STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED PUBLIC EMPLOYEES OF CALIFORNIA, LOCAL 792, Charging Party, v. COUNTY OF LASSEN, Respondent.	Case No. SA-CE-902-M PERB Decision No. 2612-M December 19, 2018

Appearances: Goyette & Associates by Nicole Valentine, Attorney, for United Public Employees of California, Local 792; Renne Sloan Holtzman Sakai by Timothy G. Yeung, Kevin McLaughlin, and Susan J. Yoon, Attorneys, for County of Lassen.

Before Banks, Winslow, and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the County of Lassen (County) and cross-exceptions by United Public Employees of California, Local 792 (UPEC) to the attached proposed decision of a PERB administrative law judge (ALJ). The ALJ concluded that the County retaliated against County employee Monique Schofield (Schofield) by terminating her employment after she sought assistance from her union, UPEC, in violation of the Meyers-Milias-Brown Act (MMBA)[1] and PERB Regulations.[2] The ALJ found that the same conduct interfered with UPEC's right to represent bargaining unit employees, in violation of the MMBA and PERB

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

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

Regulations. As a remedy, the ALJ ordered the County to, among other things, make Schofield whole by offering her reinstatement to her prior position, and by providing back pay and benefits, with interest, subject to offset for wages earned during the relevant period.

The County excepts to the ALJ's finding that the County terminated Schofield because she exercised protected rights and to the ALJ's remedial order. UPEC's cross-exceptions challenge the ALJ's denial of its motion to amend the complaint to allege that the County interfered with Schofield's individual rights.

We have reviewed the record in this matter and considered the parties' arguments in light of applicable law. We conclude that the ALJ's proposed decision is free of prejudicial error and we adopt it as the decision of the Board itself, subject to the following discussion.

BACKGROUND

The ALJ's procedural history and extensive factual findings can be found in the attached proposed decision. We summarize those findings here to give context to our discussion of the exceptions.

On October 29, 2014, County Director of Health and Social Services Melody Brawley (Brawley) sent Schofield a written offer of employment as a Behavioral Health Case Worker II (Case Worker II). Schofield accepted the offer several days later and started work on December 1, 2014. Under the parties' Memorandum of Understanding (MOU), Schofield's employment was subject to an initial 12-month probationary period, in which the County could terminate Schofield without cause.

On January 14, 2015,[3] Union representative Ryan Heron (Heron) sent an e-mail to Brawley and Personnel Analyst Cheryl Douglas (Douglas). Heron's e-mail asked about a

[3] All dates hereafter refer to 2015, unless otherwise stated.

rumor he had heard that the County had hired a Case Worker II who did not have a Bachelor's degree. Heron's e-mail also asked the County to send him a copy of the Case Worker II job description. Heron did not know the identity of the employee in question at that time. After receiving Heron's e-mail, Brawley reviewed the applications of recently hired employees, discovered that Schofield had not yet completed her Bachelor's degree, and determined that the County had therefore erred in hiring her at the Case Worker II level.[4]

The next day, January 15, Brawley called Schofield and informed her of the County's mistake. Brawley offered to correct the error by temporarily demoting Schofield to a Case Worker I position, which would result in a 10 percent pay cut. Brawley said Schofield would move back to the Case Worker II position as soon as she completed her Bachelor's degree, which was expected to be in four months' time. Brawley also told Schofield that since she had been working in the wrong classification, she had been overpaid, and that Brawley would consult with other County officials to determine how to address the overpayment. Brawley e-mailed Schofield later that day, informing her that the County had overpaid her by $354.44, and asking her whether she wanted to repay that amount via deductions from one paycheck or two. Brawley's e-mail reiterated that Schofield would be promoted to Case Worker II as soon as she graduated.

[4] The job description provides that the minimum qualifications for Case Worker II "typically" can be met by a combination of a Bachelor's degree and 3-4 years of experience, while the minimum qualifications for Case Worker I "typically" can be met by a combination of an Associate Arts (AA) degree and 1-2 years of experience. Brawley testified that, despite the flexible job description provision, it was the County's practice to require a Bachelor's degree for appointment to the Case Worker II classification. Schofield clearly noted on her employment application that she had an AA degree and that her Bachelor's degree was "in progress." There is no suggestion that Schofield was anything less than candid regarding her educational background and work experience, and indeed the County acknowledged its mistake and apologized to Schofield for its error in hiring her at the Case Worker II level prior to completion of her Bachelor's degree.

Later on January 15, Brawley e-mailed Heron, stating that the County was looking into the matter and that "[i]f an error was made, it will be corrected promptly." Brawley did not identify Schofield as the employee at issue, and did not tell Heron about her communications with Schofield.

On January 16, Brawley again e-mailed Schofield to ask whether she would prefer the repayment to be made in one paycheck or two. Schofield forwarded Brawley's e-mails to Heron and asked him to "weigh in."

