

STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



SAN BERNARDINO COUNTY PUBLIC  
ATTORNEYS ASSOCIATION,

Charging Party,

v.

COUNTY OF SAN BERNARDINO (OFFICE OF  
THE PUBLIC DEFENDER),

Respondent.

UNFAIR PRACTICE  
CASE NO. LA-CE-431-M

PROPOSED DECISION  
(May 17, 2012)

Appearances: Reich, Adell & Cvitan by Marianne Reinhold, Attorney, for San Bernardino County Public Attorneys Association; Kenneth C. Hardy, Deputy County Counsel, for County of San Bernardino (Office of the Public Defender).

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union alleges that an employer denied representation rights, retaliated against an employee who exercised those rights, and failed to provide requested information, all in alleged violation of the Meyers-Milias-Brown Act (MMBA).<sup>1</sup> The employer denies any violation.

The San Bernardino County Public Attorneys Association (Association) filed an unfair practice charge against the County of San Bernardino (Office of the Public Defender) (County) on January 16, 2008. The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint against the County on June 13, 2008. The County filed an answer on July 16, 2008.

PERB held an informal settlement conference on July 16, 2008, but the case was not settled. PERB held a formal hearing on February 24-25, May 14, July 15-16, and October 5-7,

<sup>1</sup> The MMBA is codified at Government Code section 3500 et seq.

2009. Prior to the hearing, the Association made a motion to amend the complaint, which was granted.

With the receipt of the final post-hearing brief on December 24, 2009, the case was submitted for decision. Thereafter, the parties jointly requested that the case be placed in abeyance pending settlement discussions. Ultimately, the parties were unsuccessful in reaching a settlement and asked that the case be removed from abeyance.

#### FINDINGS OF FACT

The County is a public agency under the MMBA. The Association is the exclusive representative of a bargaining unit of County employees that includes both Deputy Public Defenders (DPDs) and Deputy District Attorneys (DDAs). Neither party to this case has suggested that it is inappropriate for these attorneys to be in the same bargaining unit.

In July 2007, the County summoned DPD Lisa Berman (Berman) to an investigatory interview. On July 20, 2007, Berman appeared at the interview with DDA Sharon Caldwell (Caldwell) as her Association-appointed representative. Assistant Public Defender Lauri Ferguson (Ferguson) was present for the interview. According to a transcript, Ferguson told Berman:

Lisa, the administrative interview for today involves matters that in my opinion are confidential. Which means that as Sharon as [sic] a member of the district attorneys [sic] office, you would be waiving attorney client privilege and work product information. Which we are not prepared to waive. So you have a choice. You can either participate in the interview without representation by somebody who has a conflict, which would be anybody in the district attorneys [sic] office, or you can proceed without representation.

Later in the interview, Ferguson told Berman:

If you decide not to re-schedule the interview, then we'll go forward with the investigation.

Berman ultimately chose not to be interviewed without her representative.

The Public Defender proceeded with an investigation and on September 25, 2007, issued Berman a Notice of Proposed Dismissal (Notice), stating three reasons:

1. You misused your position of Deputy Public Defender to gain official access to visit inmate [name redacted] for personal reasons.
2. On [date redacted], 2007, you falsified San Bernardino County Sheriff's Department form "Request for Official/Special Interview or Visit" when you made personal visits with inmate [name redacted] on each of those occasions.
3. On [date redacted], 2007, you falsified a "Request for Paid Vacation or Sick Leave["], when you claimed sick leave when in fact you were not sick.

The Notice further told Berman:

Your willful misrepresentation that you were [name redacted]'s attorney and abuse of your position as a Deputy Public Defender to gain official access to an inmate for personal visits cannot be tolerated and alone is just cause for termination. However, your additional misconduct of falsifying a request for sick leave truly leaves the Office with no other appropriate alternative but to terminate your employment.

The Notice contained no reference to any casefiles, any client communications, or any legal work.

In a letter to Boxer dated August 5, 2007, Association President Grover Merritt (Merritt) stated in part:

First, Ms. Ferguson has **refused** to supply S.B.C.P.A.A. [the Association] with a copy of your office's policy manual, that is, the pertinent portions that relate to discipline. At the time of this writing, we still do not have a copy of your office rules of conduct which purportedly can be used to impose punishment. After so refusing, Ms. Ferguson has used that *same* policy to form the basis of at least one letter of reprimand. In that instance, the S.B.C.P.P.A. member was ordered not to discuss the reprimand letter with his representative, and he did not. However, it is simply not acceptable for Ms. Ferguson to

interpose *her* interpretations on the relationship between union Members and the union. [Emphasis in the original.]

