

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 1021,

Charging Party,

v.

COUNTY OF SAN JOAQUIN (SHERIFF'S
DEPARTMENT),

Respondent.

Case No. SA-CE-897-M

PERB Decision No. 2619-M

December 28, 2018

Appearances: Weinberg, Roger & Rosenfeld, by Anthony J. Tucci, Attorney, for Service Employees International Union Local 1021; Office of County Counsel, by Matthew Dacey, Deputy County Counsel, for County of San Joaquin.

Before Banks, Winslow, and Krantz, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the Service Employees International Union Local 1021 (Local 1021) to the proposed decision of a PERB administrative law judge (ALJ). The complaint, as amended, alleged that the County of San Joaquin (Sheriff's Department) (County) violated the Meyers-Milias Brown Act (MMBA)¹ by: (1) denying employee Joel Madarang's (Madarang) right to be represented and Local 1021's right to represent him by refusing Madarang's request to consult with a union representative before submitting a written memorandum that he believed could result in discipline; and (2) taking adverse action against Madarang because he requested a representative. The ALJ dismissed the complaint, finding no violation of

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

representational rights because, ultimately, Madarang did not submit the memorandum, and concluding the County had successfully demonstrated that it disciplined Madarang for a legitimate, non-discriminatory reason.

In its exceptions, Local 1021 does not dispute the factual findings or the ALJ's legal conclusions regarding discrimination/retaliation, but argues that the County violated Madarang's right to representation and Local 1021's right to represent him when it denied him a representative, regardless of whether he submitted the memorandum, and that a make-whole remedy is appropriate because the County disciplined Madarang in part for requesting a representative.

Based on our review of the proposed decision, the entire record, relevant legal authority, and Local 1021's exceptions and the County's response thereto, we conclude that the County interfered with Madarang's protected rights, as well as Local 1021's protected rights, by denying Madarang a representative and disciplining him. Based on this review, we reverse the ALJ's dismissal of the complaint for the reasons that follow.

FACTUAL BACKGROUND²

Jurisdiction

The County is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a).³ The Sheriff's Department (Department) is a department of the County.

² The parties do not except to the ALJ's findings of fact. Because we affirm the ALJ's factual findings but do not attach the proposed decision, we provide this summary of the factual findings.

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

Local 1021 is the exclusive representative of an appropriate unit of employees, within the meaning of PERB Regulation 32016, subdivision (b), the Safety, Investigative and Custodial bargaining unit, which includes the classification of Custody Recreation Supervisor.

Madarang

Madarang has been employed by the Department as a Custody Recreation Supervisor at the county jail since 2010.⁴ In that capacity, he supervises inmate recreational programs which include, among other things: bingo, card games, dominoes, volleyball, basketball, softball, television, movies and gardening. Madarang's supervisor is the Programs and Services Director, Kristen Hamilton (Hamilton).

April 2014

In April 2014,⁵ Madarang began conducting bingo games for the female general population inmates in unit IV of the jail on Thursdays. The games were to be run in the afternoons and the winners of the game received candy. The games were popular and at times loud.

On April 24, Hamilton e-mailed Madarang that beginning in May, he would need to change the start time of the bingo games from 1:00 p.m. to 10:30 a.m. Hamilton also communicated this to Madarang verbally. Hamilton explained the reason for the time change was to make room for a new mental health program, "Seeking Safety." In short, Hamilton did not want the female inmates attending an entertainment-type of recreational activity instead of the Seeking Safety class, which was designed to decrease the recidivism rate of inmates once they were released from the county jail.

⁴ Madarang held other positions with the County prior to 2010.

⁵ Hereafter, all dates refer to 2014, unless otherwise specified.

Madarang held the unit IV bingo games in the morning on May 8, 22, and 29, but held them in the afternoon on May 15, June 12, and June 19. Madarang testified as to why he changed the times on June 12 and June 19, but he did not testify regarding May 15. Madarang testified that he changed the game time on June 12 because he needed some inmates to help him clean the tool shed that morning.

As for the June 19 game, Madarang explained that he wanted to demonstrate how to conduct the bingo games to his recreation assistant, who was shadowing him that day. Since the early morning activity ran late, Madarang consulted with the unit's correctional officer whether to start the games at the appointed time. The correctional officer was concerned that the bingo games would interfere with the inmates' early lunch, and so Madarang started them in the afternoon.

Madarang understood that Hamilton had directed him to move the time of bingo games so as not to interfere with the "Seeking Safety" class. However, he also believed he had discretion to make changes to the recreation schedule, so he did not seek Hamilton's authorization before holding the games on the afternoons of May 15, June 12, and June 19.