The following chain of events occurred on January 20. Brawley e-mailed Schofield a third time to ask about the repayment. Schofield responded that she did not agree with either repayment option and had asked Heron for assistance. Schofield then forwarded Brawley's January 20 e-mail to Heron, again asking for assistance. Heron then responded to Schofield's e-mail, copying Brawley, Douglas, and other County officials. Heron raised several questions about the County's proposed action, including whether the California Labor Code allowed for the recoupment of wages, whether the action was a demotion, and whether it would affect Schofield's anniversary date or probationary period. Brawley did not respond to Heron, but rather e-mailed Schofield to advise her that she was being designated as a Case Worker I with a reduction in pay, retroactive to December 1, 2014, and that the retroactive change "will be reflected in your next paycheck." Brawley also stated that any wage recoupment would be suspended until Schofield's questions about the County's right to repayment were settled. Schofield forwarded Brawley's e-mail to Heron. Later that evening, Heron wrote to Brawley and Douglas (with a copy to Schofield), reminding them that he had earlier written to them regarding whether the reclassification was a demotion, and asking them to "check into" whether the proposed action was consistent with the parties' MOU and state labor law. Heron

concluded his e-mail: "I appreciate you checking into these items. I understand the need for the County to have people in the right classifications based upon qualifications, but want to ensure the MOU is followed and labor laws are adhered to as well. Thanks for working with us on this."

The County did not respond to Heron's questions. Instead, it terminated Schofield's employment on January 26, and informed her that as a probationary employee she did not have a right to appeal or grieve the termination. The County did not inform Schofield that she could reapply for a Case Worker I position, even though it was standard practice to so inform employees. Schofield believed that the County would not rehire a terminated employee.

DISCUSSION

Although the Board reviews exceptions to a proposed decision de novo, to the extent that a proposed decision adequately addresses issues raised by certain exceptions, the Board need not further analyze those exceptions. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) The Board also need not address alleged errors that would not impact the outcome. (*Ibid*.) In this case, we do not address UPEC's exceptions, as they would not impact the outcome.[5]

I. Liability Analysis

The crux of this case involves the following well supported finding: "The County changed its decision to reclassify Schofield to a decision to terminate her employment because UPEC raised questions [the County] did not know how to answer. The County provided no

[5] UPEC excepts to the ALJ's denial of its motion to amend its charge and the unfair practice complaint to include an allegation that the County interfered with Schofield's rights. The proposed interference allegation is based on the same facts as the retaliation claim. We need not resolve UPEC's exception, because in this decision we order a fully-restorative remedy, which would be substantially the same even were we to find that the ALJ should have granted UPEC's motion to amend.

evidence that it would have terminated Schofield's employment had UPEC not intervened on her behalf." (Proposed decision, p. 15.) In its exceptions, the County admits that UPEC's questions set in motion a course of events that led to Schofield's termination. The County claims that this sequence does not render the termination unlawful, and that the proposed decision would prevent an employer from ever terminating an employee based upon information provided by a union. Moreover, the County claims as an affirmative defense that it would have terminated Schofield's probationary employment, notwithstanding UPEC's involvement.

While the proposed decision adequately addresses these arguments, we supplement the proposed decision by emphasizing that the County's legal violation was its about-face once UPEC raised questions about whether the County's actions were consistent with the Labor Code and the MOU. This is not to say that an employer need always continue employing an employee who does not meet established qualifications. However, where there is a means to continue employing the employee, the employer may not refrain from doing so, or cancel a plan to do so, merely because the employee's union raises questions or otherwise seeks to represent the employee. Such employer conduct is quintessential retaliation for protected activity and interference with protected rights. (*Regents of the University of California (UC Davis Medical Center)* (2013) PERB Decision No. 2314-H, pp. 11, 14 [employer notified employee of his options regarding involuntary schedule change, employee sought union's assistance, and employer then offered inferior options]; *Berkeley Unified School District* (2003) PERB Decision No. 1538, pp. 4-5 [even where employer had discretion whether to grant scheduling waivers to employees, it could not discontinue granting waivers in response to protected activity].) Moreover, we affirm the ALJ's conclusion that the County did not have

an alternative non-discriminatory reason for terminating Schofield's employment. There were no performance issues with Schofield's work, and the County's concern about fairness to other bargaining unit members would have been resolved by maintaining its initial decision to temporarily reclassify Schofield as a Case Worker I. The County's lament that it "did not know what to do" in response to Heron's e-mail is not credible and in any event is legally inapposite; an employer may not take adverse action merely because it is perplexed as to how to respond to a union's advocacy.

II. Remedy Analysis

The County also excepts to the ALJ's remedy. MMBA section 3509, subdivision (b), grants PERB wide discretion to determine the appropriate remedy necessary to effectuate the purposes of the Act. The ordinary remedy in a discharge case includes both reinstatement and back pay. (See, e.g., *Santa Clara Unified School District* (1979) PERB Decision No. 104, pp. 26-28 (*Santa Clara USD*).) In this case, however, the County objects to the ALJ's reinstatement and back pay order.