The County did not respond to this portion of the letter.

In January 2009, the County summoned DPD Stephan Willms (Willms) to an investigatory interview. This led to a series of e-mail messages. On January 6, 2009, Merritt informed the County that Willms had requested a representative and the Association had appointed Caldwell. Later that same day, Boxer responded that “the Public Defender continues to object to having [DDAs] represent [DPDs] in administrative investigations on personnel issues.” On the following day, January 7, 2009, Boxer sent an e-mail message to both Merritt and Willms, stating in part:

Please be advised that no member of the District Attorney’s office will be permitted to attend this meeting.

If I do not receive a request to postpone the meeting from Mr. Merritt or from Mr. Willms, the meeting will proceed tomorrow, January 8th at 1:30 in the Public Defender Administration office, and as such Mr. Willms is ordered to be present at that time and place. *Violation of this order can result in discipline up to and including termination.* [Emphasis added.]

Willms responded by requesting a postponement, emphasizing that he did not want the meeting to occur without representation. The meeting was postponed to January 29, 2009.

In an e-mail message to Merritt dated January 28, 2009, Boxer stated in part:

I am interested in his manager, Chief Deputy John Zitny, speaking with Mr. Willms about how he interacts with other counsel, and how this may possibly affect the handling of death penalty cases. Consequently, my office needs to review with him in detail his case load, and one case in particular of which [sic] may be reassigned. We need to discuss detailed information about death penalty cases.

Other than the communication issue, I have no information to date that he has mishandled cases, but in order to ensure proper representation to criminal defendants in the most sensitive of

cases, i.e., death penalty cases, I need to have Mr. Zitny have this conversation with Mr. Willms.

In an e-mail message later that same day, Merritt replied in part:

If the topic of conversation is as you outline in paragraphs three and four of your morning e-mail, CDPD [Zitny] talking to DPD Willms vis-à-vis his caseload, I see that as a management prerogative regarding case loads in HDU and how the personnel pieces of the HDU work together. We would not presume to assert a union interest in it.

The next morning, Willms sent the following e-mail message:

If this meeting is just between Mr. Zitny and myself I do not request representation.

The meeting proceeded on that basis, without representation and without objection.

#### ISSUE

1. Did the County deny representation rights?
2. Did the County retaliate?
3. Did the County failed to provide requested information?

#### CONCLUSIONS OF LAW

##### Representation rights

An employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. PERB adopted the *Weingarten*<sup>2</sup> rule in *Rio Hondo Community College District* (1982) PERB Decision No. 260. In order to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation; (b) for an investigatory meeting; (c) which the employee reasonably believed might result in disciplinary

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<sup>2</sup> In *National Labor Relations Board v. Weingarten* (1975) 420 U.S. 251 (*Weingarten*), the U.S. Supreme Court granted employees the right to representation during disciplinary interviews.

action; and (d) the employer denied the request. (See *Redwoods Community College District v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617; *Fremont Union High School District* (1983) PERB Decision No. 301; see also, *Social Workers' Union, Local 535 v. Alameda County Welfare Department* (1974) 11 Cal.3d 382.)

In *Rio Hondo Community College District, supra*, PERB Decision No. 260, the Board cited with approval *Baton Rouge Water Works Company* (1979) 246 NLRB 995, that provided:

the right to representation applies to a disciplinary interview, whether labeled as investigatory or not, so long as the interview in question is not merely for the purpose of informing the employee that he or she is being disciplined.

In approving the *Weingarten* rule, the U.S. Supreme Court noted with approval that the National Labor Relations Board would not apply it to “such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques.” (*Weingarten, supra*, 420 U.S. 251, quoting *Quality Manufacturing Co.* (1972) 195 NLRB 197, 199.)

In the present case, it is clear that the County denied DPD Berman the representative of her choice: DDA Caldwell. The County argues, however, that the denial was necessary because of the inherent conflict of interest between DPDs and DPAs, which (the County argues) can only be managed by a blanket policy against DDAs representing DPDs. The Association argues, on the contrary, that the issue can be managed if any DDA representative simply recuses himself or herself from handling or discussing any criminal case involving a representation matter. I reject both arguments.

Carried to its logical extreme, the County’s argument would prevent the bargaining unit from functioning altogether. The Association could never represent DPDs, because the Association includes DDAs. Also, presumably, the Association could never represent DDAs

either, because the Association includes DPDs. As noted before, neither party has suggested that it is inappropriate for these attorneys to be in the same unit. As long as they are all in the same unit, the Association must be allowed to do its job of representing them all.

