted its own disciplinary hearing and rejected his recommendation. In this case McGreevy did rely upon Smith's recommendation as evidenced by her citing to and attaching Smith's December 14, 2004, notice of proposed termination. McGreevy also acknowledged

[5]McGreevy testified that she held a Skelly hearing for Caldaronello on January 3, 2005. At the hearing, she allegedly discussed each of the items in a December 14, 2004, letter with Caldaronello. In the proposed decision, the ALJ did not find that Caldaronello's meeting with McGreevy was a Skelly hearing and made no finding as to whether the District deprived Caldaronello of this right, because the issue was not alleged in the complaint nor fully litigated at hearing. (Skelly v. State Personnel Board (1975) 15 Ca1.3d 194 (124 Ca1.Rptr. 14).

that she was only aware of Caldaronello's October 12, 2004,[6] conversation with his immediate supervisor, Jaynes, and Smith because she read about it in Smith's December 14, 2004, letter. We find that the record in this case supports a finding that the designees' actions are attributed to the District.

ORDER[7]

Based upon the entire record in this matter, the Public Employment Relations Board (PERB) finds that the Jurupa Community Services District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503 and 3506, and PERB Regulation 32603(a) and (b) (Cal. Code Regs., tit. 8, sec. 31001, et seq.). The District violated the MMBA by discharging James Caldaronello (Caldaronello) in retaliation for his filing a grievance.

Pursuant to MMBA section 3509(b), it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Discharging or otherwise disciplining employees because of their exercise of protected rights;

2. Depriving recognized employee organizations of the right to represent their members.

[6]In the October 12, 2004 conversation, Caldaronello informed Jaynes and Smith of his intention of filing a grievance.

[7]The District excepted to the ALJ's determination that Caldaronello should be made whole by reinstatement and back pay wages with interest. The Board's statutory authority under the MMBA includes the ability to determine the appropriate remedy necessary to effectuate the purposes of the MMBA including the authority to order reinstatement with or without back pay. (MMBA sec. 3509(b); PERB Reg. 32325.) In this instance the Board has determined to revise a portion of the Order to clarify what we intend.

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

1. Offer to Caldaronello reinstatement to his former position of employment or if that position no longer exists, then to a substantially similar position;

2. Make Caldaronello whole for lost benefits, monetary and otherwise which he suffered as a result of his discharge in January 2005, including back pay together with interest computed at the rate of 7 per cent per annum;

3. Remove from all District files all notes, written warnings, notices of proposed termination, determination of proposed termination, and other documents relating to the discipline or discharge of Caldaronello;

4. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations in the District where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District 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.

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The District 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 the Jurupa Community Services District Employees Association.

Members Shek and Neuwald 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-224-M, Jurupa Community Services District Employees Association v. Jurupa Community Services District, in which all parties had the right to participate, it has been found that the Jurupa Community Services District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503 and 3506, and Public Employment Relations Board Regulation 32603(a) and (b) (Cal. Code Regs, tit. 8, sec. 31001, et seq.). The District violated the MMBA by terminating James Caldaronello (Caldaronello) in retaliation for his filing a grievance.

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

A. CEASE AND DESIST FROM:

1. Discharging or otherwise disciplining employees because of their exercise of protected rights;

2. Depriving recognized employee organizations of the right to represent their members.

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

1. Offer to Caldaronello reinstatement to his former position of employment or if that position no longer exists, then to a substantially similar position;

2. Make Caldaronello whole for lost benefits, monetary and otherwise which he suffered as a result of his discharge in January 2005, including back pay together with interest computed at the rate of 7 per cent per annum;

3. Remove from all District files all notes, written warnings, notices of proposed termination, determination of proposed termination, and other documents relating to the discipline or discharge of Caldaronello.

Dated: _____ JURUPA COMMUNITY SERVICES DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JURUPA COMMUNITY SERVICES DISTRICT EMPLOYEES ASSOCIATION, Charging Party, v. JURUPA COMMUNITY SERVICES DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-224-M PROPOSED DECISION November 7, 2006

Appearances: City Employees Associates by David Twedell, Attorney, for Jurupa Community Services District Employees Association; Best, Best & Krieger by Michael Summerour and Brett Harvey, Attorneys, for Jurupa Community Services District.

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

On May 31, 2005, the Jurupa Community Services District Employees Association (Association) filed an unfair practice charge alleging that the Jurupa Community Services District (District) terminated the employment of James Caldaronello (Caldaronello) in retaliation for his filing a grievance. On December 9, 2005, the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that by the above conduct, the District violated the Meyers-Milias-Brown Act (MMBA) section 3506 and PERB Regulation 32603(a), and by the same conduct violated section 3503, thereby committing an unfair practice under section 3509(b) and PERB Regulation 32603(b).[1] In its answer to the

[1] The MMBA is codified at Government Code section 3500 et seq. Section 3506 states: "(P)ublic agencies . . . shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502." Section 3503 provides that "(R)ecognized employee organizations shall have the right to represent their members in their employment relations with public agencies." Section 3509(b) provides that violation of the above sections "shall be processed as an unfair practice charge by the board." PERB Regulations are codified at California Code of Regulations, title

complaint, the District denied any wrongdoing.

