STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN MATEO COUNTY FIREFIGHTERS LOCAL 2400, Charging Party, v. MENLO PARK FIRE PROTECTION DISTRICT, Respondent.	Case No. SF-CE-390-M PERB Decision No. 1983-M October 28, 2008

Appearances: Davis & Reno by Duane W. Reno, Attorney, for San Mateo County Firefighters Local 2400; Burke, Williams & Sorensen by William F. Kay, Attorney, for Menlo Park Fire Protection District.

Before Neuwald, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the San Mateo County Firefighters, Local 2400 (Local 2400) of a dismissal of an unfair practice charge. The charge alleged that the Menlo Park Fire Protection District (District) violated the Meyers-Milias-Brown Act (MMBA)[1] by imposing discipline on Fire Captain Troy Holt (Holt) for engaging in protected activity. Local 2400 alleged that this conduct constituted a violation of MMBA section 3506.

We have reviewed the entire record, including but not limited to, the unfair practice charge, the District's position statement, the warning letter, the amended charge, the dismissal letter, Local 2400's appeal, and the District's response. Based on this review, we find the dismissal of this case was proper for the reasons set forth below.

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

BACKGROUND

The District staffs a special Swift Water Rescue team (SWR) and also sponsors the California Task Force 3 Urban Search and Rescue Team (US&R). The instant charge begins in August 2005 when both the SWR and the US&R teams were deployed to New Orleans to aid in disaster relief following Hurricane Katrina.

Holt is a fire captain for the District and a member of the US&R team. Local 2400 is his exclusive representative. At the time of the events leading to this charge, Holt served on the board that reviewed firefighter applicants and determined who would be accepted/rejected for firefighter positions in the District.

Rudy Torres (Torres) is a mechanic for the District and is training to become a firefighter. Torres is not one of Holt's subordinates and is not in Holt's chain of command. In addition, Torres is not a member of the bargaining unit represented by Local 2400.

A. Holt's Investigation of Torres

Although he was a member of the US&R team, Holt was not deployed to New Orleans.[2] Torres, on the other hand, was deployed. According to Local 2400, after learning of Torres' deployment, Holt developed some concerns regarding safety issues because he believed Torres was not adequately trained for the tasks associated with such duty. In Holt's opinion, Steve Strom (Strom), another District mechanic, was adequately trained and, therefore, should have been deployed in lieu of Torres.

Upon Torres' return from New Orleans, Holt questioned Torres regarding the duties he performed in New Orleans. Specifically, Holt asked Torres about his "Code 3" training and

[2]The SWR team was the first team deployed to New Orleans. Holt was available for deployment but was not selected. It is unclear from the record why Holt was not sent with the SWR team. A few days later, the US&R team was deployed. According to the Local 2400, Holt sustained an injury that prevented him from participating in the deployment with the US&R team.

whether he drove Code 3 during the deployment.[3] Following this conversation, Holt sent an e-mail dated October 6, 2005, to a Local 2400 representative requesting an investigation into this matter. Local 2400 notified Chief Schapelhouman (Schapelhouman) of Holt's concerns but did not request a formal investigation.

On November 26, 2005, Holt attended an officers' conference. Captain Phil Van Orden (Van Orden), Torres' instructor at the Menlo Park Fire Academy, also attended the conference. While at the conference, Holt questioned Van Orden regarding the status of Torres' training. In particular, he asked Van Orden if Torres would be required to make-up the classes he missed due to the Katrina deployment or if he would be given "a pass". Holt warned Van Orden that there would be "consequences" if he gave Torres "a pass".

Holt met with Fire Chief Douglas Sporleder (Sporleder) on November 29, 2005, to discuss his concerns regarding the US&R team, Torres, and other issues regarding his staff. Among other things, Holt told Sporleder that personnel who did not meet the minimum qualifications were deployed to New Orleans. Holt also informed Sporleder that Torres drove Code 3 but was neither trained not qualified to perform such duty. In addition, Holt indicated he was retaliated against when members from outside the District were deployed to Katrina when Holt was available for deployment. Sporleder indicated he would look into the matters discussed and get back to Holt.

[3]"Code 3" refers to the use of both lights and siren on a moving emergency vehicle. The use of lights and siren on a stationary vehicle is not a Code 3 violation.