The County argues that requiring it to offer Schofield reinstatement to her "prior position" is "vague and ambiguous" if it requires Schofield to be reinstated to a Case Worker II position for which she was not qualified at the time of hire. UPEC responds that it is correct to reinstate Schofield to a Case Worker II position, as it is undisputed that Schofield completed her Bachelor's degree on May 15, 2015, and the County's initial plan, prior to its unlawful about-face, was that Schofield would be demoted only temporarily, until she received her degree. We agree with UPEC and clarify the remedial order to require that Schofield be offered reinstatement to a Case Worker II position. (See *Santa Clara USD*, *supra*, PERB Decision No. 104, p. 27 [employee entitled to reinstatement to a full-time position because

part-time position she was wrongfully denied became full-time, and the Board's statutory mandate requires it to fully compensate wrongfully terminated employee, including all benefits she would have accrued but for the violation].)[6]

Turning to the back pay award, we further clarify the remedial order to take into account that Schofield would have experienced a temporary pay reduction until she received her degree on May 15, 2015. (*Santa Clara USD, supra*, PERB Decision No. 104, p. 27 [back pay award should compensate employee for amount she would have earned, including the period during which the position was full-time].)

Lastly, the County urges us to modify the back pay order to grant it an offset for wages that it claims could have been earned with reasonable efforts during the relevant period. We disagree, and, to assist with compliance in this and other cases, we explain some of the relevant concepts regarding an employee's duty to mitigate losses resulting from an adverse employment action.

An employee who has suffered an economic loss due to an employer's discriminatory conduct must make reasonable efforts to obtain alternative employment. (*Fresno County Office of Education* (1996) PERB Decision No. 1171, pp. 2-5 & adopting proposed decision at pp. 3-10 (*Fresno*).) The burden of establishing that a discriminatee failed in this duty rests on the employer who committed the wrongful act. (*Id.* at pp. 3-4 & adopting proposed decision at p. 4.) Any uncertainty is resolved against the employer. (*Id*. at p. 2, fn. 1 & adopting proposed decision at pp. 4, 7.)

[6] We also modify the remedial order to provide for removal of the termination letter, payroll action form, and other references to the January 2015 probationary termination contained in Schofield's personnel file. (*Mt. San Antonio Community College District* (1982) PERB Decision No. 224, pp. 8-9.)

To establish a failure to mitigate, the employer must demonstrate that the claimant failed to make efforts "consistent with the inclination to work and to be self-supporting." (*Fresno*, *supra*, PERB Decision No. 1171, p. 2, fn. 1 & adopting proposed decision at p. 4, internal quotation marks omitted.) Claimants are not expected to seek a job more onerous that the one from which they were removed but rather are expected to seek a substantially equivalent job. (*Ibid.*) The principle of mitigation of damages does not require success; it only requires an honest good-faith effort. (*County of Riverside* (2013) PERB Decision No. 2336-M, adopting proposed decision at p. 19 (*Riverside*).)

The County maintains that Schofield should have applied for a Case Worker I position after the County decided not to demote her temporarily to that position and instead terminated her altogether. Even where the employer shows that there were multiple appropriate jobs for which an employee failed to apply, the employee can rebut the employer's defense by showing that she made reasonable job-hunting efforts. (*Fresno*, *supra*, PERB Decision No. 1171, adopting proposed decision at pp. 4-5.) In this case, the County has not established even a single example of another job for which Schofield reasonably should have applied. As noted, the County offered Schofield a temporary demotion to Case Worker I until she earned her degree, but once the County became aware that she had sought UPEC's representation in this matter, it summarily terminated her employment with no explanation for its reversal. The County did not follow its regular practice of informing an employee released on probation that she was not barred from reapplication, and Schofield reasonably believed that she was not eligible for rehire after being terminated. Moreover, contrary to the County's suggestion, there is no evidence that Schofield "fail[ed] to accept alternative employment offered by the County." Rather, the only evidence is that the County rescinded its offer to reclassify

Schofield as a Case Worker I and determined instead to terminate her employment; once it rescinded its initial offer, the County made no subsequent offer of employment.

Next, the County argues that Schofield failed to pursue mitigating employment with sufficient diligence, because she attended school to work on a Master's degree. However, an employee who enrolls in a course of training or avails herself of other educational opportunities during the back pay period may nevertheless be entitled to back pay to the extent that the employee seeks to combine school with job hunting, or reasonably decides that gaining education and changing careers is the best path toward gainful employment. (*Dailey v. Societe Generale* (2d Cir. 1997) 108 F.3d 451, 456-457 [rule of reasonableness applies to employee's decision to enroll in school full time rather than continue job search]; *E&L Plastics Corp.* (1994) 314 NLRB 1056, 1059 [decision to enter plumbing apprenticeship was "not a matter of indulging [a] personal enjoyment," but rather was "a reasonable attempt to increase [employee's] employability and productivity"]; *Essex Valley Visiting Nurses Assn.* (2008) 352 NLRB 427, 439 [no failure to mitigate where employees still sought part-time work while also pursuing educational opportunities].)