An informal conference was held at the Los Angeles offices of PERB on January 19, 2006, but the matter was not resolved. A formal hearing was held before the undersigned on August 15 and 16, 2006. After the submission of post-hearing briefs, the matter was submitted for decision on October 20, 2006.

FINDINGS OF FACT

The District is a public agency within the meaning of MMBA section 3501(c). The Association is a recognized employee organization within the meaning of section 3501(b). Caldaronello was at all material times a public employee within the meaning of section 350l(d). He was employed by the District as a Grade I sewer collections worker since July 7, 2003. His immediate supervisor was Steve Jaynes (Jaynes); Jaynes' supervisor is Operations Manager Charles Smith (Smith), who in turn reports to General Manager Carol McGreevy (McGreevy). Caldaronello was a member of the bargaining unit represented by the Association. On January 30, 2004, Jaynes issued him a Performance Review for the period July 7, 2003, through January 7, 2004, in which he was rated "Meets Job Requirements" in each category. In the category entitled "Co operation," Jaynes commented:

> Jim generally co operates with associates and has assisted the Water Department staff when asked to do so. However he can also exhibit an abrasive manner whether it be in a joking manner or otherwise. This type of behavior is counterproductive. Jim must exhibit a more positive outlook.

In the "Current & Future Goals" section, one listed item reads:

> (U)se a more tactful and less abusive approach when speaking with his co-workers and the public.

8, section 31001 et seq. Regulation 32603 states in relevant part: "It shall be an unfair practice for a public agency to do any of the following: (a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by (MMBA) . . . (b) Deny to employee organizations rights guaranteed to them by (MMBA).

Prior to the events herein Caldaronello had never been disciplined.

On October 12, 2004,[2] Caldaronello had conversations with Jaynes and Smith. He claimed he should be paid travel time when he was called to work while off duty, and said he intended to file a grievance on the matter. On October 13 the Association filed a grievance on his behalf with McGreevy, alleging that the District unilaterally changed its practice of paying travel time for "on-call assignments.

On December 9 Caldaronello had an altercation with another employee, Russell Duckworth (Duckworth), (described fully, infra) whose supervisor was Robert Frusher (Frusher). On December 10 Jaynes and Frusher issued written reprimands to the two employees:

> As stated in the District's Personnel Manual (citations omitted), the Districts (sp] goals are to provide a work environment that promotes respect and cooperation among all employees. Harassment of any employee by another employee is illegal and shall not be tolerated. (Harassment may consist of verbal, physical, or visual types). Discourteous treatment of fellow employees is cause for disciplinary action.
>
> These guidelines will be adhered to during your employment with the District.
>
> The District was made aware of an incident involving you and a co-worker on December 9, 2004 at approximately 5:00 p.m. The District has investigated this matter and determined that a non-respective (sic] verbal exchange did occur between you and a co-worker. This exchange involved derogatory and inflammatory remarks by you (you are a fucking dick, you're a fucking asshole).
>
> Your actions on December 9, 2004 were in violation of the above stated District rules and policies. Failure to follow these procedures will lead to further disciplinary actions up to and including dismissal.[3]

[2] All dates hereafter refer to the year 2004 unless otherwise specified.

[3] Duckworth received a virtually identical written reprimand.

Jaynes and Frusher also spoke about the altercation with Smith and with McGreevy (discussed fully, infra.) McGreevy asked Jaynes if there had been other incidents involving Caldaronell0[4]; when Jaynes responded affirmatively, she told him to document all incidents and proceed with a proposed termination.

On December 14 Jaynes issued another written reprimand regarding Caldaronello's December request for credit for eight hours compensatory time. The reprimand accuses Caldaronello of falsely accusing a supervisor of modifying his time card. The reprimand also criticizes Caldaronello for not completing an incident form or providing medical verification after taking a day of sick leave on December 3 (both incidents are described fully, infra.) The reprimand concludes as follows:

> Honesty and truthfulness are traits employers must insist on. You have exhibited a lack of both. Your actions on December 7, 2004 (the day he returned to work after the injury) were in violation of the above stated District rules and policies. Failure to follow these procedures will lead to further disciplinary actions up to and including dismissal.

Also on December 14, Smith prepared a Notice of Proposed Termination citing seven items, which McGreevy reviewed and approved before it was given to Caldaronello. The only incidents directly involving Smith were the first and fourth items; the others were reported to him by Jaynes from the notes Jaynes had prepared at McGreevy's request. The Notice reads:

> You are hereby advised that intent to terminate of (sic) your employment with the Jurupa Community Services District (District) has been proposed, effective the end of the work day on December 22, 2004.
>
> This action is based on the following:
>
> (1) The Field Supervisor warned you on February 19, 2004 for intentionally slamming doors in the warehouse area.

