

PUBLIC EMPLOYMENT RELATIONS BOARD

Division of Administrative Law
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 324-0143
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RECEIVED

DEC 04 2017

WR&R

November 30, 2017

Re: *Service Employees International Union Local 521 v. County of Monterey*
Case No. SF-CE-1420-M

Dear Parties:

Attached is the Public Employment Relations Board (PERB or Board) agent's Proposed Decision in the above-entitled matter.

Any party to the proceeding may file with the Board itself a statement of exceptions to the Proposed Decision. The statement of exceptions shall be filed with the Board itself at the following address:

PUBLIC EMPLOYMENT RELATIONS BOARD**Attention: Appeals Assistant****1031 18th Street, Suite 200****Sacramento, CA 95811-4124****(916) 322-8231****Fax: (916) 327-7960****E-File: PERBe-file.Appeals@perb.ca.gov**

Pursuant to California Code of Regulations, title 8, section 32300, an original and five copies of the statement of exceptions must be filed with the Board itself within 20 days of service of this decision. A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, § 32135, subd. (a); see also, Cal. Code Regs., tit. 8, § 32130.)

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, which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, §§ 32135, subds. (b), (c) and (d); see also, Cal. Code Regs., tit. 8, §§ 32090, 32091, and 32130.)

The statement of exceptions shall be in writing, signed by the party or its agent and shall: (1) state the specific issues of procedure, fact, law or rationale to which each exception is taken; (2) identify the page or part of the decision to which each exception is taken; (3) designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception; and (4) state the grounds for each exception. Reference shall be made in the statement of exceptions only to matters contained in the record of the case. An exception not

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specifically urged shall be waived. A supporting brief may be filed with the statement of exceptions. (Cal. Code Regs., tit. 8, § 32300.)

Within 20 days following the date of service of a statement of exceptions, any party may file with the Board itself an original and five copies of a response to the statement of exceptions and a supporting brief. The response shall be filed with the Board itself at the address noted above. The response may contain a statement of any exceptions the responding party wishes to take to the proposed decision. Any such statement of exceptions shall comply in form with the requirements of California Code of Regulations, title 8, section 32300. A response to such exceptions may be filed within 20 days. Such response shall comply in form with the provisions of this section.

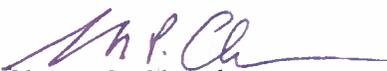
All documents authorized to be filed herein must also be “served” upon all parties to the proceeding, and a “proof of service” must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly “served” when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Any party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file with the statement of exceptions or the response thereto a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument. (Cal. Code Regs., tit. 8, § 32315.) All requests for oral argument shall be filed as a separate document.

A request for an extension of time within which to file any document with the Board itself shall be in writing and shall be filed at the headquarters office at least three days before the expiration of the time required for filing. The request shall state the reason for the request and, if known, the position of each other party regarding the extension. Service and proof of service pursuant to California Code of Regulations, title 8, section 32140 are required. Extensions of time may be granted by the Board itself or an agent designated by the Board itself for good cause only. (Cal. Code Regs., tit. 8, § 32132, subd. (a).)

Unless a party files a timely statement of exceptions to the proposed decision, the decision shall become final. (Cal. Code Regs., tit. 8, § 32305.)

Sincerely,


Shawn P. Cloughesy
Chief Administrative Law Judge

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, 1031 18th Street, Sacramento, CA 95811-4124.

On November 30, 2017, I served the Proposed Decision regarding Case No. SF-CE-1420-M on the parties listed below by

placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid.

personal delivery.

facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).

electronic service (e-mail).

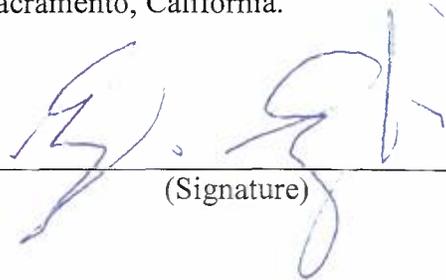
Anthony Tucci, Attorney
Weinberg, Roger & Rosenfeld
1001 Marina Village Pkwy., Ste. 200
Alameda, CA 94501-1091

Janet L. Holmes, Deputy County Counsel
County of Monterey
168 West Alisal Street, 3rd Floor
Salinas, CA 93901-2439

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on November 30, 2017, at Sacramento, California.

B. Buddingh'

(Type or print name)



(Signature)

On April 14, 2017, the County filed its answer to the complaint denying the material allegations and raising a number of affirmative defenses.