On the record before us, there is no evidence that Schofield acted in a manner that was inconsistent with "the inclination to work and to be self-supporting." (*Fresno*, *supra*, PERB Decision No. 1171, p. 2, fn. 1 & adopting proposed decision at p. 4, internal quotation marks omitted.) Not only has the County failed to show that pursuing a Master's degree was unreasonable, but Schofield also testified that she actively sought other jobs from the date of her termination through the hearing, even while also pursuing her studies. In addition, Schofield served as a guest lecturer at Lassen College and as a self-employed public relations and technical writer. (See *Riverside*, *supra*, PERB Decision No. 2336-M, adopting proposed

decision at p. 19 [attempting to go into business for oneself can satisfy a discriminatee's duty to mitigate damages].)

Accordingly, the County has not met its burden to demonstrate that Schofield failed to mitigate her damages.[7]

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the County of Lassen (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3506 and 3506.5, subdivisions (a) and (b), and PERB Regulation 32603, subdivisions (a) and (b), and therefore committed unfair practices under MMBA section 3509, subdivision (b), by terminating Monique Schofield's (Schofield) employment in retaliation for engaging in protected activity.

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

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected activity;

2. Denying employee organizations the right to represent their members.

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

1. Make Schofield whole by offering her reinstatement to her prior position as a Behavior Health Case Worker II, and providing back pay and benefits, with interest at the rate of 7 percent per annum, from January 26, 2015 to the date she is reinstated or declines the

[7] Our decision here is reflective of the record evidence, and we do not pass on whether Schofield continued to make reasonable efforts to mitigate her damages since the formal hearing and whether the County may be entitled to some offset of its back pay liability attributable to the post-hearing period. Such questions should be resolved during the compliance stage of this proceeding.

offer of reinstatement, subject to offset for wages earned during the relevant period. The amount of back pay owed shall take into account that Schofield should have been temporarily demoted to Behavioral Health Case Worker I from January 26, 2015 until May 15, 2015.

2. Remove the termination letter, payroll action form, and other references to the January 2015 probationary termination from Schofield's personnel file.

3. Within 10 workdays following the date this decision is no longer subject to appeal, post at all County work locations where notices to employees in the bargaining unit are customarily posted, copies of the Notice attached hereto as an Appendix. In addition to physical posting, the Notice shall be posted by electronic means customarily used by the County to regularly communicate with employees in the bargaining unit. The Notice must be signed by an authorized agent of the County, 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.

4. 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. The County 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 UPEC.

Members Banks and Winslow 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. SA-CE-902-M, *United Public Employees of California, Local 792 v. County of Lassen*, in which all parties had the right to participate, it has been found that the County of Lassen violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3506 and 3506.5, subdivisions (a) and (b), and PERB Regulation 32603, subdivisions (a) and (b), and therefore committed unfair practices under MMBA section 3509, subdivision (b), by terminating Monique Schofield's (Schofield) employment in retaliation for engaging in protected activity.

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 employees for engaging in protected activity;

2. Denying employee organizations the right to represent their members.

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

1. Make Schofield whole by offering her reinstatement to her prior position as a Behavior Health Case Worker II, and providing back pay and benefits, with interest at the rate of 7 percent per annum, from January 26, 2015 to the date she is reinstated or declines the offer of reinstatement, subject to offset as provided for in the Order, including for wages earned during the relevant period.

2. Remove the termination letter, payroll action form, and other references to the January 2015 probationary termination from Schofield's personnel file.

Dated: _____ County of Lassen

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

UNITED PUBLIC EMPLOYEES OF CALIFORNIA, LOCAL 792, Charging Party, v. COUNTY OF LASSEN, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-902-M PROPOSED DECISION (03/15/2017)

Appearances: Goyette & Associates by Nicole Valentine, Attorney, for United Public Employees of California, Local 792; Renne Sloan Holtzman Sakai by Timothy G. Yeung, Attorney, for County of Lassen.

Before Robin W. Wesley, Administrative Law Judge.

INTRODUCTION

A union alleges that a public agency employer violated the Meyers-Milias-Brown Act (MMBA),[1] and regulations of the Public Employment Relations Board (PERB or Board),[2] by retaliating against an employee when it demanded repayment of wages and terminated her employment because she engaged in protected activity. The employer denies any violation of law or regulations.

PROCEDURAL HISTORY

On February 5, 2015, United Public Employees of California, Local 792 (UPEC or Union) filed an unfair practice charge against the County of Lassen (County). On February 27, the County filed a position statement in response to the charge.

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

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

On April 15, 2016, the PERB Office of the General Counsel issued a complaint alleging that the County retaliated against Monique Schofield (Schofield) for engaging in protected activity by terminating her employment. This conduct is alleged to have violated MMBA sections 3503, 3506, and 3506.5, subdivisions (a) and (b), and thereby constitute an unfair practice under MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a) and (b). The County answered the complaint admitting certain allegations, denying others, and asserting affirmative defenses.

On July 15, 2016, the parties participated in a PERB settlement conference, but the matter was not resolved.

On August 31, 2016, UPEC filed a motion to amend the complaint and an amended unfair practice charge. The County submitted its opposition to the motion on September 21. On October 5, the motion was granted in part and denied in part. The complaint was amended to include the allegation that the County took adverse action against Schofield by demanding repayment of wages. The interference allegation was denied.[3]

A formal hearing was held on October 17, 2016, and the case was submitted for decision on December 9, after receipt of post-hearing briefs.