[4] There is no evidence that McGreevy asked Frusher if there were prior incidents involving Duckworth.

(2) On August 3, 2004, you were once again warned about using derogatory comments to describe a co-worker that had received a promotion in the Collections Department.

(3) You were given written instruction on September 2, 2004 to provide the District with verification of future illnesses by his[5] medical provider due to incurring three separate sick leave occurrences within a six-month period per District policy Exhibit (A)([6]).

(4) On October 12, 2004,I confronted you with a problem regarding grievance procedures for travel time not allowed within District practice. You responded that you would let the representative go forward. You were warned regarding your attitude during the exchange.

(5) You called to report that he (see footnote 3) could not report to work on Friday December 3, 2004 due to an injury. It was not known to the District whether the injury was work related or from after hours activities. After returning to work on December 7, 2004 from sick leave, you were asked for verification from your medical provider. You stated that the time off was due to an injury at work. You were reminded that you had not informed a supervisor immediately and had not completed the required incident/accident report. You stated that you would fie a grievance if you had to submit the verification because a co-worker knew of your injury and your intent to claim a HEPPA[7] violation; for actions that you informed the co-workers of. (You were warned about lifting too much weight on the preceding Thursday by a lead worker, but you did not heed this warning). You were instructed to provide the required verification and report. You have not provided the required information as of this date.

(6) On December 7, 2004 you filed a Comp Time Request for hours from November 11, 2004 that which (sic) you had already been compensated for. You then falsely accused your supervisor of making modifications to your timecard.

(7) On December 10, 2004 you were again involved in a dispute

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[5] As noted above, Smith got his information from Jaynes' written notes, thus he incorporated the notes into this Notice without changing the pronoun.

[6] This item refers to a memo sent by Jaynes to Caldaronello reciting the District's six-month sick leave policy, informing him that because he had already taken sick leave three times during the period April 29, 2004 to August 18, 2004, he was required to provide written medical verification for any future use of sick leave, and that failure to follow proper procedures "will lead to further disciplinary actions . . ."

[7] This refers to a set of environmental regulations.

> with another co-worker that involved your use of derogatory and inflammatory remarks and a written reprimand was issued Exhibit (B).
>
> Due to your unwillingness to affect needed conduct changes and your unresponsiveness to multiple warnings I am recommending as of December 22, 2004 that you be relieved of your position with the District.

On December 20 Smith issued a Notice of Proposed Termination, Clarification of Verbage (sp) in which he changed the original Notice as follows: a few grammatical changes were made; the words "once again" were deleted from paragraph (2); and the following language was added to paragraph (4), indicated by underline:

> You responded that you would let the representative go forward with the grievance without following the guidelines. You were warned regarding your attitude during the exchange of information because you were insubordinate during the conversation.

In early January 2005, McGreevy spoke one-on-one with Caldaronello and other witnesses regarding the various incidents cited in the Notice and the other incidents reported by Jaynes.[8] On January 27, 2005, McGreevy issued a Determination of Proposed Termination, which states:

> You are hereby advised that in accordance with the District's

[8] At the hearing, McGreevy characterized her January meeting with Caldaronello as a Skelly hearing. (In Skelly v. State Personnel Board, (1975) 15 Ca1.3d 194 (124 Cal.Rptr. 14), the court determined that public employees have a due process right to a pre-termination hearing). The Association disputes that a due process hearing was held. The District's Personnel Manual provides that upon notice of a proposed termination, the employee may respond orally or in writing to the Manager, who "shall review the matter" and render a determination, which is what happened here. The Manual also provides that the employee may appeal the Manager's determination, in which case a hearing would be held before the Personnel Committee. Here, Caldaronello filed an appeal but the District rejected it as untimely. In its original unfair practice charge the Association alleged that the District unlawfully denied Caldaronello his right to a hearing; however, the amended charge did not address this issue and it was dismissed by PERB prior to complaint. Based on the Personnel Manual, I do not find that Caldaronello's meeting with McGreevy was a Skelly hearing. However, as the issue of his right to a due process hearing was not alleged in the complaint or fully litigated at the hearing, I make no finding as to whether the District deprived him of this right.

> Personnel Manual (citations omitted), I have considered and reviewed all the relevant facts concerning the proposed termination notice provided to you on December 14, 2004, and letter of clarification dated December 20, 2004 (both attached).
>
> It is with regret that I must inform you that due to the previous disciplinary memorandums provided to you on September 2, 2004, December 10, 2004 and December 14, 2004 (copies attached), and above all, the seriousness of the actions by you, as described within the December 10, 2004 written reprimand, your release from employment with the District will be upheld, and is effective on January 29, 2005.

The Determination letter then recites the items in Smith's corrected Notice with the following changes: various sections of the District Personnel Manual are cited as being violated by these items; and paragraph (4) is eliminated.

