STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ANTHONY GARCIA, Charging Party, v. SUNLINE TRANSIT AGENCY, Respondent.	Case No. LA-CE-1536-M PERB Decision No. 2928-M October 31, 2024

Appearance: Atkinson, Andelson, Loya, Ruud & Romo, by Irma Rodriguez Moisa and Eric T. Riss, Attorneys, for SunLine Transit Agency.

Before Banks, Chair; Krantz and Nazarian, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on Respondent SunLine Transit Agency's exceptions to a proposed decision of an administrative law judge (ALJ). The amended complaint alleged that SunLine violated the Meyers-Milias-Brown Act (MMBA) by retaliating against Charging Party Anthony Garcia for engaging in protected activity.[1] Specifically, the complaint alleged that SunLine retaliated when it: (1) issued Garcia notice of an impending written warning in January 2022; (2) placed Garcia on paid administrative leave pending investigation in May 2022; and (3) fired Garcia in September 2022. After a formal hearing, the ALJ sustained the first two claims and dismissed the third claim.

[1] The MMBA is codified at Government Code section 3500 et seq. Undesignated statutory citations are to the Government Code.

SunLine filed exceptions challenging the ALJ's ruling in Garcia's favor on the first two claims. In the alternative, SunLine argues that one of the ALJ's two cease-and-desist orders was improper. Garcia neither responded nor filed cross-exceptions. For the reasons explained in this decision, we reject SunLine's exception challenging its liability for issuing Garcia a written warning, but we sustain SunLine's exception regarding its decision to place Garcia on paid administrative leave pending investigation, as well as its exception regarding the ALJ's remedy. Finally, because neither party challenged the ALJ's dismissal of Garcia's claim that SunLine terminated him for protected activity, we incorporate that dismissal in our order without expressing any opinion on it.

FACTUAL BACKGROUND[2]

SunLine is a public agency within the meaning of MMBA section 3501, subdivision (c). SunLine employs motor coach operators (MCOs), i.e., bus drivers, who provide fixed-route transit services and paratransit services in parts of Riverside County. Isabel Vizcarra, who served as SunLine's Chief Transportation Officer at all relevant times, oversaw day-to-day operations of paratransit and fixed route services, customer service, reservations, and planning. Vizcarra was also in charge of hiring, coaching, disciplining, and terminating employees in the Operations Department,

[2] We summarize the ALJ's most critical findings pertaining to the complaint's first two claims. For context, we also briefly summarize the ALJ's findings as to Garcia's termination claim, even though it is not before us. Garcia acceded to all the ALJ's findings, as he filed no exceptions. For its part, SunLine filed exceptions primarily about legal issues. To the extent SunLine has raised factual issues, we have considered its arguments in reaching our factual findings, and these findings rely in large measure on SunLine's own witnesses and documents.

including Garcia and other MCOs. Tina Hamel was SunLine's Chief of Compliance and Labor Relations, while Tamara Miles served as Human Resources Chief.

Amalgamated Transit Union Local 1277 (ATU) represents SunLine's MCOs and maintenance personnel, excluding management, supervisory, professional, and confidential employees. SunLine and ATU were parties to a memorandum of understanding (MOU) effective April 1, 2019, through March 31, 2022.

At all relevant times, Garcia was a public employee within the meaning of MMBA section 3501, subdivision (d). Garcia worked as an MCO in SunLine's fixed route division for more than 26 years. SunLine stipulated that it had no issue with Garcia's work performing his day-to-day duties. Except for the discipline at issue in this case, Garcia had an unblemished employment record.

I. SunLine's Employee Handbook

The record includes a 55-page employee handbook dated June 2016. Section 1 of the handbook, entitled "General," includes a Harassment, Discrimination, and Retaliation Prevention Policy that prohibits harassment "in any form," including any "[v]erbal, physical and visual conduct that creates an intimidating, offensive or hostile working environment or that unreasonably interferes with job performance." The policy states that "[a]ny employee who feels he/she has been harassed, or who is aware of another employee who has been harassed, should immediately contact our Agency's representative responsible for receiving such complaints." The policy promises that when SunLine receives complaints, it "will take prompt and appropriate remedial action, including disciplinary action against the harasser(s), up to and including termination."

Section 1 also includes a Violence in the Workplace Policy that states, among other provisions: "[SunLine] has a zero tolerance for violence in the workplace. If an

employee engages in any violence in the workplace, or threaten[s] violence in the workplace, his/her employment will be terminated immediately. No talk of violence or joking about violence will be tolerated. 'Violence' includes physically harming another, shoving, pushing, harassing, intimidating, coercing, brandishing weapons, and threatening or talking of engaging in those activities (whether seriously or in jest)."