FINDINGS OF FACT

The County is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). UPEC is an exclusive representative within the meaning of PERB Regulation 32016, subdivision (b). During the relevant period, Schofield was a public employee within the meaning of MMBA section 3501, subdivision (d).

[3] UPEC renewed its motion to include the interference allegation during the hearing. The motion was denied.

On October 9, 2014, Schofield submitted an application in response to a County job posting for Behavioral Health Case Worker I/II. A case worker provides case management and mental health services, alcohol and drug treatment services, and crisis intervention. The required minimum qualifications for Case Worker I are an Associate of Arts (AA) degree in psychology or related field, and two years of experience providing rehabilitation and counseling services. For Case Worker II, a Bachelor's degree is required, and three to four years of experience in rehabilitation and counseling.

Schofield's application stated that her Bachelor's degree was "in progress," and she circled three years of college in response to the question regarding the highest level of education completed. Schofield's resume also stated that her Bachelor's degree was in progress with an expected graduation date of May 2015.

Schofield was willing to take either the Case Worker I or II position. She was not asked whether she met the minimum qualifications for Case Worker I or II during the job interview.

On October 29, 2014, Director of Health and Social Services Melody Brawley (Brawley) sent Schofield a written offer of employment for Behavioral Health Case Worker II. On November 4, Schofield submitted a written acceptance of the offer for the Case Worker II position. Schofield also signed a notice that advised her she would serve a 12-month probation period, and that she was considered an at-will employee during the probationary period.

On December 1, 2014, Schofield started work and was assigned to the crisis team dealing with mental health clients in crisis and post-hospitalization clients.

In December 2014, Schofield received a department-wide email from the County HIPAA[4] officer, which advised that the entire department was being investigated for HIPAA violations. The County suspected that a particular employee had improperly accessed client records, but believed it needed to interview all employees so it did not appear to be discriminating against any particular employee. At the time, Schofield had worked eight days, was still job shadowing, and believed she had nothing to worry about.

In January 2015,[5] Schofield received a written notice that she was being investigated for HIPAA fraud. Schofield was directed to appear for an interview on January 13, and was advised she could bring a union representative. Brawley testified that every employee received the same letter, and the letter's reference to "fraud" was unclear and "unfortunate."

As her interview approached, Schofield began to get nervous. On January 13, Schofield called UPEC Labor Relations Representative Ryan Heron (Heron) and asked him to represent her at the interview. Schofield met Heron for the first time just before the interview. Heron represented eight to ten County employees in their HIPAA interviews.

During the interview, Schofield was told that she was not the focus of the investigation. Her interview lasted five minutes, and afterward she was not concerned about her responses. Brawley knew the HIPAA investigation was being conducted, but did not participate in the interviews and did not know Schofield had a union representative during her interview.

Following the employee interviews, Heron believed there was a problem with the records system that showed inaccurate access times. On January 14, Heron sent an email to Nancy LaSalle (LaSalle), the County employee conducting the HIPAA investigation,

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[4] Health Insurance Portability and Accountability Act of 1996.

[5] Hereafter, all dates refer to 2015, unless otherwise noted.

requesting the timesheets of four employees, including Schofield. The County did not respond.

Also on January 14, in an email to Brawley and Personnel Analyst Cheryl Douglas (Douglas), Heron reported that several employees had informed him that the County hired a Case Worker II who did not have a Bachelor's degree. Heron asked the County for verification, and requested a copy of the job description. Heron did not know which employee may have been improperly hired when he sent the email.

After receiving Heron's email, Brawley reviewed the applications of recently hired employees. She discovered that Schofield did not have her Bachelor's degree, and was not qualified to be hired as a Case Worker II.

On January 15, Brawley informed Douglas and Schofield's supervisor, Pamela Grosso (Grosso), Director of Behavioral Health, that the County mistakenly hired Schofield as a Case Worker II because she would not have her degree until May. Brawley said the mistake had to be rectified, and asked if Schofield had to repay the difference in wages between a Case Worker I and II. Brawley asked that they not respond to Heron "until we know what we're going to do."

On January 15, Brawley called Schofield and informed her the County had made a mistake and should not have hired her as a Case Worker II because she did not have a Bachelor's degree. Brawley told Schofield she had been overpaid, could be appointed as a Case Worker I with a reduction in pay, and that she would consult with the County Auditor to determine how to address the overpayment. Brawley advised Schofield that after she completed her degree, she would move to the Case Worker II position and salary. Brawley

said she would send a confirming email, and asked Schofield to let her know how she wanted to repay the wage overpayment.

Brawley's follow-up email on January 15, informed Schofield the County overpaid her by $354.44, and asked if she wanted to repay this amount in one paycheck or two.

Late on January 15, Brawley responded to Heron, stating that the County was looking into the matter and, "If an error was made, it will be corrected promptly." Brawley did not identify Schofield as the employee not meeting minimum qualifications, but did provide a copy of the job description.