The District contends that its decisions were motivated by Caldaronello's misconduct and that it would have taken the same actions in the absence of his grievance. Both Smith and McGreevy testified that the incidents cited in the Notice and the Determination include all the reasons for his termination and that there are no other reasons. As to those incidents, the parties contend as follows:

(1) Door slamming: On February 19 Smith was in the warehouse area when he saw Caldaronello head for the bathroom. Smith could not see the bathroom door, but heard it slam when Caldaronello exited, which caused it some damage. Smith called out to him that slamming doors wouldn't solve anything; Caldaronello responded that he didn't slam it, but it had slipped. According to Caldaronello, Smith also said, "We can send people home for that," to which Caldaronello responded, "For what?" At the hearing Smith testified that he did not believe the door slipped, as it was a heavy door, very hard to open and close, and he believed Caldaronello deliberately slammed it. There was no further discussion on the matter, and no action was taken.

(2) Derogatory comments to coworker: In August Jaynes told Smith that employee John Faber (Faber), who had successfully competed against Caldaronello for a promotion, said Caldaronello subjected him to "repeated verbal abuse" by saying, "(T)he only way to get ahead in this District is to be a kiss-ass." Smith testified that his reference to Caldaronello's being "once again warned," (which was included in his original December 14 Notice but removed in his December 20 Clarification) was because Jaynes told him that Faber had made prior complaints. Smith did not explain why he deleted the reference to prior warnings in his Clarification.

McGreevy, in her investigation of the events leading to the discharge in January 2005, spoke to Faber; according to her notes, Faber said no adverse remarks were made to his face but Caldaronello had told other coworkers that he (Caldaronello) should have gotten the promotion. For his part, Caldaronello denied insulting Faber, rather, he claimed to have congratulated him on the promotion. Faber did not testify.

(3) Sick leave instructions: When asked whether Jaynes' giving Caldaronello the September 2, 2004, memo regarding sick leave policy was disciplinary, Smith claimed that it was a "corrective action." However, Caldaronello was not counseled or disciplined regarding this memo. There is no allegation that prior to the issuance of the memo Caldaronello had violated any sick leave policy.

(4) Travel time grievance: On December 3 Caldaronello was called to work while off duty; on his time card he claimed travel time. On December 12 he spoke with Jaynes, who said the District does not pay for travel time. According to Caldaronello, he said if Jaynes could not get it resolved, he would fie a grievance. Jaynes admitted that Caldaronello "may have said" he might fie a grievance. Later that day Jaynes told Smith about the travel time problem and the potential grievance. Smith testified that Jaynes said Caldaronello had not

spoken with him about it; but Smith could not explain how Jaynes knew there was a problem if he hadn't spoken to Caldaronello about it. Shortly after talking with Jaynes, Smith went to where Caldaronello was working and approached him to discuss the potential grievance. Smith told him there were "steps to go through," i.e., he must first speak with his supervisor, then go through the "chain of command," i.e., the General Manager, then the Personnel Committee. Smith said the District had an "open door" policy and problems should be worked out at the personal level.[9] Smith also explained to Caldaronello that the District did not reimburse travel time. However, according to Smith, Caldaronello seemed intent on going forward with a grievance, and responded: "(W)ell, the grievance is filed and I'll let my representatives handle it. That's one of the pleasures and joys of having representation. I paid for representation, let them do it." Smith testified that what upset him was Caldaronello's attitude and his unwillingness to follow proper procedures. At the hearing Smith was asked several times, by the undersigned and by District counsel, if an employee must first go through the entire chain of command before filing a grievance; Smith said no, you could fie a grievance simultaneously; however, if that were so, Smith could not explain how Caldaronello was abusing the grievance procedure. Smith was also asked why he felt Caldaronello was insubordinate; he responded that it was because Caldaronello had put travel time on his time card knowing the District would not pay for it, and because he indicated he did not care about the procedures and did not have to follow them but would go forward with his grievance.

On October 13 the Association filed the grievance with McGreevy in a letter explaining, inter alia, that Caldaronello had already pursued Step 1 of the grievance procedure by speaking with Jaynes, who could not resolve the problem. Neither Smith nor any other

[9] At the hearing, Smith did not explain whether this "chain of command" process was part of the parties' written grievance procedure, part of the District's Personnel Manual, or an unwritten informal process of which employees were aware.

District witness pointed to any abuse of the contractual grievance procedure by Caldaronello or the Association.

McGreevy testified that during her January 2005 investigation, she spoke with employee Mark Center (Center), who overheard the conversation between Smith and Caldaronello and said that Caldaronello was "verbally aggressive." However, her investigation notes, entered into evidence, show that Center reported as follows: "The conversation was normal on both sides. Calm, no raised voices. When he (Center) heard it was personnel problem he walked away." In her Determination letter, she omitted the entire incident; when asked why it was omitted, she testified as follows:

> I didn't consider that was part and parcel of why I should be terminating Mr. Caldaronello ... It wasn't something that I was concerned with ... my main concern was the fact that Mr. Caldaronello's actions towards employees had escalated and was getting worse as time went on. My main concern was for the safety of my employees and the safety of the public ... Mark Center had said to me that there were no raised voices so I didn't even take that portion into consideration.