On May 25, 2017, an informal settlement conference was held but the matter was not resolved.

On August 23, 2017, a formal hearing was conducted in Oakland.

On November 3, 2017, the matter was submitted for decision with the filing of post-hearing briefs.

FINDINGS OF FACT

SEIU is an employee organization, within the meaning of section 3501(a), and an exclusive representative of a bargaining unit of public employees, within the meaning of PERB Regulation 32016(b). The County is a public agency within the meaning of section 3501(c).

Lourdes Mercado is an office assistant II with Department of Social Services, Family and Children's Services Division (Department). She has 11 years of experience handling general clerical duties (answering phones, data entry, copying, and assisting social workers). Mercado has reached the top step in her salary range.

The Department has adopted a procedure for employee evaluations. The goal of the evaluation policy is to assist the employee in improving his/her performance, with a view to professional development and advancement within the ranks. The supervisor is to set expectations, monitor performance, and provide monthly feedback. An overall meets standards rating is a prerequisite for a step increase. The County's evaluation form is an eight-page form with 32 rating categories, together with a two-page checklist. The evaluation form is entered in the personnel file. A failure to meet performance expectations can potentially lead to termination.

SEIU and the County were parties to a memorandum of understanding (MOU) for the period July 1, 2013, through June 30, 2016. Section 37 of the MOU provided that an employee who disagrees a summative evaluation rating may request to meet with the next level manager if discussion with the supervisor does not achieve a resolution. If a resolution is not achieved at that level, the employee may request a meeting with the department head. The department head is to respond in writing. That decision is final and not subject to the grievance procedure.

Section 37 is silent with respect to a right of union representation at these steps in the procedure. In negotiations for the 2013-2016 agreement, there was no discussion about union representation in performance evaluation review meetings. Brette Neal, the county's bargaining representative, acknowledged there is no language in the MOU that waives SEIU's right to represent an employee in a meeting regarding an evaluation. In the successor MOU negotiations, between April and August 2016, SEIU proposed to add language allowing for union representation. The County rejected the proposal, and no change occurred.

The County's general practice is only to allow a union representative on behalf of an employee in a meeting with a management representative (i.e., *Weingarten*³ representative) in two instances: when the matter affects working conditions, or the employee fears discipline.

Mercado's annual evaluation for the period of November 2014 to 2015 was the product of the opinions of several raters, including supervisors Sharon Gold, Jinny Meyers, and Polly Young, as well as Program Manger Emily Nicholl. Gold and Nicholl co-authored the evaluation. The evaluation identified "needs improvements" in categories of verbal communication, work habits, adaptability, and personal relations. These all centered around Mercado not taking direction well, being argumentative, questioning procedures, complaining

³ *NLRB v. J. Weingarten, Inc.* (1975) 42 U.S. 251.

of inability to complete the work, and difficulty receiving feedback. Mercado was “very professional” dealing with clients. Six of the 32 categories were checked needs improvement. Mercado was placed on a 90-day “Performance Improvement Plan” (PIP) as a result of the overall needs-improvement rating. Mercado was required to attend training and model appropriate behavior. Mercado testified that the PIP frightened her. She construed the situation as meaning she could face discipline in the future, including possible termination. On that basis she consulted with SEIU.

Mercado was successful in scheduling a meeting with supervisor Nicholl. SEIU Contract Enforcement Specialist Frank Garden was present to discuss the evaluation, but Nicholl referred her to Human Resources Senior Administrator Cheryl Collins. Again a meeting was scheduled. Garden was present and there were some exchanges between him and Collins.

The next performance evaluation issued on June 24, 2016. It was a six-month interim evaluation through April 2016. The needs-improvement status was extended due to lack of significant progress. This form repeated the same six needs-improvement marks. Supervisor Pat Mannion wrote the majority of this evaluation. She had feedback from interim supervisors Jennifer Mitchell and Brianne Walker.

Under the category of verbal communication, Mercado was cited for one incident of throwing phone messages from the Child Abuse Hotline on the desk of the interim supervisor and saying she could not keep up with the workload. On another occasion with the same supervisor, Mercado questioned office procedure, claiming referral forms had not been completed with enough information, and insisted she was right. On a third occasion she complained that procedures had changed when they had not. The report found her otherwise

professional communications skills were “overshadowed by her sometimes inappropriate communication.”

The report justifying extending the needs-improvement explained that Mercado “has had challenges around interactions with supervisors as well as challenges with adapting to changes and new instructions, and in accepting feedback.”

On June 24, after reviewing documentation provided by Mercado, Garden agreed to represent Mercado at an “evaluation appeal meeting.”