That evening, Schofield reviewed the Memorandum of Understanding (MOU), and found Article 6.05, "Salary Upon Demotion," which suggested that her salary could be maintained at the same rate if she was demoted to a Case Worker I. Article 6.05 states, in part:

> Any employee who is demoted to a classification having a salary range lower than the classification from which he/she was demoted shall have his/her salary reduced to a monthly salary that is equal to or lower than the salary he/she received before demotion.

[Emphasis added.]

On January 16, Brawley emailed Schofield asking her to make her repayment decision that day. Brawley did not have a lot of experience with wage overpayments, but she was aware that the County previously collected overpayments from employees erroneously overpaid when they did not have sufficient leave credits. Brawley conferred with a payroll clerk who had the same understanding.

On January 16, Schofield forwarded Brawley's two email messages and her questions to Heron, asking him to "weigh in," and advised that Brawley requested an immediate answer.

Heron learned from Schofield's email that she was the employee hired as a Case Worker II without a Bachelor's degree.

Early on January 20, Brawley emailed Schofield again asking for an answer on the repayment method. Brawley advised that if Schofield did not respond, the overpayment would be taken from her next paycheck.

On January 20, Schofield responded to Brawley, stating that she was stunned she was being demoted to a Case Worker I because managers and co-workers told her she was doing an excellent job. Schofield told Brawley that she was unsure how to proceed, she did not agree with either repayment option, and she had asked Heron for assistance.

On January 20, Heron responded to Schofield's email, which copied Brawley, Douglas and Grosso. Heron questioned whether the County could recoup wages based on Labor Code section 221, asked if the action was a demotion, and sought information on any change in Schofield's anniversary date or probation period.

After receiving Heron's email, Brawley spoke with Douglas and the County's personnel consultant, Rick Haeg (Haeg). Haeg thought Heron might be right about the County's ability to recover the wage overpayment. The County decided to suspend its collection efforts until it could determine if Heron's position was correct.

Brawley did not respond to Heron. On January 20, Brawley sent Schofield a letter by email advising that she would be designated a Case Worker I with a reduction in pay, retroactive to December 1, 2014. Brawley stated it was not a demotion because Schofield should have been hired as a Case Worker I. Brawley also said the wage recoupment would be suspended until Schofield's questions about the County's right to repayment were settled.

Schofield forwarded Brawley's letter to Heron. Late on January 20, Heron wrote to Brawley and Douglas expressing concern about the County's decision to demote Schofield and reduce her salary. Heron referenced MOU Article 6.05, asserting that based on this provision Schofield's wages must be maintained. He again cited the Labor Code, arguing that requiring Schofield to repay wages was improper. Heron asked the County to review these provisions, concluding, "Thanks for working with us on this."

Prior to receiving Heron's email, Brawley had not considered Article 6.05. Brawley discussed this provision with Douglas, Haeg, and County Administrative Officer/Personnel Director Richard Egan. The County initially did not believe making Schofield a Case Worker I was a demotion, but nothing in the MOU or personnel rules addressed the hiring error. The County was not sure if Article 6.05 prevented a reduction in Schofield's salary, and whether Heron might be correct if they reclassified her to a Case Worker I. They considered reclassifying Schofield as a Case Worker I and keeping her pay at the II level, but did not believe that was fair to other Case Worker I's.[6]

The County did not know how to correct the problem. Because Schofield was a probationary employee, however, they knew they could release her on probation, and she could then reapply for a Case Worker I position. The County decided to terminate Schofield's employment on probation. Brawley testified that releasing Schofield on probation had nothing to do with her work performance.

Grosso was tasked with notifying Schofield that her employment was terminated. The County planned to notify Schofield of her termination on January 23, but Grosso was out of the

[6] The County employed nine Case Worker I's and five Case Worker II's.

office. On January 26, Grosso informed Schofield that her employment was terminated, and as a probationary employee she did not have a right to appeal or grieve the termination.

Brawley said it was standard practice to tell employees they could reapply for a County position, but she did not know whether Grosso informed Schofield she could apply for the Case Worker I position. Schofield stated she was not told she could reapply for Case Worker I. Schofield believed that once she was terminated, she would not be rehired by the County.[7]

The County decided not to pursue recoupment of the wage overpayment, but it never informed Schofield that it had dropped its efforts to seek repayment.

Brawley also stated that while she discussed other issues with Heron at other times, she never spoke to him about Schofield after receiving either of his January 20 emails. Generally, County managers discuss and decide who is going to respond to union inquiries. This time, Brawley did not follow up with Douglas to determine who would respond to Heron because she was more concerned about how to resolve the problem. Brawley testified, "We probably could have had better communication. I don't think any of us understood that Mr. Heron was attempting to engage in a conversation with his emails. We certainly could have had a conversation with them."

ISSUE

Did the County retaliate against Schofield because she engaged in protected activity by demanding repayment of wages and terminating her employment?

[7] The County recruited six times for Case Worker I/II since Schofield's termination.

CONCLUSIONS OF LAW

Public employees 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." (MMBA, § 3502.) Public agencies and employee organizations may not "interfere with, intimidate, restrain, coerce or discriminate against public employees" because of their exercise of rights under MMBA section 3502. A public agency employer is prohibited from imposing reprisals on employees because of their participation in protected activities. (MMBA, § 3506.5, subd. (a).)