(5) Sick leave: On December 3 Caldaronello phoned Jaynes and said he could not report to work because his back was hurting. When he returned to work on December 7, the next scheduled work day, he told Jaynes he injured his back at work. Jaynes told him he needed a doctor's note for the absence and should fill out an incident report for the work injury. Caldaronello said he had not seen a doctor, so he was sent to the City's medical provider, who presumably provided a written report to the City. Caldaronello did not submit an incident report because he decided not to fie a Workers Compensation claim.[10] Caldaronello testified that he believed the City's sick leave policy did not require a doctor's note for his December 3 absence, as it was beyond the six-month period referred to in Jaynes'

[10] The District did not provide evidence regarding what circumstances require an incident report; I assume it is a precedent to filing a work injury claim.

September 2 memo, i.e., beginning April 29. Jaynes did not speak to him about this again, but issued him a written reprimand on December 14. The only testimony Smith gave was that Jaynes told him Caldaronello was asked to bring in a doctor's note and he did not comply. McGreevy testified that when she spoke with Caldaronello in January 2005, she learned that he was confused about how the "rolling six months" applied to the sick leave policy.

(6) Making a false accusation: On December 7 Caldaronello went to the District payroll office to inquire why compensatory time, which he believed he earned, did not show on his pay stub. The secretary showed him his time card and explained that he had been properly paid. According to Caldaronello, the secretary then asked if he were accusing someone of altering his time card and he said no. However, Jaynes testified that Caldaronello "made an allegation that a supervisor had changed his time card;" Jaynes did not say which supervisor was accused or how he learned of it. Jaynes issued a December 14 written reprimand accusing Cadaronello of making a false accusation. The only testimony Smith gave was that Jaynes told him Caldaronello made a false accusation. The payroll secretary did not testify

(7) Duckworth altercation: According to the District, this was the incident which precipitated the termination. It is undisputed that Caldaronello and Duckworth were involved in an angry exchange of words on December 9. Duckworth, whose truck was missing a piece of equipment, called Caldaronello a "lens thief," and the men swore at each other; they also made some body contact. According to Caldaronello, at the start of the incident he was bent over looking into his mailbox when Duckworth came over to him and they "made contact;" shortly thereafter he was at the ice machine when Duckworth approached him, called him a thief, and they swore at each other. He denied that he pushed or shoved or made any intentional contact with Duckworth. The two men were spoken to by their supervisors, Jaynes and Frusher. According to Jaynes, Duckworth said Caldaronello deliberately "banged into

him" or "shoved him," while Caldaronello said he just lightly "bumped him." Jaynes testified that he did not cite physical contact in his reprimand because, while the two employees agreed as to the words spoken, they disagreed as to the physical contact. Frusher testified that Duckworth reported the incident as follows: Caldaronello brushed up against him and nudged him with an elbow; he asked what the problem was and Caldaronello said he heard Duckworth accused him of stealing; the two men then got into name-calling; Caldaronello went into the lunchroom, came back out, nudged Duckworth again, knocking a clipboard out of his hand, and there was more name-calling. Frusher said another employee was nearby but did not see or hear anything; there were no other witnesses. Frusher said he believed Duckworth, who was shaken by the incident, and that Caldaronello was the aggressor. Jaynes and Frusher issued written reprimands to their respective supervisees dated December 10.

Jaynes reported the incident to both Smith and McGreevy. Jaynes testified reporting to Smith that there was verbal abuse, as the two men admitted swearing at each other, but that there was only "possible" physical abuse as the men disagreed on whether there was intentional physical contact. Smith, whose entire knowledge of the incident came from Jaynes and Frusher, testified, in contradiction to Jaynes, that he believed Caldaronello intentionally approached Duckworth and pushed him. Smith also testified that other employees told Frusher that Caldaronello was the principal aggressor; Smith did not know the names of these other employees. However, according to Frusher's testimony, there were no witnesses to the incident. Smith claimed the City has "zero tolerance" for abuse and that upon this incident he decided to issue a proposed termination. However, physical contact was not mentioned in his Notice; Smith did not say why it was not mentioned.

As for McGreevy, Jaynes reported to her that there was a verbal altercation, but he did not say it was physical. She asked Jaynes if there were any previous incidents involving

Cadaronello; Jaynes said there were and that other employees were afraid of him because he was aggressive. McGreevy told Jaynes to document all previous incidents and to proceed with a proposed termination. She also spoke about the December 9 incident with Duckworth; she testified that he told her that Caldaronello purposely bumped into him and that he felt threatened. McGreevy testified that her main concern with the incident was that it went from verbal to physical, because the City has zero tolerance for verbal and physical abuse. However, physical contact was not mentioned in her Determination letter; when asked at the hearing why it was not mentioned, she said she did not know.

Duckworth did not testify; at the time of the hearing he was no longer employed by the City.