In addition, Section 1 includes a heading entitled "Standards of Conduct/At-Will Employment."[3] Under this heading, the handbook provides a non-exhaustive list of offenses that can result in discipline, including:

> "1. Insubordination, including improper conduct toward a manager/supervisor or refusal to perform tasks assigned by a manager/supervisor in the appropriate manner.
>
> [¶] . . . [¶]
>
> "3. Release of confidential information about [SunLine] or its employees.
>
> [¶] . . . [¶]
>
> "13. Violation of the harassment, discrimination, and retaliation prevention policy.
>
> "14. Lying, dishonesty, omitting or failing to report information required to be reported."

Section 9 of the handbook, entitled "Other," contains 11 miscellaneous policies: "Bulletin Boards," "Emergency Closing," "SunLine Suggestion Box," "Housekeeping

[3] The handbook's reference to at-will employment is inconsistent with the MOU, which permits discipline only for proper cause. However, the outcome of this case does not turn on the handbook's reference to at-will employment, and the record reflects that SunLine knew it could only discipline employees for proper cause.

Guidelines," "Lost & Found," "Media Contact," "Office Supplies," "Personal Blogs/Social Media," "Rideshare," "Recycling," and "Visitors."

Under "Personal Blogs/Social Media," the handbook states:

> "Blogging/social media participation, except by authorized personnel, may not occur on Agency property or equipment at any time.
>
> "Employees are prohibited from representing [SunLine] or representing that they speak on behalf of [SunLine] without express, advance authorization. Employees are similarly prohibited from using any [SunLine] trademarks, logos, or copyright-protected material.
>
> "Employees who engage in blogging or other internet postings outside the workplace in which they identify themselves as employees of [SunLine] or in which they regularly or substantively discuss [SunLine] publicly, are expected to clearly state that any views or opinions expressed therein regarding [SunLine] are the employee's own, not those of the Agency. Postings must not contain confidential Agency information, trade secrets, or otherwise violate this Handbook, other [SunLine] policies, or applicable law.
>
> "Employees are reminded and cautioned that information posted on a social media site may be used as evidence in an internal investigation and administrative or legal proceedings. Employees should also expect that any information created, transmitted, downloaded, exchanged, or discussed on any social media site may be accessed by [SunLine] or any third party at any time without prior notice. Furthermore, anything posted on the Internet or in a social media forum may be accessible by anybody else. Employees have no reasonable expectation of privacy in anything posted on the Internet."

The parties did not present competent, persuasive evidence as to how SunLine may have applied its social media policy prior to the circumstances at issue here.[4]

The handbook's introduction states, among other things, that employees should read the handbook "carefully," should "know and understand its contents," and should know about and understand "changes once they have been published." The final two sentences of the introduction state: "Employees shall sign the acknowledgement form at the back of this Employee Handbook and return it to the Human Resources Department. This will provide [SunLine] with a record that each employee has received and read this Employee Handbook." However, the record does not show that Garcia ever received, read, or signed for the 2016 version of the handbook, or any other version containing the Personal Blogs/Social Media Policy.

II. SunLine's Investigations of Garcia and Resulting Discipline

A. Overview

SunLine retained Garon Wyatt to conduct two separate investigations of Garcia. The first began in September 2021, after two of Garcia's co-workers filed harassment complaints against him. During the investigation, Wyatt learned of multiple videos that Garcia posted to YouTube. When Wyatt concluded his investigation in January 2022, his report exonerated Garcia on the harassment charges that had occasioned the investigation, while opining that Garcia's YouTube videos violated SunLine's social

[4] Garcia's testimony included an off-hand remark about a video that another SunLine employee allegedly filmed on SunLine property and posted to YouTube. However, neither party elicited evidence that would allow comparison to this alleged video or any other potential comparator. Absent information about the contents of any such video, whether management learned of it, and whether management thereafter responded in any way, we make no inferences on these issues.

media policy. On January 26, 2022, SunLine issued Garcia a Notice of Impending Discipline (NID) indicating SunLine's intent to issue Garcia a written warning for violating the social media policy. Garcia proceeded to exhaust his pre-disciplinary right to challenge the written warning, at which point the warning became effective.

The second investigation began in May 2022 after Tiffany Moore, SunLine's Customer Service Manager, complained to SunLine's Human Resources Department about Garcia. SunLine placed Garcia on paid administrative leave on May 18, and he remained on that leave for the remainder of his time as a SunLine employee. This second investigation repeatedly expanded in scope, concluded in August 2022, and led to Garcia's September 2022 termination.