June 23 Incident

On Friday, June 20, County Mental Health Clinician Cynde Borges (Borges) sent an e-mail, which was eventually forwarded to Hamilton, stating that the Seeking Safety program had been impacted by the unit IV bingo games for the previous three weeks. On Monday morning, June 23, Borges reiterated this information to Hamilton at a staff meeting. After the meeting, Hamilton consulted with Custodial Captain Kimberly Moule (Moule) as to how to handle the situation. Moule advised Hamilton to sit down with Madarang to discover his

rationale for deviating from the schedule and then to reiterate the importance of adhering to it or notifying Hamilton if there was a need to change the schedule.

At 9:50 a.m. that day, Hamilton sent an e-mail to Madarang, which stated:

Your calendar has bingo listed from 10:30-12 [noon]? Why are you having it in the afternoon when I clearly told you last month that you were to reschedule for the morning? You have interrupted the Seeking Safety program for [three] weeks now. Please advise me of why you did not follow my request and why your calendar has one thing listed and your log says something else.

Madarang responded at 11:45 a.m., stating that the unit's correctional officer requested that he move the bingo program to the afternoon so that the inmates could be fed early.

Madarang accepted responsibility for not changing the calendar. Shortly after sending this e-mail, Madarang left his desk and did not see a follow-up e-mail that Hamilton sent 11

minutes later, which stated:

I've just about had it with you continuously [undermining] what I'm telling you to do. I told you that you had to move your program to the morning because we had a program going on in the afternoon. I told you to work with the Officers and advise them that you needed to change to the morning due to the program. This was discussed at our Staff Meeting last month.

*I want a memo explaining why you failed to follow my directions.
I want you to bring it over when you are done.*

(Emphasis added.)

Hamilton testified that she asked Madarang for the memo because she wanted to find out why he did not comply with her directive. Upon receiving the memo, Hamilton intended to have a conversation with Madarang regarding his thought process so she could correct his behavior.

Madarang did not get back to his desk or access his computer until approximately 3:00 p.m., at which time he received a telephone call from Hamilton. Hamilton asked Madarang why he had not responded to her e-mail. Madarang believed Hamilton was referring to her 9:50 a.m. e-mail, and stated that he had responded to it. Hamilton replied that she had sent a later e-mail and that he needed to respond in writing to that e-mail, as directed. Because Madarang had been issued prior discipline and had been through an investigative interview without a representative, he told Hamilton that he wanted to speak to a representative first. Hamilton responded that Madarang did not need a union representative for this and that he should just write the memo so she could get his side of the story and correct his behavior. Again, Madarang stated that he wanted to speak to a union representative before writing the memo. Hamilton again instructed Madarang to write the memo and to bring it to her. After Madarang again requested representation prior to writing the memo, Hamilton replied, "Well, that is it."

Hamilton then spoke with Administrative Lieutenant Williamson (Williamson) about the matter, as Moule was not available at that time. When Hamilton eventually spoke with Moule, Hamilton reported that Madarang had requested a union representative. Moule responded that if Madarang wanted to speak with a representative, he should be allowed to bring one when he brought her the requested memo. Instead of relaying this information to Madarang, however, Hamilton decided to request an internal affairs investigation as Madarang had refused to write the memo and bring it to her office.

After Hamilton denied Madarang's request for a union representative, Madarang continued his regular duties. Lieutenant Robert Teague (Teague) then called Madarang over the radio to get his location, which Madarang provided. Teague came to Madarang's location,

escorted him to his desk, and instructed Madarang to take his personal effects and follow him to the administration building to meet with Williamson. Williamson informed Madarang that he was being placed on paid administrative leave. Hamilton had no role in the decision to escort Madarang off grounds or the decision to place him on administrative leave.

Request for Internal Affairs Investigation and Notification of Investigation

On that same day, Hamilton prepared a memorandum requesting the initiation of an internal affairs investigation of Madarang. After setting forth her version of the events, Hamilton wrote:

I am requesting that an Internal Affairs Investigation be conducted on Mr. Madarang for failing to comply with a “direct order” by not providing me with the memo I requested, for not complying with an order to come to my office, and for neglect of duty for not following direction and providing the activity in the manner he was directed to do so.

On June 23 or 24, Internal Affairs Sergeant Jerald Alejandre (Alejandre) received Hamilton’s request and was assigned to conduct the internal affairs investigation. On July 8, Alejandre notified Madarang that he was being investigated for the following reasons:

[F]ailure to follow direct orders from Kristen Hamilton in regards to you scheduling Bingo in the morning instead of in the afternoon which was impacting a previously established program. Failing to write a memo to Kristen Hamilton explaining why you failed to follow her prior order and failing to report to her office as directed.