B. Other Complaints Regarding Torres

In addition to Holt's concerns regarding Torres, at least two other employees raised concerns about Torres to District management. Strom, the mechanic that was not deployed to New Orleans, asked Sporleder for an explanation regarding the decision to deploy Torres to New Orleans. A meeting was held on November 16, 2005, to address Strom's concerns. The meeting was attended by Strom, Torres, Sporleder, Shapelhouman, Chief Randy Shurson (Shurson), Chief Frank Fraone, Rob Dehoney (Dehoney), and two other fire chiefs. Holt did not participate in the meeting. At the conclusion of the meeting, Torres indicated he did not have any issues to bring up to the chiefs.[4]

Firefighter Bill Moore (Moore), a member of Holt's crew, complained to Holt on two separate occasions that Torres was getting preferential treatment by circumventing the chain of command. On both occasions, Holt encouraged Moore to file a complaint with Shapelhouman. Following Holt's advice, Moore telephoned Shapelhouman and expressed his concerns. By e-mail, dated November 29, 2005, Shapelhouman informed Moore that Torres' conduct did not violate the District's policy. However, Shapelhouman did indicate he wanted to develop a policy addressing Moore's concerns and asked Moore for his assistance.

C. Torres' Formal Complaint

On December 5, 2005, Torres met with Shurson and asked to be removed from his US&R duties. When asked why he sought the removal, Torres indicated Holt, Moore and Strom had been harassing him. Torres stated Holt confronted him, made threats over his

[4]According to the e-mail summarizing this meeting, Dehoney, based on "recent and ongoing conversations that took place between individuals," took exception with Torres' assertion that he did not have any other issues that required consideration. Dehoney's conversations, however, were not summarized in the e-mail. In addition, the e-mail required Torres and Strom to "address and treat each other with respect and maintain a professional work environment" and to "attend conflict resolution and communication enhancement training."

deployment to New Orleans and threatened Torres regarding his future as a firefighter. Thereafter, on December 21, 2005, Torres filed formal complaints against Holt, Moore and Strom in which he alleged their threatening behavior created a hostile work environment.

All three complaints were investigated by outside investigators. Both Moore and Strom were exonerated. Holt, however, was given a written reprimand on April 27, 2006. The reprimand found Holt's interaction with Torres violated, among other provisions, the District's anti-harassment policy. In addition, the reprimand included a summary of the independent investigator's findings, which provided in relevant part:

> You were not happy that Mr. Torres was part of the US&R team that was deployed to New Orleans to Hurricane Katrina. You also were not happy that you were not deployed. When Mr. Torres returned from New Orleans in September 2005, you said to Mr. Torres 'You took food out of my kid's mouth' because Mr. Torres had gone to New Orleans and had the opportunity to earn certain overtime that you did not. You also made similar comments to other personnel about this decision to send Mr. Torres and not you to New Orleans.
>
> On another occasion, you questioned Mr. Torres in an accusatory manner regarding his activities while in New Orleans. You asked Mr. Torres if he had been driving with 'lights and siren on.' You also asked if Mr. Torres went out with the Coast Guard doing rescues. You made your inquiries to Mr. Torres outside the chain of command, and apparently, with the hopes of learning of inappropriate actions by Mr. Torres or orders from Menlo Fire's Chief Officers while Mr. Torres was deployed.
>
> Making matters worse, you explicitly went on to tell Mr. Torres that, if he did not report alleged improprieties by Menlo Fire's Chief Officers, it could get Mr. Torres in trouble if he wanted to become a firefighter with Menlo Fire. This threat also entirely inappropriate.
>
> You also told Mr. Torres on October 17, 2005 that he was getting an 'Orley Hatfield' reputation. Orley Hatfield was a prior candidate for firefighter that was rejected at the oral board stage. You served on Mr. Hatfield's oral board which apparently rejected Mr. Hatfield, at least in part, because you resented Mr. Hatfield's good relationship with certain Chief Officers. Thus, your comment to Mr. Torres conveyed that, if he did not

report alleged improprieties by Chief Officers, Mr. Torres would also suffer when he interviewed with the oral board.

On September 20, 2006, Local 2400 filed the instant unfair practice charge in response to the issuance of this reprimand.

DISCUSSION

To establish a prima facie case of discrimination/retaliation in violation of MMBA section 3506 and PERB Regulation 32603(a),[5] 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 Assn. v. City of Campbell (1982) 131 Cal.App.3d 416 [182 Cal.Rptr. 461] (Campbell); San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 [127 Cal.Rptr. 856] (San Leandro).)

A. Holt Engaged in Both Protected Conduct and Non-Protected Conduct

PERB has held that reports by employees regarding safety concerns may be protected. In Regents of the University of California (1983) PERB Decision No. 319-H (Regents), the Board held that an employee's report regarding safety concerns to his exclusive representative was protected. In Los Angeles Unified School District (1995) PERB Decision No. 1129 (LAUSD), the Board held that an employee's report regarding a safety related incident to an employer was protected. More recently, the Board held that, under certain circumstances, an employee's report regarding safety concerns to third parties can also be protected. (Oakdale Union Elementary School District (1998) PERB Decision No. 1246 (Oakdale).)