B. The First Investigation and the Resulting Written Warning to Garcia

In 2021, Garcia and other employees sought to decertify ATU as their exclusive representative, an effort that eventually failed. In August 2021, SunLine received two complaints that Garcia had coerced or harassed colleagues, seeking to pressure them into signing a decertification petition. Hamel contacted Wyatt to investigate the matter. From September through December 2021, Wyatt interviewed Garcia and other SunLine employees. During this time, Wyatt also learned of, and watched, Garcia's YouTube videos.

The record in this case does not include the investigation report that Wyatt submitted to SunLine on or about January 15, 2022, at the close of his investigation. However, there is no dispute as to its conclusion: Wyatt concluded that Garcia had not engaged in the misconduct originally alleged but had violated SunLine's Personal Blogs/Social Media Policy.

The record also does not include the YouTube videos referenced in Wyatt's report, or any transcripts or other records thereof. However, the parties agree that the videos involved commentary and complaints about working conditions, health and safety issues, and alleged poor management at SunLine. The videos were the latest aspect of Garcia's consistent complaints regarding these topics. Beginning in 2018 or earlier, and continuing until his discharge, Garcia expressed concerns about allegedly unsafe and otherwise poor working conditions. Garcia's concerns included complaints about worn out drivers' seats on SunLine's buses, MCOs' inability to take breaks, and lack of access to restrooms, among other issues. He raised these issues with fellow employees, SunLine managers, and members of the agency's Board of Directors, as well as in grievances under the MOU.

Starting in 2021, Garcia began publicizing these issues by posting videos on a YouTube channel called "Anthony G." For instance, Garcia posted one such video to YouTube on October 30, 2021, entitling it "Driver needs to find a restroom." The video showed Garcia wearing his SunLine uniform, walking through a field and describing his search for a restroom.[5]

[5] This summary of the "Driver needs to find a restroom" video comes from Wyatt's second investigation report, which is in the record. The summary is undisputed, and to the extent Garcia relies on it, Wyatt's characterization of the video falls under a hearsay exception as an admission of party-opponent. (*County of San Joaquin* (2021) PERB Decision No. 2775-M, pp. 22-23.) The same is true of other aspects of Wyatt's second report. For instance, regarding the events covered in Wyatt's first report (which is not in the record), Wyatt's second report states: "Beginning in October 2021, Anthony Garcia began posting videos on YouTube . . . Garcia alleged unsafe working conditions. In addition, Garcia interviewed several past employees about their wages and benefits."

After receiving Wyatt's report, Vizcarra concluded that Garcia had violated SunLine's Personal Blogs/Social Media Policy by posting videos while in uniform and while failing to mention that he was offering his own opinions rather than SunLine's views. Vizcarra directed Human Relations staff to draft a written warning.

Hamel sent Garcia written notice of the investigation's outcome on January 19, 2022.[6] The letter advised Garcia that he had violated SunLine's "'Personal Blogs/Social Media' Policy found on pages 53-54 of the employee handbook (June 2016)," and that Garcia's department manager would contact him "to discuss next steps and whether SunLine intends to take any disciplinary action." The letter included the referenced handbook pages as an attachment, with the Personal Blogs/Social Media Policy highlighted in yellow. The letter did not indicate how Garcia had violated the policy.

On January 26, SunLine issued Garcia an NID stating that it proposed to issue him a written warning. Like the January 19 letter, the NID referenced a "violation of SunLine Transit Agency's 'Personal Blogs/Social Media' policy as found on pages 53-54 of the employee handbook," without indicating how Garcia violated the policy. The NID further notified Garcia that he had a pre-disciplinary right to challenge the proposed discipline by attending a meeting on January 31, during which he could raise information or facts that Garcia believed to be relevant. The NID includes a notation at the bottom, dated January 31, indicating that on that date SunLine received a "Request for 2 Level." From this notation and other aspects of the record, we infer that during or

[6] All further dates refer to 2022, unless otherwise noted.

after the January 31 meeting, Garcia pursued a post-disciplinary grievance at step 2 of the MOU's grievance procedure. Step 2 is the final allowable grievance procedure step for a written warning, as the MOU does not allow a grievance to proceed to arbitration if it only challenges a written warning. A timeline of events that Wyatt included in his second investigation report confirms that Garcia requested a second level hearing on January 31, and that Garcia's step 2 grievance remained pending as of August.