To establish a prima facie case that an employer discriminated or retaliated against an employee for participating in protected activities, a charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M; *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S.)

Protected Activity

Seeking help from a union regarding employment concerns is protected activity. (*Jurupa Unified School District* (2015) PERB Decision No. 2420; *County of Riverside* (2011) PERB Decision No. 2184-M.) In a matter of days, Schofield twice sought and obtained union representation. On January 13, Schofield requested that Heron represent her in her HIPAA investigation interview. On January 16, Schofield again sought Heron's assistance after Brawley informed her she had mistakenly been hired as a Case Worker II, her pay would be

reduced, and she was required to repay wages. Schofield emailed Heron, asking him to weigh in on these issues. Thus, Schofield engaged in protected activity by obtaining union representation.

Knowledge of Protected Activity

The County does not dispute that Brawley was the primary decision maker in the determination to request repayment of wages and terminate Schofield's employment. There is no evidence that Brawley was aware that Schofield was represented by UPEC during the HIPAA investigation. Brawley knew the investigation was being conducted and all department employees would be interviewed, but she did not participate in the interviews and did not know that Heron represented Schofield in her January 13 interview.

On January 14, Heron sent an email to the County raising issues about the record keeping system and requesting timesheets for several employees, including Schofield. The email would have given notice that Schofield was represented by UPEC, but it was sent to LaSalle, not Brawley.

On January 20, Brawley learned that Schofield obtained union representation when Schofield told her she requested assistance from Heron. Brawley, therefore, had knowledge on January 20 of Schofield's protected activity, before the decision was made to terminate her employment.

Before Brawley learned that Schofield was represented by the Union, however, she had already informed Schofield on January 15 that she was required to repay the wage overpayment. Assuming that the demand for repayment of wages is an adverse action, because Brawley was not then aware that Schofield was represented by the Union, the demand for repayment could not have been made in retaliation for Schofield's protected activity. (*Santa*

Clara Valley Water District, *supra*, PERB Decision No. 2349-M [employer not aware of protected activity at the time it took action against employee].) Accordingly, the allegation that the County retaliated against Schofield by demanding repayment of wages because she engaged in protected activity is dismissed.

Adverse Action

In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) PERB has long held that the termination of the employment of a probationary employee is an adverse act. *(City of Santa Monica* (2011) PERB Decision No. 2211-M; *County of Riverside*, *supra*, PERB Decision No. 2184-M.) The County's termination of Schofield's probationary employment on January 26, therefore, is an adverse action.

Unlawful Motivation

Finally, a charging party must show that the employee's protected activity was a motivating factor in the employer's decision to take adverse action. (*Omnitrans* (2010) PERB Decision No. 2121-M.). PERB has long recognized that direct evidence of discriminatory intent is rarely found. (*Oakdale Union Elementary School District* (1998) PERB Decision No. 1246; *Contra Costa Community College District* (2003) PERB Decision No. 1520; *Omnitrans*; *Berkeley Unified School District* (2003) PERB Decision No. 1538.) The employer's motivation, therefore, may be proven by either direct or circumstantial evidence. *(Omnitrans*; *Carlsbad Unified School District* (1979) PERB Decision No. 89; *Novato Unified School District*, *supra*, PERB Decision No. 210.) Where direct evidence of unlawful

motivation is established, however, circumstantial evidence is not required. (*Berkeley Unified School District*.)

The Board has previously found direct evidence of unlawful motivation. In *Alisal Union Elementary School District* (1998) PERB Decision No. 1248, the Board concluded that an employee engaged in protected activity when submitting a written response to a letter of warning. The Board found direct evidence of unlawful motivation when the employer issued discipline for the written statement the employee submitted in response to the prior letter of warning.

Direct evidence of unlawful motivation has also been found when the employer issued a letter of reprimand to an employee for reporting safety issues to a third party, which was held to be protected activity. (*Oakdale Union Elementary School District*, *supra*, PERB Decision No. 1246.) In *Omnitrans, supra*, PERB Decision No. 2121-M, direct evidence of unlawful motive was found when the employer admitted it terminated an employee for being absent on days when the employee was on union business.

This is one of those rare cases where there is direct evidence of unlawful motivation. Here, Brawley informed Schofield of the County's decision to reclassify her to Case Worker I and reduce her pay retroactive to December 1, 2014. After learning of this decision, Heron sent a second email to Brawley challenging the decision to demote Schofield, asserting that MOU Article 6.05 required Schofield's wages to be maintained, and claiming that the Labor Code barred the repayment order. The County considered the issues Heron raised and thought he might be right. Because of Heron's questions, the County did not know what to do, so it decided to terminate Schofield's probationary employment. This is direct evidence that the County changed its decision to reclassify Schofield, and instead terminate her employment

because Heron raised issues which the County did not know how to answer. Accordingly, UPEC has established a prima facie case of retaliation.