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

In its appeal, Local 2400 argues that Holt was engaged in protected conduct when he questioned Torres regarding his deployment in New Orleans and reported his concerns to Local 2400. The District, on the other hand, argues that Holt's conduct amounted to harassment, intimidation and threats and, therefore, was not protected by the MMBA.

Clearly, there is a dispute between the parties regarding the nature of Holt's conduct. However, when determining whether a charging party has stated a prima facie case, the Board agent must credit the charging party's factual allegations over those of other parties. (Golden Plains Unified School District (2002) PERB Decision No. 1489.) Consequently, any disputed facts or competing theories of law should properly be left for an administrative law judge to consider after a formal hearing.

Based on the foregoing, we find Local 2400 presented sufficient evidence to establish that: (1) Holt harbored safety concerns regarding Torres' deployment to New Orleans; (2) Holt questioned Torres to determine if those concerns were warranted; and (3) that Holt reported those concerns to his exclusive representative. Thus, based on Regents, we conclude Holt's e-mail to his union representative regarding his safety concerns about Torres's deployment to New Orleans was protected by the MMBA. In addition, based on LAUSD, we find Holt's November 29, 2005, discussion with Sporleder regarding his safety concerns about Torres's deployment was also protected by the MMBA.

Local 2400 also claims Holt engaged in protected activity when he questioned Van Orden regarding Torres' make-up work in the fire academy classes. However, one of the key elements to finding protected conduct under Regents and LAUSD is the actual reporting of the safety concerns to either the exclusive representative or to the employer. In this case, Holt's questioning of Van Orden occurred after Holt reported his concerns regarding Torres to the union and there is nothing in the record to suggest Holt reported (or intended to report)

facts derived from this conversation to either Local 2400 or to the District. As such, this conduct was not protected under Regents or LAUSD.

B. The District was Aware that Holt Exercised Protected Rights

As discussed above, Holt reported his concerns regarding Torres' deployment to a Local 2400 representative and requested an investigation into the matter. In response to this request, Local 2400 informed Shapelhouman of Holt's concerns but did not request an investigation. In addition, Holt met with Sporleder on November 29, 2005, to discuss his complaints regarding the Hurricane Katrina deployment, including his complaint that Torres should not have been deployed. Based on the foregoing, we find the District was aware of Holt's protected conduct. Accordingly, the second element of the prima facie case is satisfied.

C. The District Imposed an Adverse Action on Holt

With respect to the next element, the Board has held that the issuance of a written reprimand constitutes an adverse action. (Trustees of the California State University (2006) PERB Decision No. 1853-H.) Thus, Holt's April 27, 2006, reprimand satisfies this element of the prima facie case. Consequently, the remaining issue is whether the District took the action because of Holt's protected conduct.

D. Local 2400 Failed to Establish a Nexus Between Holt's Conduct and the Reprimand

In its appeal, Local 2400 argues that the issuance of the reprimand constitutes an unfair labor practice because it threatens Holt with additional disciplinary actions if he attempts to address safety concerns through his union. Although not expressly set forth in the statement of exceptions, it appears that Local 2400 is arguing that the reprimand, on its face, provides direct evidence that Holt was disciplined for his protected conduct.

The reprimand, however, does not state that Holt was disciplined for reporting his alleged safety concerns to Local 2400. Rather, in addition to several other admonitions, the reprimand merely states:

> To the extent you have concerns with a particular procedure, or decision or action of others, you should feel free to report it, but should follow the chain of command. If particular circumstances clearly preclude this, you should speak to an uninvolved Fire Manager, rather than use your status as a Captain and/or oral board member for new firefighter candidates to pressure, intimidate or threaten other employees.

Clearly, the reprimand directs Holt to follow the chain of command. However, it does not expressly state it was issued because Holt reported his safety concerns to Local 2400. Accordingly, we find the reprimand, on its face, does not constitute direct evidence that the District issued the reprimand because of Holt's protected activity.

PERB has long recognized that direct evidence of discriminatory intent is rare. (See Oakdale.) Thus, the Board has held that circumstantial evidence of discriminatory intent may be sufficient to establish the required nexus. 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 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 Assn. v. County of Los Angeles (1985) 168 Cal.App.3d 683 [214 Cal.Rptr. 350]).