When attempting to schedule this meeting around the evaluation, Deputy Director Lori Medina responded for the County stating that the “Evaluation Review” meeting could occur, but without union representation. After some further email exchanges, Medina asserted that the meeting was not related to contract and, as a meeting over an evaluation, was to be without a representative per the County’s practice. Medina ruled in this fashion after consulting with the human resources department and County Counsel. Mercado acknowledged the rule but stated her intention to file an unfair practice charge.

Medina met with Mercado on August 17, 2016, for the review meeting. Mercado tried to explain that she was admittedly outspoken but had never failed to follow direction. Medina promised to investigate. Medina inquired with Nicholl and found nothing on which to move forward, because Nicholl’s view was shared by several other supervisors. Medina failed to communicate to Mercado that her claim was denied, because Mercado went on leave.

Garden testified that he supervises assignments of stewards in response to requests for representation by employees in the bargaining unit. Through speaking with his telephone intake worker, Garden is aware of representation requests at meetings to contest evaluation

ratings. He has assigned stewards in the past for such meetings. He did not have any examples of such requests in the Department.

ISSUE

Did the County interfere with Mercado's right to representation by SEIU in the meeting held to discuss her performance evaluation?

CONCLUSIONS OF LAW

Unlike a *Weingarten* case where the circumstances of the meeting compel an obligation by the employer to provide a union representative upon request, here SEIU contends that the County is required to allow representation upon request by Mercado based on a statutory right to representation which arises from the matters addressed in the meeting. Addressing this theory requires examination of the evolving contours of the right to representation, inclusive of the *Weingarten* principle.

In *Sonoma County Superior Court* (2015) PERB Decision No. 2409-C, PERB overruled a charge dismissal where the employee was denied representation in the interactive meeting within the disability accommodation process. PERB held that an employee's right to union representation includes meetings with the employer in grievance-type proceedings of this nature. The right emanated from a strand of the law of union representation that is distinct from the *Weingarten* right and one arising from the statutory schemes of the California labor statutes. (*Id.* at pp. 13-15.) The extension of the *Weingarten* right beyond the scope established in *Redwoods Community College District* (1983) PERB Decision No. 293, affirmed at *Redwoods Community College District v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617, 623, proceeded from a distinct underlying basis, namely, the importance of enforcing the terms of the collective bargaining agreement, rather than the threat of discipline.

(*Sonoma County Superior Court, supra*, PERB Decision No. 2409-C, p. 14, overruling *Trustees of the California State University* (2006) PERB Decision No. 1853-H.)⁴

PERB separately acknowledges an employee's right to representation in a meeting to discuss the employee's appeal of a performance evaluation where the meeting is initiated by a manager who ranks above the employee's direct supervisor and is "imbued with sufficient formality and 'appellate' character to take on the quality of a grievance." (*Redwoods Community College District* (1983) PERB Decision No. 293, p. 8.)

Sonoma County Superior Court, supra, PERB Decision No. 2409-C found its legal basis in the statutory language of the right to represent, right to participate, and legislative purpose. These provisions are found in the Trial Court Employment Protection and Governance Act and the Educational Employment Relations Act. (Secs. 3540, 3543, subd. (a), 3543.1, subd. (a), 71630, subd. (a), 71631, 71633.) It is the same language found in the MMBA. (Secs. 3500, 3502, 3503.) The representation right attached to the interactive reasonable accommodation meeting because it (1) was initiated by the employee, (2) involved a give-and-take process seeking a mutual resolution, and (3) potentially impacted terms and conditions of employment. (PERB Decision No. 2409-C, p. 14.) An important factor was the potential for the employee to lose employment status.

The right to representation is not unlimited. (*Sonoma County Superior Court* (2015) PERB Decision No. 2532-C, pp. 7, 12, 19-20 [rejecting request to overrule *Sonoma County Superior Court, supra*, PERB Decision No. 2409-C, due to absence of any limits on the representation right].) It does not extend to routine ("shop floor") conversations in which the

⁴ For this reason, PERB felt unconstrained by the language of the Court of Appeal decision that the *Weingarten* right would only attach in "highly unusual circumstances," absent the threat of discipline.

employer gives the employee instructions on training or corrects work techniques. (*Id.* at pp. 19-21; *Redwoods Community College District supra*, PERB Decision No. 293, p. 8.) The purpose served by representation was described in the following terms:

A representative's presence at a meeting over a disputed evaluation could assist the employee in presenting clear, cogent arguments and facts supporting his/her point of view. The representative may also act as a buffer in a confrontation that is filled with potential acrimony, a function obviously beneficial to both sides. Also, the potential power imbalance between management, unfettered in the number of representatives it may have, and the lone employee calls for a representative's presence.