The County's Defense

Once a charging party establishes a prima facie case of retaliation, the burden shifts to the employer to show that it had an alternative non-discriminatory reason for imposing the adverse action and that it acted because of this alternative non-discriminatory reason, not because of the employee's protected activity. (*Novato Unified School District, supra*, PERB Decision No. 210; *Palo Verde Unified School District* (2013) PERB Decision No. 2337; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line, A Div. of Wright Line, Inc.* (1980) 251 NLRB 1083.) When it appears that the employer's adverse action was motivated by both lawful and unlawful reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers*, at p. 729.) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.) When conducting the "but for" analysis, the proper inquiry is whether the employer's true motivation for taking the adverse action was the employee's protected activity. (*Regents of the University of California* (1993) PERB Decision No. 1028-H.)

The County contends that while it could have had better communication with UPEC, it failed to realize that Heron's email messages were his attempts to engage in a dialogue regarding Schofield's employment status. Regardless, the County asserts that it would have reached the same conclusion, release of Schofield on probation, notwithstanding UPEC's

involvement. The County contends it was concerned about violating the MOU, and took the action it believed was fair to its employees and was within the County's authority.

Initially, the County believed it had corrected its hiring mistake when it decided to reclassify Schofield to a Case Worker I, reduce her pay, and require repayment of wages. After UPEC identified provisions in the MOU and Labor Code which appeared to conflict with the County's decision, the County decided to terminate Schofield's probationary employment. The County admits there were no performance issues with Schofield's work. There is no evidence of fiscal concerns, as the County recruited for Case Worker I/II positons at least six times since Schofield's employment was terminated. The County's claim that it needed to be fair to other employees would have been resolved by maintaining its initial decision to reclassify Schofield to a Case Worker I.

The County "rushed" to correct its mistake without responding to Heron. Although Brawley discussed other matters with Heron, the County did not recognize Heron's emails as an effort to engage them on the issue, notwithstanding Heron's last statement thanking the County "for working with us on this." Nor did the County follow its normal procedures for deciding who would respond to UPEC's inquiry.

The County changed its decision to reclassify Schofield to a decision to terminate her employment because UPEC raised questions it did not know how to answer. The County provided no evidence that it would have terminated Schofield's employment had UPEC not intervened on her behalf. Accordingly, the County has not met its burden to establish that it had an alternative non-discriminatory reason for terminating Schofield's employment.

REMEDY

MMBA section 3509, subdivision (b), authorizes PERB to remedy unfair practices, providing, in part:

> The initial 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, shall be a matter within the exclusive jurisdiction of the board.

The County has been found to have retaliated against Schofield by terminating her employment for engaging in protected activity in violation of MMBA sections 3506 and 3506.5, subdivision (a), and committed an unfair practice under MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivision (a). By this conduct, the County also interfered with UPEC's right to represent bargaining unit employees in violation of MMBA sections 3503 and 3506.5, subdivision (b), and committed an unfair practice under MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivision (b). It is appropriate to order the County to cease and desist from such conduct.

PERB is authorized to order a remedy "designed to restore, so far as possible, the status quo which would have been obtained but for the wrongful act." (*Santa Clara Unified School District* (1979) PERB Decision No. 104, p. 26.) It is appropriate therefore to make Schofield whole for employment losses suffered as a result of the County's conduct. The County is ordered to offer Schofield reinstatement to her prior position, and provide back pay and benefits, at the rate she was paid prior to her termination, with interest at the rate of 7 percent per annum for wages lost from the date of termination to the date the offer of reinstatement is made. The back pay order is subject to offset for wages earned during the relevant period. (*County of Riverside* (2013) PERB Decision No. 2336-M.)

Finally, it is appropriate that the County be ordered to post a notice incorporating the terms of this order at all locations where notices to bargaining unit employees are customarily posted. In addition to the physical posting requirement, the notice shall be posted by electronic means customarily used by the County to regularly communicate with bargaining unit employees. (*City of Sacramento* (2013) PERB Decision No. 2351-M.) Posting such a notice, signed by an authorized agent of the County, will provide employees with notice that the County has acted in an unlawful manner, is required to cease and desist from such 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 the County's readiness to comply with the ordered remedy. (*Placerville Union 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 County of Lassen (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. The County violated the MMBA by terminating the employment of Monique Schofield because she engaged in activity protected by the MMBA. All other allegations are dismissed.

Pursuant to section MMBA section 3509, it hereby is ORDERED that the County, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against Monique Schofield because of her participation in activities protected by the MMBA.

2. Interfering with the right of United Public Employees of California, Local 792 to represent bargaining unit employees.

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

1. Make Monique Schofield whole by offering her reinstatement to her prior position, and providing back pay and benefits, with interest at the rate of 7 percent per annum for wages lost from the date of termination to the date the offer of reinstatement is made, subject to offset for wages earned during the relevant period.

2. Within 10 workdays after service of a final decision in this matter, post at all County work locations where notices to employees in the bargaining unit are customarily posted, copies of the Notice attached hereto as an Appendix. In addition to physical posting, the Notice shall be posted by electronic means customarily used by the County to regularly communicate with employees in the bargaining unit. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 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.

3. 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. The County 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 UPEC.

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 within 20 days of service of this Proposed 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, meeting 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).)