Madarang was also notified that he had the right to bring a representative to the interview.

Internal Affairs Investigation

Alejandre conducted recorded interviews with the following witnesses between July 14, and August 4: Teague, Lieutenant Monica Serros, Hamilton, Borges, and Madarang.

Hamilton, Borges and Madarang all provided recorded statements regarding the allegation that

Madarang failed to follow direct orders from Hamilton in regards to scheduling bingo in the morning instead of the afternoon.

July 21 Investigatory Interview of Madarang with Local 1021 Representation

Alejandre interviewed Madarang on July 21, for approximately one and one-half hours. Mike Fouch served as Madarang's union representative. During the interview, Alejandre informed Madarang that the subject of the investigation was Madarang's failure to follow Hamilton's order regarding scheduling the bingo games, and his failure to write an explanatory memo and bring it to Hamilton's office on June 23. Madarang explained that he had rescheduled bingo games for the afternoon on a few occasions because morning activities ran long and he believed he had the discretion to do so. Madarang further stated that he had no intention of disobeying Hamilton's directive.

Conclusion of the Investigation

On August 5, Alejandre forwarded the investigative report to Moule for her review and disposition, without providing any opinions or conclusions.

On August 26, Moule sustained all allegations and forwarded the investigation file to the department's discipline committee. On that same day, Moule notified Madarang of her finding. Moule testified that Madarang's failure to follow Hamilton's directive regarding the bingo scheduling "was not at the top of my priority [*sic*]" in issuing the discipline. Her concern, rather, was Madarang's failure to follow the directives to prepare the memorandum and report to Hamilton, and "get[ting] his attention, get[ting] him to understand the importance of that, and change [his] behavior."

On September 16, the discipline committee reviewed the internal affairs package and recommended that Madarang be suspended for 10 working days. On October 9, Moule issued Madarang a Notice of Intent to Suspend (Notice of Intent) for 10 working days.⁶

Skelly Hearing

On October 28, a *Skelly* hearing was held before Undersheriff John Picone (Picone). Madarang was represented by Local 1021 Field Representative William Petrone (Petrone). Petrone argued that Hamilton had violated Madarang's *Weingarten*⁷ rights and this violation should be taken into consideration.

Later that day, Picone informed Petrone of his decision to: (1) strike all allegations in the Notice of Intent concerning Madarang's refusal to follow Hamilton's order to prepare a memorandum and to bring it to her office, and (2) uphold the same penalty of a ten-day suspension. Picone stated in part:

The sustained violations will center solely on the failure of Mr. Madarang to comply with a legal and lawful order from his supervisor to change the times of his Bingo sessions to accommodate the Mental Health Group Therapy Class.

I have discussed my decision with Sheriff Moore, and he is in agreement with my finding. Captain Kimberly Moule will process the discipline.

This decision has not been made lightly. All factors were taken into consideration. Based on those factors, Mr. Madarang's insubordination was established beyond a preponderance of the evidence submitted and warrants the decision made referencing this issue.

⁶ The Notice of Intent refers to the 10-day suspension also as an 80-hour suspension.

⁷ *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251 (*Weingarten*).

Picone testified that he eliminated the allegation of insubordination for not providing a written memo to Hamilton and not bringing it to her office because he thought the allegation could constitute an unfair practice.

On or about October 28, the County issued Madarang an Order of Suspension (disciplinary order) for 10 working days for the remaining allegations which were not struck from the October 9 Notice of Intent.

DISCUSSION

Violation of Representational Rights

The representational rights of employees and employee organizations derive from MMBA sections 3502 and 3503, the language of which is similar to Educational Employment Relations Act (EERA) sections 3543 and 3543.1.⁸ In *Capistrano Unified School District*, we explained that this language includes rights similar to those described in *Weingarten, supra*, 420 U.S. 251, but that the representational rights under PERB-administered statutes are considerably broader and are not limited by the requirements of *Weingarten*. (*Capistrano Unified School District* (2015) PERB Decision No. 2440, pp. 10-16 (*Capistrano*).)