C. Garcia's Additional YouTube Videos, and Moore's Resulting Complaint

While Garcia briefly paused his YouTube posts based on SunLine's warnings, he resumed his YouTube activity in late April. Garcia continued this activity for his remaining time as a SunLine employee, posting approximately 70 videos in that period. Garcia created certain videos by himself, while others involved collaborators. Garcia's most common collaborator was a SunLine employee named Joseph Raeck, and the two of them created a YouTube channel called "J&A Voices for Change."

Because only the complaint's first and second claims are before us, we have cause to consider only those videos posted prior to May 18, when SunLine placed Garcia on paid administrative leave pending investigation. Moreover, we note that the record in this case contains transcripts showing the content of only six social media videos, including five that fall within the period relevant to SunLine's decision to place Garcia on paid administrative leave. Like Garcia's earlier videos, these five videos centered on workplace concerns and complaints about allegedly poor management.

The video posted on April 27 is central to our analysis, as it led to Moore's complaint against Garcia and SunLine's resulting decision to investigate Garcia and place him on paid administrative leave during the investigation. The April 27 video

featured Garcia's sister as a guest. She was a former SunLine employee who had worked as a Reservationist before resigning in about December 2021. While Garcia asks his sister questions and interjects comments throughout the April 27 video, the transcript includes long segments in which Garcia's sister speaks without interruption, leveling a series of general and specific accusations against SunLine managers. These accusations were often rhetorical complaints or opinions that employees are free to air regarding their workplace. However, one accusation against Moore stood out from the others because it involved a specific, significant factual allegation that (if true) could have led to Moore's dismissal, or even a referral for criminal investigation. Specifically, Garcia's sister alleged that Moore used SunLine funds and/or a SunLine credit card for personal use. Garcia's sister also disclosed that Moore and another employee had contracted COVID, as part of complaining about working near others without adequate safety precautions.

On May 9, Moore sent Miles an e-mail with the subject line "Hostile work environment." In this e-mail, Moore complained about "recent videos posted on social media" which, in Moore's view, attacked her character, disclosed her confidential medical information, and contained content that was "unsettling," "outright untrue," "impacted [her] ability to do [her] job," and made Moore "feel really uncomfortable coming in to work every day." Moore's message attributed the videos to "current employees," whom she had "direct contact with . . . on a daily basis," and claimed that "[t]hey [were] discussing wearing video cameras and currently taking pictures of SunLine employees." Moore alleged that the videos created a hostile work environment, and she requested that Human Resources take "some type of action" to enable her to

"come in and work in a safe healthy environment and perform [her] job without fear of being recorded or waking up to emails and texts from fellow employees stating [she was] being discussed in a video on social media." It is undisputed that the April 27 video prompted Moore's complaint.

D. The Decision to Investigate Garcia Again and Place Him on Paid Leave

On May 13, Miles forwarded Moore's e-mail to Hamel, who in turn forwarded it to Wyatt, asking him to investigate Garcia and Raeck "ASAP."[7] Hamel's message also included a link to the "J&A Voices for Change" YouTube channel. Wyatt followed the link to this channel and found that it had 138 subscribers. Wyatt's report describes videos on this channel as alleging "unsafe working conditions, a hostile work environment, nepotism, cronyism, and corruption" at SunLine, and featuring "several guest speakers who claimed to be either [SunLine] customers or previous employees." Certain videos on the channel came from the "Anthony G." channel, and some had been part of Wyatt's first investigation.

On or about May 16, Wyatt interviewed Moore. During the interview, Moore denied that she had misused SunLine's funds and/or credit card. Moore complained that Garcia and Raeck had not investigated or verified this allegation before publishing the video, nor allowed Moore an opportunity to speak in her defense. Moore also complained that the video disclosed that Moore had contracted COVID.

On May 18, SunLine informed Garcia that he was the subject of a "confidential personnel investigation" concerning whether statements made on the "J&A Voices for

[7] We express no opinion regarding any issues pertaining to SunLine's parallel investigation of Raeck, which is not at issue in this case.

Change" channel violated various policies, including the Personal Blogs/Social Media Policy, the Harassment, Discrimination and Retaliation Prevention Policy, SunLine's Core Values, Code of Ethics, and Standards of Conduct, and its Unauthorized Use of Agency Equipment/Agency Property Policy. The notice advised Garcia that SunLine was placing him on paid administrative leave pending investigation. The notice further stated that SunLine intended to investigate "the basis or support in existence for the allegations" made in the YouTube videos, and the "underlying truthfulness of those statements." SunLine advised Garcia that if its investigation determined his allegations were unfounded, he could be subject to discipline. The notice also stated expectations, which it characterized as "a standard part of any investigatory process," including that Garcia cooperate fully with the investigation by answering honestly any questions posed during his interview and by providing the investigator with any information that may be relevant to the investigation.