1. Timing

To establish a nexus, Local 2400 must first show that Holt's protected activity and the District's adverse action occurred close in time to one another. In this case, Holt sent his e-mail regarding Torres to Local 2400 on October 6, 2005, and Local 2400 contacted the District to address Holt's concerns. However, the District did not issue the reprimand until April 27, 2006. Considering the fact that over six months elapsed between the time of Holt's protected conduct and the adverse action, we conclude the charge lacks the close temporal proximity between protected conduct and the adverse action to support a finding of nexus in this case.

2. Holt Was Not Subjected to Disparate Treatment

Assuming, arguendo, that timing supported an inference of retaliation, Local 2400 must also show at least one additional factor to establish a nexus between Holt's protected conduct and the issuance of the reprimand. An employer's disparate treatment of the employee is one such factor. (City of Milpitas (2004) PERB Decision No. 1641-M.) However, it does not appear that the District's anti-harassment policy was applied differently between the three individuals implicated in Torres' complaint. Holt, Strom and Moore were investigated by an outside investigator in response to the complaint, and the District acted upon the separate findings of all three investigations. Under these circumstances, notwithstanding Holt's reprimand, we do not find that Holt was treated differently from other, similarly situated employees.

3. The District Did Not Depart From Established Procedures

In its reply to the District's position statement, Local 2400 argues the District departed from its harassment policy when it failed to require Torres to exhaust the informal harassment complaint resolution process before initiating the formal complaint process. However, the District's policy states:

> Using the informal complaint procedure is not comfortable for everyone or appropriate for every situation. Protesting or objecting to the conduct with the individual(s) involved is not a prerequisite to filing a formal or an informal complaint.

Local 2400 does not cite to any specific language in the District's harassment policy that explains why the informal process must be exhausted prior to the initiation of a formal complaint. To the contrary, the policy expressly states that using the informal complaint process is not appropriate for every situation. Thus, based on the plain language of the policy, it does not appear that the District impermissibly departed from established procedures when it issued Holt's reprimand.

4. The District Did Not Conduct a Cursory Investigation, or Offer Inconsistent, Vague or Exaggerated Justifications for the Issuance of the Reprimand

After receiving Torres' formal complaint, the District referred the matter to an outside investigator. According to the District, the investigator interviewed eight witnesses, including Holt, and submitted a report summarizing her findings on March 10, 2006. The District issued the reprimand on April 27, 2006.

Based on the foregoing, we find nothing in the record to support the inference that the District's investigation was cursory. Moreover, it appears the District reasonably considered and relied upon the report as the basis for the reprimand. Consequently, we find that the District did not offer inconsistent or contradictory justifications for the issuance of the

reprimand, nor did it offer exaggerated, vague, or ambiguous reasons for the issuance of the reprimand.

5. The District Did Not Exhibit Union Animus

Last, a nexus can be established by demonstrating the employer harbors animosity towards union activists. In this case, however, the District took no action against Holt when it first learned that Holt reported his concerns regarding Torres to Local 2400 and, in fact, appeared to cooperate with Local 2400 to address Holt's concerns. Moreover, both Holt and Moore had union representation during the investigation of Torres' complaint, but only Holt was disciplined for his conduct. Based on our review of the record, we find nothing to suggest that the issuance of the reprimand was the product of any union animus on behalf of the District.

In its appeal, Local 2400 noted that in 2003, Holt sent an e-mail to a Local 2400 representative expressing concern regarding the District's use of contract employees who were paid using funds from the Federal Emergency Management Agency but assigned to perform work that was not related to US&R. The e-mail identified tasks that contract employees were assigned to perform and also indicated that the US&R equipment cache suffered because of the use of the contract employees. According to Local 2400, Holt was removed from his coordinator position for the US&R Logistics Group because of this e-mail. Later, Schapelhouman stated in an e-mail to Holt:

> As an Officer and Manager in the organization you should have worked through your chain of command to solve these problems and address these issues. Instead you sent in your Labor Representatives who brought up your issues of getting rid of US&R contract employees because they were not used how you had intended them to be and returning to just using Menlo Park Fire Personnel and having overtime opportunities returned to our members. The information you provided was inaccurate, divisive and counterproductive to the program. Many of the issues had nothing to do with labor and should have been handled through

> the normal chain of command, and the ones that did involve labor could have been handled differently.

Although not expressly stated in the appeal, it appears this evidence was offered to demonstrate the District harbored animosity against Holt for his union activities.[6] We find this evidence does not support that inference. Rather, we find this evidence merely supports that proposition that Holt has a penchant for operating outside the chain of command. We, therefore, conclude the record does not support the proposition that the District issued the reprimand due to union animus.

Because Local 2400 failed to establish any of the nexus factors, we find Local 2400 failed to establish a prima facie case of retaliation against Holt. Accordingly, this charge was properly dismissed.