The Association's argument, on the other hand, would require the Public Defender to entrust to individual DDAs the protection of the Public Defender's client communications and work product. There may be counties in which the level of trust between defenders and prosecutors would be high enough for simple recusal to be reasonably acceptable, but I do not see evidence of that level of trust in this case. Given the inherently adversarial professional relationship between the Public Defender and the DDAs, it would be inappropriate for PERB to order either of them to trust the other in these matters.

I conclude that in order for the Association and the Public Defender to do their respective jobs, the County must allow DDAs to represent DPDs except to the extent that an investigatory interview is inseparable from the review of casefiles containing client communications and attorney work product. I also conclude that the exception does not apply to the interview of DPD Berman. As shown by the Notice of September 25, 2007, some (if not all) of the issues for investigation were separable from client communications, attorney work product, and other casefile issues. The County should have allowed DDA Caldwell to represent DPD Berman as to those non-casefile issues. Its refusal to do so violated the MMBA.

#### Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; (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 (*Novato*.) 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.) In a later decision, the Board further explained that:

The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an *adverse impact on the employee's employment*.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), 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 additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104; (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland*

*Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District, supra*, PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210).

In its opening brief, the County identified one of the issues in this case as follows:

When the Public Defender ordered DPD Willms to attend the interview and stated that failure to attend the interview may result in disciplinary action, did the County discriminate and retaliate against DPD Willms in violation of the MMBA?

In the same brief, the County's entire argument on this issue was as follows:

The County believes ... that DPD Willms was not retaliated against for exercising any union right.

I am unpersuaded by the County's asserted belief.

In its reply brief (to which the Association had no opportunity to respond), the County cited *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294 (*Upland*).

The county argued:

As for the retaliation claim, no competent evidence was submitted. DPD Willms did not testify. The alleged retaliatory act was a routine assertion by management that failure to comply with a directive could lead to disciplinary action. Even if the context of the possible delay of the investigative interview was due to the dispute over representation, the Association cannot convert this dispute into a retaliation claim. In *Upland*, an officer was ordered under threat of insubordination to answer questions despite the fact that his attorney was not present. The police department proceeded with the investigative interview because this was the second time the lawyer had rescheduled. The department informed the officer that he had a right to representation, but could not delay the investigation because he

wanted the particular attorney who was delayed. The court found no violation of Weingarten or any constitution right. [Citation omitted.] The Public Defender's directive, in the context of the rescheduling she provided, was mild compared to the situation in *Upland*.

I am still unpersuaded. In *Upland*, the Court stated in part:

More specifically, we fully support the officer's right to be represented by a person of his or her choice during an interrogation. We only hold that such a right is not unlimited. The officer must choose a representative who is reasonably available to represent the officer, and who is physically able to represent the officer at the reasonably scheduled interrogation. But it is the officer's responsibility to secure the attendance of his or her chosen representative at the interrogation. If he or she is unable to do so, the officer should select another representative so that the interrogation may proceed "at a reasonable hour."

(*Upland, supra*, 111 Cal.App.4th at 1306.) In the present case, Willms chose a representative who was both reasonably available and physically able to represent him. Unlike the conduct in *Upland*, this was clearly protected conduct.

Furthermore, Boxer's threat to terminate Willms was clearly adverse action. Any reasonable person would consider the action to have an adverse impact on employment. Finally, as the e-mail messages show, that threat grew promptly and directly out of the protected conduct, without any apparent justification, and thus violated the MMBA.

#### Information

The exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (*Stockton Unified School District* (1980) PERB Decision No. 143). PERB uses a liberal standard, similar to a discovery-type standard, to determine relevance of the requested information. (*Trustees of the California State University* (1987) PERB Decision No. 613-H.) Failure to provide such information is a per se violation of the duty to bargain in good faith.

Notwithstanding the liberal standard, an employer can refuse to release information that is otherwise “relevant and necessary” if, for example, it will impose burdensome costs on the employer, or the release will compromise employee privacy rights. (*Los Rios Community College District* (1988) PERB Decision No. 670, p. 13 (*Los Rios*); *Modesto City Schools and High School District* (1985) PERB Decision No. 479, p. 11.) However, the employer must affirmatively assert its concerns and then both parties must bargain in good faith to ameliorate those concerns. (See, e.g., *Los Rios, supra*, PERB Decision No. 670, pp. 10-12 [employer bargained in good faith by offering to delete social security numbers from requested document].) The employer cannot simply ignore a union’s request for information.