(*Id.* at p. 7.)

Under the foregoing authorities, it is found that a right of union representation attached to the meeting between Mercado and Medina, the third level supervisor responsible for reviewing the lower level evaluation determinations of her staff. The meeting was initiated by Mercado in an attempt to remove the cloud over her ongoing performance evaluation. It involved an employee's attempt to enforce the MOU's provisions providing for a three-step review process.⁵ The meeting involved a give-and-take process. Mercado was permitted to give her side of the case in terms of why the evaluation was too harsh. Medina took that information and conducted an investigation with those in her chain of command. A representative could have assisted Mercado in advancing the best arguments in support of her case, including arguments based on comparative analysis of the County's treatment of other

⁵ The County's human resources manager testified that there is no appeal process as to evaluations. There is only the "review" process whereby the employee is permitted to provide input and have that input considered. Whether the review process is, or is not, an appeal process is not dispositive in this case.

employees. Despite the fact that Mercado was not entitled to any further step increases, there was potential impact on terms and condition of employment, because she could suffer further adverse consequences with the performance improvement requirements in place. The meeting was not one involving an initial evaluation, nor can it be considered a shop floor discussion where an employee is given direction on proper performance of duties. (*Redwoods Community College District supra*, PERB Decision No. 293, p. 8.)

The County provides no analysis supporting grounds for distinguishing *Sonoma County Superior Court, supra*, PERB Decision No. 2532-C, or the related authorities. The County simply argues that the past practice and the existing MOU have failed to codify a right to representation in these circumstances. This argument is without merit. SEIU's claim is based on the theory that representation is required by the statute. The County admits there is no explicit language of waiver in the MOU, and the failure of SEIU to obtain a right to representation in the most recent MOU does not operate as an implied waiver. (*Los Angeles Community College District* (1982) PERB Decision No. 252, pp. 13-14.)

Accordingly, the County denied Mercado her right to representation in the meeting to review her performance evaluation, in violation of sections 3502 and 3503, and PERB Regulation 32603(a) and (b).

REMEDY

Pursuant to section 3509, subdivision (a), the PERB, under section 3541.3, subdivision (i), is empowered to order remedies necessary to effectuate the policies of the Act.

The County has been found to have violated sections 3502 and 3503 and PERB Regulation 32603(a) and (b) as a result of denying Mercado's request to be represented by an

SEIU representative at her August 17, 2016, meeting to consider the appeal of her performance evaluation. The appropriate remedy is to cease and desist from such unlawful conduct.

(Rio Hondo Community College District (1983) PERB Decision No. 292.) Further, the County is ordered to restore the status quo ante by conducting a meeting, upon Mercado's request, to consider the appeal of her performance evaluation, and granting Mercado a representative if she requests one. *(Sonoma County Superior Court, supra, PERB Decision No. 2532-C, pp. 29-30.)*

In addition, it is the ordinary remedy in PERB cases that the party found to have committed an unfair practice be ordered to post a notice incorporating the terms of the order. Such an order is granted to provide employees with a notice signed by an authorized agent that the offending party has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. Thus, it is appropriate to order the County to post a notice incorporating the terms of the order herein at its buildings, offices, and other facilities where notices to bargaining unit employees are customarily posted, and through electronic messaging. Posting of such notice effectuates the purposes of the MMBA that employees are informed of the resolution of this matter and the County's readiness to comply with the ordered remedy.

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 Monterey (County) violated the Meyers-Milias-Brown Act (MMBA) in case number SF-CE-1420-M as a result of denying Lourdes Mercado's request to be represented by a Service Employees International Union, Local 521 (SEIU) representative at her

August 17, 2016, meeting to discuss her performance evaluation, in violation of Government Code sections 3502 and 3503, and PERB Regulation 32603, subdivisions (a) and (b).

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

A. CEASE AND DESIST FROM:

1. Interfering with employees' right to have a union representative at meetings to consider an appeal of a performance evaluation.

2. Denying SEIU the right to represent its employees.

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

1. Upon request by Lourdes Mercado, the County shall conduct a meeting to consider the appeal of her performance evaluation. The County shall permit SEIU to represent Mercado at this meeting upon her request for such representation.

2. 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 Court customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the Court, 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. 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 units represented by SEIU.

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. 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 SEIU.

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 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
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, 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, 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).)

