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March 2019

DIRECTIVE NOT TO CONTACT WITNESSES IMPROPER

County of Santa Clara (2018) PERB Decision No. 2613-M

By Robert Rabe, Esq.

The County initiated an investigation focused on Lance Scimeca concerning an alleged violation of a workplace communications policy. Scimeca was placed on administrative leave and directed to stay away from the Sheriff's Office unless directed to enter by a captain. Scimeca was also given the following order: *"You are hereby ordered not to discuss this matter with any, witnesses, potential witnesses, the complainant, or any other employee of the Sheriff's Officer other than your official representative."* All individuals placed on administrative leave pending an investigation for alleged misconduct are given the same directive. According to the Undersheriff, it was standard practice in the Sheriff's Office to separate witnesses from officers who are under investigation to prevent "collaboration and tainting of the witnesses or the subject officers."

The Administrative Law Judge (ALJ) hearing the matter, observed that "a workplace rule that infringes on [the right of employees to discuss with each other working conditions] may be valid only where the employer demonstrates a legitimate and substantial business justification." The ALJ found that the directive restricted Scimeca's right to

communicate with his fellow employees concerning working conditions, namely the "matter" that caused the Sheriff's Office to place him on administrative leave. This placed the burden on the County to establish a substantial and legitimate business justification for its directive.

The County argued that the directive was justified because management needed to: (1) ensure the investigation was free from improper collusion or coercion by the subject employee; and (2) treat all employees the same with respect to restrictions when it conducts an investigation into misconduct. The County also asserted that the order was necessary because the environment in which correctional deputies work is dangerous with real threats of violence.

The ALJ rejected these justifications because they articulated only general concerns unconnected with the particular investigation of Scimeca. There were no facts presented indicating that the safety of inmates or employees was compromised by Scimeca's alleged misconduct, or that he abused inmates or abused his position or intimidated his coworkers or inmates. The ALJ referenced a NLRB

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decision that explained how it was the employer's burden "to first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover up." The ALJ concluded: "In short, the County gives very little beyond its own characterization of the conduct as egregious to warrant denying Scimeca his right to meet and confer with coworkers about working conditions." Because the County failed to meet its burden, the ALJ ruled that it violated the MMBA by restricting Scimeca's right to discuss with his coworkers working conditions, including the County's pending investigation of his alleged misconduct. The ALJ ordered the County to rescind the directive and cease and desist from interfering with Scimeca's rights.

The PERB observed that there is "no more fundamental right afforded employees ... than the right to communicate with others about working conditions." "Working conditions" include the circumstances underlying and surrounding an investigation into alleged employee misconduct. The PERB noted that "the directive ... prohibited Scimeca from communicating with his co-workers about the matter for which he was being investigated. He thus was prevented from contacting potential witnesses, or from making other inquiries that could help him prepare for his investigatory interview. This, in turn, prevented him from giving effective assistance to [the Correctional Peace Officers' Association] in its representation of him in the investigation." Thus, the directive harmed Scimeca's right to discuss working conditions with fellow employees, as well as the Association's right to communicate with employees under investigation and therefore its right to represent employees.

The issue the PERB had to address in this case, was whether the rule requiring an employer to provide a case-specific "legitimate and substantial business justification" for a directive not to discuss an ongoing investigation applies to public safety employers. The County asserted that it was prevented from providing the information to fully explain the rationale behind the directive "because

the employee, Scimeca, refused to waive the privacy rights unique to peace officers, thus tying the County's hands and preventing the County from fully explaining the significance and importance of [the directive] in this case." The PERB rejected that argument, noting nothing prevents a public safety employer from filing a *Pitchess* motion or utilizing another procedure for protecting peace and custodial officer personnel records in a PERB unfair practice hearing, which the County made no attempt to do. The PERB concluded that the requirement to provide a *case specific justification would apply to public safety employers*, and affirmed the ALJ's conclusion that the County violated the MMBA.

Absent a valid *case specific justification* that confidentiality is justified, public safety employees should, following this decision, be able communicate with potential witnesses, including fellow employees, about the incident for which they are under investigation. This will allow the individual officer under investigation, and their union representative, to properly prepare for the investigatory interview.

Note: This decision does not provide authority for an officer to ignore or disobey a "no contact" order. If you are given a directive, similar to that given to Scimeca in this case, without being told the circumstances justifying why, or if your employing agency continues to give a similar "standard" directive without proper justification, you may want to bring this decision to the attention of your association or union for possible action. It may become necessary for the PERB to issue more "cease and desist" orders before all public safety employers understand what they can, and cannot, do during an investigation into possible employee misconduct.

Stay Safe!

Robert Rabe is Stone Busailah, LLP's writs and appeals specialist. His 40 years practicing law include 16 years as a Barrister, Supreme Court of England and Wales, practicing in London, England.

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