ORDER

The unfair practice charge in Case No. SF-CE-390-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Neuwald joined in this Decision.

Member Dowdin Calvillo's concurrence begins on page 14.

[6]These events clearly occurred outside the six-month statute of limitation and may not form the basis of an independent unfair practice charge. However, notwithstanding the timing of these events, they may be used as background evidence of the District's motivation. (Trustees of the California State University (2008) PERB Decision No. 1970-H .)

DOWDIN CALVILLO, Member, concurring: I concur in the majority's conclusion that the Menlo Park Fire Protection District did not retaliate against Captain Troy Holt (Holt) for engaging in protected activity. I also join in the majority opinion's analysis, with one exception. Unlike the majority, I believe it is necessary to determine whether Holt's questioning of Rudy Torres (Torres) in October 2005 regarding Torres' New Orleans deployment was protected activity under the Meyers-Milias-Brown Act (MMBA). For the following reasons, I would find that the charge did not allege facts establishing that Holt's questioning of Torres was protected by the MMBA.

The Public Employment Relations Board (PERB or Board) has thrice held that reporting safety concerns is protected activity. (Oakdale Union Elementary School District (1998) PERB Decision No. 1246; Los Angeles Unified School District (1995) PERB Decision No. 1129; Regents of the University of California (1983) PERB Decision No. 319-H.) However, none of these cases addresses the issue here: whether and to what extent an employee's conduct leading up to the safety report is protected. National Labor Relations Board (NLRB) cases provide relevant guidance on this issue. However, before turning to those cases, it is necessary to discuss the scope of protected activity under MMBA.

MMBA section 3502 provides in relevant part that "public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." Section 3543(a) of the Educational Employment Relations Act (EERA)[1] contains identical language. Section 7 of the National Labor Relations Act (NLRA), on the other hand, provides in pertinent part that "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own

[1]EERA is codified at Government Code section 3540 et seq.

choosing, and to engage in other concerted activities for the purpose of collective bargaining and other mutual aid or protection."

Despite the differences in language, the Board in Modesto City Schools (1983) PERB Decision No. 291, found the scope of protected activity under EERA section 3543(a) to be the same as that under Section 7 of the NLRA. Because the relevant language of MMBA section 3502 is identical to that in EERA section 3543(a), the scope of protected activity under MMBA is the same as under both EERA and the NLRA.[2]

Under Section 7 of the NLRA, "any activity by a single employee may be protected if it seeks to initiate, induce or prepare for group action." (Transit Management of Southeast Louisiana (2000) 331 NLRB 248, 249 [170 LRRM 1447].) Similarly, PERB has held that "individual action with or on behalf of others is deemed concerted action and therefore entitled to protection, but that conduct less than that, divorced from collective concerns," is not protected. (Regents of the University of California (1987) PERB Decision No. 615-H.) Under the NLRA, protected concerted activity specifically includes discussions about safety related issues between two or more employees. (Systems with Reliability, Inc. (1996) 322 NLRB 757, 760 [154 LRRM 1096].)

However, the NLRB has only found pre-safety report discussions to be protected when they address safety concerns already held by the participants and the purpose of the discussion is to pursue further action on behalf of the participants. For example, in Anheuser-Busch, Inc. (1978) 239 NLRB 207 [99 LRRM 1548], the NLRB found an employee engaged in protected activity by "discussing with his coworkers the safety of welding in the grain building and drafting the questions and comments [to present to management] in consultation with them."

[2]When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the NLRA and California labor relations statutes with parallel provisions. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

(Id., at p. 211.) Likewise, in Beverly Health & Rehabilitation Services (2000) 332 NLRB 347 [170 LRRM 1273], the Board found an employee's conversations with co-workers about their mutual safety concerns to be protected, particularly as the employee then took those concerns to line management. (Id., at p. 368.)

Here, the charge does not establish that Holt's questioning of Torres was protected concerted activity. The charge alleges that Holt had safety concerns about Torres' conduct in New Orleans. However, it does not show that Torres shared those concerns or that he wanted Holt to present those concerns to management, San Mateo County Firefighters Local 2400 or a third party. Instead, the charge indicates that Holt questioned Torres merely to confirm what he had heard about Torres so that he could make a report of his own safety concerns. Thus, the discussion between Holt and Torres was not of the same character as those found protected in the NLRB cases above. Further, while the charge alleges that Holt "was told" Torres was driving Code 3, it does not allege that the employees who made these statements to Holt shared his safety concerns or that he was acting on their behalf in questioning Torres. For these reasons, I would find that the facts alleged in the charge fail to establish that Holt's questioning of Torres was protected by the MMBA.