In its opening brief, the County identified one of the issues in this case as follows:

Did the County fail to meet and confer in good faith with the Association, or interfere with unit employee rights to be represented by the Association, or interfere with the Association’s right to represent unit members, due to the Public Defender’s Office’s response to a request for information?

In the same brief, the County’s entire argument on this issue was as follows:

The County believes that there was no failure to provide information to the Association ... .

Again, I am unpersuaded by the County’s asserted belief.

In its reply brief (to which the Association had no opportunity to respond), the County asserted (without citation to the record), “The Association testified that such request was not in writing.” Although there is no legal requirement that a request for information be in writing, the Association did confirm its request in writing, in its letter of August 5, 2007. The County still failed to respond, thus violating the MMBA.

## REMEDY

MMBA section 3509(b) states 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, except that in an action to recover damages due to an unlawful strike, the board shall have no authority to award strike-preparation expenses as damages, and shall have no authority to award damages for costs, expenses, or revenue losses incurred during, or as a consequence of, an unlawful strike.

In the present case, the County has been found to have violated the MMBA by denying representation rights, retaliating against an employee who exercised those rights, and failing to provide relevant information requested by the Association. It is therefore appropriate to order the County to cease and desist from such conduct. It is also appropriate to order the County to rescind the e-mail of January 7, 2009, threatening to terminate Willms, who exercised his representation rights, and to provide the Association with all existing policies regarding the discipline of employees, as requested.

I have concluded that the County should allow DDAs to represent DPDs except to the extent that an investigatory interview is inseparable from the review of casefiles containing client communications and attorney work product. An expert witness for the County, when asked whether no DDA should ever represent a DPD, testified in part:

I wouldn't go that far. Where I think the standard is, and frankly, I think this should be worked out with the two offices. I think there should be a protocol that addresses these issues.

In the present case, no such protocol exists, it is up to PERB to create one.

As previously stated, the County should allow DDAs to represent DPDs except to the extent that an investigatory interview is inseparable from the review of casefiles containing client communications and attorney work product. To the extent there are issues that are not

separable from client communications, attorney work product and other casefile issues, the County should give the Association a written explanation of why this is so in the particular case and should offer to discuss that explanation with the Association. If, after any discussion with the Association, the County determines in good faith that certain issues are inseparable from casefile issues, it may prevent DDAs from representing DPDs as to those issues.

It is also appropriate to order the City to post a notice incorporating the terms of the order in this case. (*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 San Bernardino (Office of the Public Defender) (County) violated the Meyers-Milias-Brown Act (Act), Government Code section 3500 et seq., by denying representation rights, retaliating against an employee who exercised those rights, and failing to provide relevant information requested by the San Bernardino County Public Attorneys Association (Association).

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

A. CEASE AND DESIST FROM:

1. Denying representation rights,
2. Retaliating against employees who exercise those rights, and
3. Failing to provide relevant information requested by the Association.

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

1. Allow Deputy District Attorneys to represent Deputy Public Defenders except to the extent that an investigatory interview is inseparable from the review of casefiles containing client communications and attorney work product.
2. Rescind the e-mail of January 7, 2009, threatening to terminate an employee who exercised representation rights.
3. Provide the Association with all existing policies regarding the discipline of employees, as requested.
4. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the County 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 it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.
5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

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

Public Employment Relations Board  
Attention: Appeals Assistant  
1031 18th Street  
Sacramento, CA 95811-4124  
(916) 322-8231  
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 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 which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

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

Thomas J. Allen  
Administrative Law Judge

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



After a hearing in Unfair Practice Case No. LA-CE-431-M, *San Bernardino County Public Attorneys Association v. County of San Bernardino (Office of the Public Defender)*, in which all parties had the right to participate, it has been found that the County of San Bernardino (Office of the Public Defender) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by denying representation rights, retaliating against an employee who exercised those rights, and failing to provide relevant information requested by the San Bernardino County Public Attorneys Association (Association).

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

A. CEASE AND DESIST FROM:

1. Denying representation rights,
2. Retaliating against employees who exercise those rights, and
3. Failing to provide relevant information requested by the Association.

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

1. Allow Deputy District Attorneys to represent Deputy Public Defenders except to the extent that an investigatory interview is inseparable from the review of casefiles containing client communications and attorney work product.
2. Rescind the e-mail of January 7, 2009, threatening to terminate an employee who exercised representation rights.
3. Provide the Association with all existing policies regarding the discipline of employees, as requested.

Dated: \_\_\_\_\_

COUNTY OF SAN BERNARDINO (OFFICE OF  
THE PUBLIC DEFENDER)

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.