Employees have a right to representation where an employer seeks to elicit incriminating evidence that could potentially impact the employment relationship, either by conducting an investigatory interview or by requesting a written statement. (*Capistrano, supra*, PERB Decision No. 2440, p. 20; *San Bernardino Community College District* (2018) PERB Decision No. 2599, p. 3 (*San Bernardino CCD*).) We will find a violation of representational rights when (a) the employee or the union representative requested representation before (b) responding to a request to provide written information, (c) which the

⁸ EERA is codified at Government Code section 3540 et seq.

employee reasonably believed could result in disciplinary action, and (d) the employer denied the request. (See *San Bernardino CCD, supra*, PERB Decision No. 2599, p. 3; *Capistrano, supra*, PERB Decision No. 2440, p. 16.)

If an employee reasonably believes that his written statement could be used for disciplinary purposes, the right to representation attaches. (*San Bernardino CCD, supra*, PERB Decision No. 2599, p. 4.) An employer faced with a valid request for representation has three options. It may: (1) grant the request; (2) discontinue the interview/request for information and investigate through other means; or (3) offer the employee the option of continuing the interview without representation or having no interview at all. (*Ibid.*; *County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, p. 23 (*County of San Bernardino*); *San Bernardino City Unified School District* (1998) PERB Decision No. 1270, pp. 62-63.) The employer may not refuse the request and order the employee to continue unrepresented. (*San Bernardino CCD, supra*, at p. 5; *County of San Bernardino, supra*, at p. 38.)

It is undisputed that Madarang requested union representation when Hamilton asked him to draft and submit a memorandum, and that Hamilton denied the request. It is also undisputed that Madarang reasonably believed the memorandum could result in disciplinary action; the purpose of the memorandum was to explain why he failed to follow orders,⁹ and the County had previously disciplined him for that offense.

Nonetheless, the ALJ concluded no violation occurred because Madarang did not submit the memorandum. We disagree. Hamilton's order that Madarang draft the memo and

⁹ The direction stated in part, "I've just about had it with you continuously [undermining] what I'm telling you to do . . . I want a memo explaining why you failed to follow my directions."

bring it to her, notwithstanding his repeated requests for a representative, was well outside an employer's permissible responses to an employee requesting a representative. When Madarang first requested a representative, Hamilton told him that he did not need one and that he should just write the memo. When Madarang repeated his request, Hamilton repeated her order to write the memo. When he insisted, she responded, "Well, that is it," and requested an internal affairs investigation of, among other things, Madarang's refusal to prepare the memorandum and report to Hamilton's office. It was incumbent upon Hamilton to act upon Madarang's request, either by granting it or terminating the interview unless it was clear that Madarang was waiving his right to representation. (*San Bernardino CCD, supra*, PERB Decision 2599, p. 5.) An employer does not fall within this safe harbor, however, if it ends the interview but penalizes the employee for failing to participate. Accordingly, we find that Hamilton's conduct violated Madarang's right to be represented and Local 1021's right to represent him.¹⁰

REMEDY

In its exceptions, Local 1021 argues that the appropriate remedy is a purge order with make-whole relief, citing *Capistrano, supra*, PERB Decision No. 2440, p. 44. As the County correctly points out in its response, in *Capistrano* we noted a purge order with make-whole relief *may* be an appropriate remedy when an employee is denied representational rights. For

¹⁰ Local 1021 did not except to the Proposed Decision's conclusion of law that the County did not retaliate against Madarang for protected activities. Local 1021's failure to except to this finding does not signify that we agree with it.

the reasons discussed below, we find that in this case it is appropriate to make Madarang whole and to expunge the discipline and all related documents.¹¹

The record does not establish that Hamilton considered discipline or sought to involve internal affairs before Madarang requested a representative. The evidence shows, rather, that Moule advised Hamilton to verbally counsel Madarang concerning the bingo-scheduling issue, and that Madarang's insistence on union representation resulted in escalation of the dispute to an internal affairs matter. According to Moule, after Madarang "refused to complete the memorandum that was ordered, not requested, he was being insubordinate . . . [a]nd we decided at that point . . . that he posed a security threat." The issue went all the way up the chain to the Sheriff, the only one authorized to place someone on administrative leave. It was at that point that what started as a counseling meeting escalated to an internal affairs investigation. There would have been no internal affairs investigation, and no discipline,¹² absent Madarang's request for representation.

Since the evidence shows Madarang's insistence on a representative triggered the disciplinary process, we find the discipline is inextricably linked to Madarang's protected activity. It is immaterial that Picone discounted the protected activity after the *Skelly* hearing, because the discipline would not have been proposed in the first place had Madarang not engaged in protected activity.¹³

¹¹ The record reflects Madarang's disciplinary suspension was reduced from ten to five days as a result of an arbitration.

¹² At most, Madarang would have received a verbal counseling regarding his scheduling of bingo games, absent his protected activity.