Other Incidents

At the hearing, Jaynes also testified that Caldaronello's behavior was improper on other occasions not cited in the Notice or Determination letter: In August 2003 he made negative remarks to an employee assigned to train him; in October 2003 he "belittled" Faber who complained to Jaynes; in December 2003 a customer complained when Caldaronello caused water to be blown out of her toilet and he blamed her for it; he made various other disparaging remarks about fellow employees and about his job, including once saying, e.g., "(N)o matter how hard you work you'll get a crappy evaluation;" the medical clinic where Caldaronello and others were sent for physical exams phoned Jaynes to report that he was being uncooperative; once when Jaynes phoned him after he failed to report to work, he said he thought he was on vacation, Jaynes told him to come in to work, and he did. Frusher also testified that Caldaronello made derogatory remarks to Duckworth on two occasions shortly before the December 9 incident. None of the affected individuals testified.

McGreevy claimed that Caldaronello's history of retaliatory and aggressive behavior led her to her decision to terminate him, that her major consideration was "the escalation of the aggressiveness from verbal to physical and going from the field into the office, from field employees now to an office employee who is a female."[11] However, she also testified that her Determination letter, which does not allege any physical abuse by Caldaronello, contains all the reasons for his termination.

ISSUE

Did the District discharge James Caldaronello in retaliation for his protected activity?

DISCUSSION

To establish a prima facie case of retaliation in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employee because of the exercise of those rights. (Campbell Municipal Employees Association v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Association v. City of San Leandro (1976) 55 Cal.App.3d 553 (San Leandro).)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following nexus factors should be present: (1) the employer's disparate

[11] The only female mentioned in connection with any of the incidents was the office secretary to whom Caldaronello allegedly made a false accusation. She did not testify. There was no allegation of either verbal or physical abuse regarding this incident.

treatment of the employee (Campbell); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) employer animosity towards union activists (San Leandro; Los Angeles County Employees Association v. County of Los Angeles (1985) 168 Cal.App.3d 683).

Timing and Animus

Here, there is no dispute that Caldaronello spoke to Smith about a grievance on October 12 and filed it on October 13, and that the District had knowledge of it. The decision to terminate his employment was made on December 10, less than two months later. Thus, timing is a factor. (Mountain Empire Unified School District (1998) PERB Decision No. 1298 (three months between protected activity and adverse action); Novato Unified School District (1982) PERB Decision No. 210 (four months between most recent protected activity and adverse action].)

Further, Smith's remarks during his October 12 travel time conversation with Caldaronello reveal his animus toward a union grievance. In that conversation Smith told Caldaronello he must first talk with his supervisor, and contended that he had not done so. This not only contradicts both Caldaronello's and Jaynes' testimony, but contradicts the fact that Smith discussed the travel time problem and the looming grievance with Jaynes immediately before his conversation with Caldaronello. Smith continued to try to convince Caldaronello to either give up his complaint because the District would not pay for travel time, or go up the "chain of command" pursuant to the District's "open door" policy, either before or

in lieu of filing a grievance; yet there is no evidence that these steps are required. However, Caldaronello stood on his right to fie a grievance; this is what angered Smith, and it was over this stand that Smith accused Caldaronello of being "insubordinate" and having a "bad attitude." These phrases have been seen as evidence of an employer's anti-union animus and as pretext for its anti-union actions. (County of San Joaquin (2003) PERB Decision No. 1524, citing NLRB v. Florida Medical Center, Inc. (5th Cir. 1978) 576 F.2d 666 (98 LRRM 3144).) I find that to be the case here.

I find therefore that the Association has shown a sufficient nexus between Caldaronello's protected activity and his termination.

District defenses

Once the charging party has established a prima facie case, the burden shifts to the employer to show that its actions were not unlawfully motivated, but that it would have taken the same actions even in the absence of the employee's protected conduct. (Wright Line, a Division of Wright Line, Inc. (1980) 251 NLRB 1083 (105 LRRM 1169)[12]; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Ca1.3d 721 (175 Cal.Rptr. 626).

The District contends that it was motivated solely by Caldaronello's misconduct:

In Jaynes testimony and in the District's post-hearing brief, examples were given of alleged acts of misconduct which are not included in the corrected Notice of December 20 (which deleted the reference to Caldaronello being previously warned about derogatory comments) or the Determination letter of January 27. However, Smith and McGreevy stated without reservation that the Notice and the Determination letter contain all the reasons for the termination. As Smith and McGreevy, the District agents who made the decision to discharge

[12] It is appropriate that PERB take guidance from cases decided by the National Labor Relations Board where, as here, the statutes are sufficiently similar. (Inglewood Teachers Association v. PERB (1991) 227 Cal.App.3d 767 (278 Cal.Rptr. 228).)

Caldaronello, limited the reasons for their decision, I shall accordingly not consider as relevant to the discharge any alleged acts of misconduct cited in their directives.

As to the items in the Notice, only three are cited which occurred prior to the filing of Caldaronello's grievance:

(1) Door slamming: There was no follow-up to this incident by counseling, verbal warning, written warning, or discipline. Rather, it seems to have been so inconsequential that Smith ignored it until December when he pulled it out of his memory and cited it in the Notice. I therefore do not find that it supports a reason for discharge.

(2) Derogatory comments to coworker: Caldaronello denied that he made derogatory comments about Faber. Faber did not testify, thus any evidence about what he told Jaynes is hearsay. Nor did any employee to whom Caldaronello's comments were allegedly made testify, thus whatever they told Faber is double-hearsay. PERB Regulation 32176 provides that "(H)earsay evidence is admissible but shall not be sufficient in itself to support a finding..." Here, the hearsay and double hearsay presented by Jaynes, Smith and McGreevy is the only evidence regarding this incident, and is contradicted by Caldaronello's denial. Thus it cannot support a finding that Caldaronello engaged in the alleged misconduct. Further, the testimony of Smith and McGreevy were contradictory: according to Smith, Jaynes reported that Faber accused Caldaronello of "repeated verbal abuse," while according to McGreevy, Faber did not say Caldaronello spoke directly to him, but rather he told other employees (whom McGreevy did not interview) that he should have been promoted instead of Faber. In addition to contradicting Smith, McGreevy's account hardly rises to the level of an incident worthy of discipline. Finally, there is Smith's unexplained removal of the reference, in his corrected Notice, to Caldaronello being previously warned about derogatory comments. I therefore find, for many reasons, that this incident does not support the District's defense.

(3) Sick leave instructions: Jaynes' September memorandum regarding the District sick leave policy cannot be considered disciplinary or even critical, as Caldaronello had not yet exceeded three sick leave days in the relevant six-month period and had not yet been accused of violating the policy. This item therefore cannot support a misconduct defense.

As to the incidents which occurred on or after October 12:

(4) Travel time grievance: The October 12 conversation with Smith is, as discussed above, evidence of anti-union animus. Beyond that, I do not find that Caldaronello engaged in any misconduct to support the District's defense. Caldaronello might have been less than polite to Smith, but he did nothing more than insist on his right to fie a grievance in the face of Smith's attempts to dissuade him. Further, McGreevy removed the incident from her Determination letter; she gave no reason for the removal other than that she was not "concerned" with it. In light of this admitted limitation of the District's reasons for the discharge, I shall not find this incident relevant to the discharge, notwithstanding the District's citation of it in the post-hearing brief.

(5) Sick leave: Caldaronello's December 3 sick leave is the only cited incident arguably worth discipline, as he admittedly did not submit a doctor's note or an incident report. However, although he did not see a doctor during his one-day absence, he was sent to the District's doctor who presumably provided the District with a written report. Further, as McGreevy was aware, Caldaronello was confused about the sick leave policy and believed he was in a new six-month period. As to the incident report, Caldaronello did not submit it because he decided not to fie a work injury claim, and the District did not provide evidence that this was required in the absence of a claim. I therefore do not find that Caldaronello's failure to submit an incident report constituted any misconduct. I do not contest that

Caldaronello should have submitted a doctor's note. However, his failure to do so was merely a technical violation and far from worthy of termination.

(6) Making a false accusation: Caldaronello denied that he accused anyone of altering his time card. Jaynes' contrary testimony, and the District's decision to discharge, were based solely on a hearsay report from the payroll secretary; the secretary herself did not testify. In Woodland Joint Unified School District (1987) PERB Decision No. 628 (Woodland), written complaints about a discharged employee were rejected as evidence of the employee's misconduct. Although the letters were relied on by the school district in discharging him, the letter writers did not appear as witnesses, thus the letters could not be used to support the school district's defense where the employee himself testified that he had not engaged in misconduct. (See also, Midland Hilton and Towers (1997) 324 NLRB 1141 (157 LRRM 1222), citing RJR Communications (1980) 248 NLRB 920 (104 LRRM 1141); (Sea Crest Construction Corp. (2000) 330 NLRB 584 (LRRM .) Here, Jaynes' hearsay testimony cannot be credited. Accordingly, I reject it and find that Caldaronello did not falsely accuse any supervisor of altering his time card. Nor do I find that Jaynes believed in good faith that Caldaronello made such an accusation. Jaynes did not counsel, reprimand, or otherwise discipline Caldaronello; to the contrary, Jaynes testified that he "did not think about any further action." Accordingly, I find that this allegation is itself a false accusation, without any basis in fact, and is used as a pretext to hide the real reason for the discharge.

(7) Duckworth altercation: This incident, which precipitated the discharge, does not ring true as a reason for the District's decision. It is undisputed that the two men swore at each other and there was some physical contact. However, there was a dispute about how the physical contact occurred and who was to blame, such that neither Jaynes nor Frusher cited it in their warning letters; Jaynes told Smith there was only "possible" physical abuse. Thus,

notwithstanding the District's reference to a "physical altercation" in its post-hearing brief, as well as the testimony of Smith and McGreevy that what motivated them toward termination was the escalation of the verbal altercation into a physical one, neither the Notice or the Determination letter cited any physical contact. Further, although Duckworth was equally reprimanded, there is no evidence that his discharge was considered. I therefore do not credit the testimony of Smith and McGreevy that they believed there was physical abuse, nor do I credit their contention that this incident was so serious that it convinced them to prepare for Caldaronello's discharge.