¹³ Even if this case involved an employee disciplined in part for protected activity and in part for other conduct, "fashioning a partial-expungement remedy poses serious conceptual and practical problems" and "the Board is not in the business of re-writing disciplinary

Accordingly, to effectuate the purposes of the MMBA, the County must make Madarang whole, as well as rescind and expunge, from any files it maintains concerning Madarang, the Order of Suspension for ten working days issued on or around October 28, 2014, together with all related documents or records such as those pertaining to the related internal affairs investigation, *Skelly* hearing, and arbitration.¹⁴

ORDER

Based on the foregoing findings of fact and conclusions of law, the entire record in this case, the Public Employment Relations Board (PERB) finds the County of San Joaquin (County) violated: (1) sections 3502 and 3506.5, subdivision (a), of the Government Code by denying Joel Madarang (Madarang) the right to representation by an employee organization regarding a request that he submit a memorandum that could lead to discipline; and (2) sections 3503 and 3506.5, subdivision (b), by denying Service Employees International Union, Local 1021 (Local 1021) its right to represent Madarang regarding an investigatory memorandum, and committed unfair practices under section 3509, subdivision (b), and PERB Regulations 32603, subdivisions (a) and (b).

documents for employers, nor attempting to achieve the same result, by parsing protected from unprotected conduct referenced or relied on in such documents.” (*Capistrano, supra*, PERB Decision No. 2440, p. 45, citing *San Ysidro School District* (1980) PERB Decision No. 134, p. 19.) Moreover, the County here did not prove that it would have taken the same action against Madarang regardless of his refusal to submit the memorandum without consulting with a union representative. (Cf. *Capistrano, supra*, at p. 51.)

¹⁴ Local 1021 also urges us to order spoken notice to bargaining-unit employees, citing *Jason Lopez Planet Earth Landscape, Inc.* (2012) 358 NLRB 383. Spoken notice, also known as notice reading, is a remedy requiring the employer or sometimes a representative of the Board read a notice posting aloud in front of affected employees. (Barnes, *Making the Bird Sing: Remedial Notice Reading Requirements and the Efficacy of NLRB Remedies* (2015) 36 Berkeley J. Emp. & Lab. L. 351, 369.) While a notice reading may certainly be warranted in appropriate circumstances, Local 1021 does not explain in its exceptions why we should order such a remedy in this case and we decline to do so on these facts.

The County, its governing board and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Denying Madarang the right to be represented by an employee organization regarding a request that he submit a memorandum that could lead to discipline.
2. Denying Local 1021 rights guaranteed by the MMBA, including the right to represent employees regarding requests to submit memoranda that could lead to discipline.

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

1. Rescind and expunge, from any files it maintains concerning Madarang, the Order of Suspension for 10 working days issued on or around October 28, 2014, together with all related documents or records such as those pertaining to the related internal affairs investigation, *Skelly* hearing, and arbitration.
2. Make Madarang whole for lost wages and other benefits of employment suffered because of the Order of Suspension. Any financial losses should be augmented with interest at a rate of 7 percent per annum.
3. Within ten (10) workdays after this decision is no longer subject to appeal, post at all work locations in the County 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 County, indicating that the County will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees in the bargaining unit represented by Local 1021. Reasonable

steps shall be taken to ensure that this 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, 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 Local 1021.

Members Winslow and Krantz joined in this Decision.



**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-897-M, *Service Employees International Union Local 1021 v. County of San Joaquin (Sheriff's Department)*, in which all parties had the right to participate, it has been found that the County of San Joaquin (Sheriff's Department) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3502, 3503, and 3506 by denying Joel Madarang the right to representation by an employee organization regarding a request that he submit a memorandum that could lead to discipline, denying Service Employees International Union Local 1021's (Local 1021) right to represent employees.

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

A. CEASE AND DESIST FROM:

1. Denying Madarang the right to be represented by an employee organization regarding a request that he submit a memorandum that could lead to discipline.
2. Denying Local 1021 rights guaranteed by the MMBA, including the right to represent employees regarding requests to submit memoranda that could lead to discipline.

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

1. Rescind and expunge, from any files it maintains concerning Madarang, the Order of Suspension for 10 working days issued on or around October 28, 2014, together with all related documents or records such as those pertaining to the related internal affairs investigation, *Skelly* hearing, and arbitration.
2. Make Madarang whole for lost wages and other benefits of employment suffered because of the Order of Suspension. Any financial losses should be augmented with interest at a rate of 7 percent per annum.

Dated: _____

County of San Joaquin (Sheriff's Department)

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.