Summary and Conclusion

Based on all the above, I do not find any of the items in the Notice or the Determination, alone or in the aggregate, sufficient to satisfy the District's defense. To the contrary, except for the technical sick leave violation, I find them to be pretextual, some exaggerated, some untrue, some pulled out of a hat, some based solely on hearsay, cited in an attempt to mask the true motivation for the discharge, i.e., the grievance. I particularly note that the District called as witnesses only members of its supervisory and managerial staff, i.e., Jaynes, Frusher, Smith, and McGreevy. Not one unit witness was called to substantiate the District's allegations that Caldaronello engaged in misconduct. This serves to weaken the District's case. (Woodland; see also, Central Union High School District (1983) PERB Decision No. 324, where charging party failed to call corroborating witnesses and respondent relied on hearsay evidence.)

The timing is close, as the termination wheel began spinning on December 10, just short of two months after the grievance was filed, prior to which Caldaronello had received no written warnings or discipline during his tenure with the District. Anti-union animus is present in Smith's October 12 reaction to the grievance. And with nothing occurring after October 12

except for a misunderstanding regarding sick leave policy and a verbal altercation with Duckworth, who was equally disciplined, Caldaronello's employment was terminated.

I find that the District has not sustained its burden of showing that it would have discharged Caldaronello in the absence of his filing a grievance. Accordingly, I conclude that the District discharged Caldaronello in retaliation for his protected activity, in violation of MMBA section 3506 and PERB Regulation 32603(a), and that by the same conduct the District deprived the Association of the right to represent its members, in violation of MMBA section 3503 and PERB Regulation 32603(b).

REMEDY

MMBA section 3509(b) gives PERB the exclusive jurisdiction to

> (m]ake a "determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter..."

It has been found that the District unlawfully discharged Caldaronello in retaliation for his filing a grievance. It is therefore appropriate that the District be ordered to cease and desist from such conduct. The District should also be ordered to offer Caldaronello reinstatement to his former position or if that position no longer exists, then to a substantially similar position, and to make him whole by paying him for financial losses suffered as a result of the discharge, including back pay for wages lost along with interest computed at the rate of 7 per cent per annum. (San Jacinto Unified School District (1994) PERB Decision No. 1078; Oakland Unified School District (1985) PERB Decision No. 540.)

The District should also be required to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes

of the MMBA that employees be informed of the resolution of this controversy and of the District's readiness to comply with the ordered remedy. (Placerville Union High School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Jurupa Community Services District (District) violated the Meyers-Milias-Brown Act (Act), Government Code section 3500 et seq. The District violated the Act by discharging James Caldaronello (Caldaronello) in retaliation for his filing a grievance.

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

A. CEASE AND DESIST FROM:

1. Discharging or otherwise disciplining employees because of their exercise of protected rights;

2. Depriving recognized employee organizations of the right to represent their members.

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

1. Offer to James Caldaronello reinstatement to his former position of employment or, if that position no longer exists, then to a substantially similar position;

2. Make James Caldaronello whole for all financial losses which he suffered as a result of his discharge in January 2005, including back pay together with interest computed at the rate of 7 per cent per annum;

3. Remove from all District files all notes, written warnings, notices of proposed termination, determination of proposed termination, and other documents relating to the discipline or discharge of James Caldaronello;

4. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, 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.

5. 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 the Jurupa Community Services District Employees Association.

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 95814-4174
FAX: (916) 327-7960

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, sec. 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130; Gov. Code sec. l I020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 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, secs. 32300, 32305, 32140, and 32135(c).)

Ann L. Weinman
Administrative Law Judge

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. 224-M, Jurupa Community Services District Employees Association v. Jurupa Community Services District, in which all parties had the right to participate, it has been found that the Jurupa Community Services District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. by terminating James Caldaronello (Caldaronello) in retaliation for his filing a grievance.

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

A. CEASE AND DESIST FROM:

1. Discharging or otherwise disciplining employees because of their exercise of protected rights;

2. Depriving recognized employee organizations of the right to represent their members.

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

1. Offer to Caldaronello reinstatement to his former position of employment or, if that position no longer exists, then to a substantially similar position;

2. Make Caldaronello whole for all financial losses which he suffered as a result of his discharge in January 2005, including back pay together with interest computed at the rate of 7 per cent per annum;

3. Remove from all District files all notes, written warnings, notices of proposed termination, determination of proposed termination, and other documents relating to the discipline or discharge of Caldaronello.

Dated: _____ JURUPA COMMUNITY SERVICES DISTRICT

By: _____
Authorized Agent

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