On June 16, Hamel sent Garcia a memo with the subject line "Investigative Interview Information and Directives" advising Garcia of the date and time of his investigative interview. The memo directed Garcia to "cooperate fully throughout the investigation"; to "be completely honest in answering questions"; to "provide the investigator with any information and documentation that . . . may help in the performance of the investigation"; and to promptly provide Hamel with "any information or documentation that may be relevant to this matter."

On June 30, Wyatt interviewed Garcia. At Garcia's request, an ATU shop steward attended via Zoom. Wyatt explained that Garcia had to answer all questions

truthfully and gave a *Garrity* assurance.[8] Garcia indicated that he understood, and the interview began. Garcia cooperated with Wyatt in confirming background information, such as Garcia's employment history and job duties. Soon thereafter, however, Garcia refused to answer questions about videos posted on the "J&A Voices for Change" channel and the matters raised in Moore's complaint. In response to these questions, Garcia repeatedly stated, "I decline to answer" and directed Wyatt to what he referred to as a "memo" from PERB. There is no dispute that the "memo" in question was the initial complaint in this case, which issued on June 22.

After Wyatt asked further questions and received the same response, he eventually asked: "Are you going to refuse to answer any questions I ask you about YouTube?" Garcia again declined to answer and referred Wyatt to PERB's "memo." Garcia also elaborated as follows: "There is a PERB violation that has been put on SunLine for the same reasons that you're investigating us. So, with that said, I'm going to exercise my right to decline answers per the memo June 22nd, 2022, PERB's Unfair Labor Practices."

Wyatt advised Garcia that he was free to pursue PERB charges, but he remained under a direct order to answer all questions. Wyatt then asked Garcia: "So, are you telling me that you're not going to answer any of my questions regarding these

[8] Pursuant to *Garrity v. State of New Jersey* (1967) 385 U.S. 493, public employers may compel their employees to answer questions truthfully about matters relating to their job performance as part of an internal, administrative investigation, so long as the employee is advised that any truthful but incriminating statements will not be used against the employee in subsequent criminal prosecution regarding the same subject of the employer's investigation. (*Id*. at p. 500.)

videos?" Garcia responded: "Well, if it pertains to my rights being violated, under the PERB jurisdiction, I'm going to decline to answer."

During the interview, Garcia alleged that Miles and two other managers had engaged in misconduct. However, when Wyatt asked for supporting evidence, Garcia responded that he was saving that information for a class action lawsuit, claiming that "you guys will be aware of all that information then."

E. The Investigation's Expansion and Garcia's Eventual Termination

In July, Wyatt's investigation expanded to include new conduct, including that Garcia had threatened or encouraged violence. After SunLine had already expanded the investigation, three SunLine employees submitted complaints regarding such allegations. On July 14, Wyatt interviewed Garcia for a second time, attempting to cover both the initial investigation topic and the expanded issues. As with the previous interview, Garcia answered questions on general topics but refused to answer most questions about the matters under investigation. When Wyatt tried to verify whether Garcia had sources for certain allegations in the videos he posted, Garcia repeatedly answered that the videos "speak for themselves" and "my opinions are my opinions," or he declined to answer and instead referred Wyatt to "the PERB memo."

On July 29, an employee complained to SunLine that a video on the "J&A Voices for Change" channel showed a recording of the employee's drive home, taken from a following vehicle. On August 1, SunLine expanded the investigation to cover this complaint. On August 5, Wyatt interviewed Garcia for a third time, focusing on the new complaint. When asked about the video, Garcia said that he had anonymously received a flash drive containing the recording, the envelope did not include a return

address or explanation, and he posted the video because he believed it showed a driver operating a SunLine vehicle in an erratic manner.

On August 11, SunLine expanded the investigation again. SunLine did so when it learned that the California Highway Patrol had cited Garcia for failing to accurately maintain required driver duty status records, including his work for a limousine service called Unlimited Creations Company, which Garcia had established in or around 2016. Wyatt's investigation thus grew to include: (1) whether Garcia's ownership of and employment by Unlimited Creations, without SunLine's approval, violated MOU Article G-32 regarding outside employment; and (2) whether Garcia violated safety regulations that require drivers, when working for multiple motor carriers in the same 24-hour period, to submit to each carrier a record showing the hours worked for all carriers, thereby allowing each carrier to comply with its duties to prevent fatigued driving. (See Cal. Code Regs., tit. 13, § 1213, subd. (k)(1).) As part of the expanded investigation, SunLine directed Garcia to provide records of his driving for any other service over the prior six months.

On August 23, SunLine provided Garcia with notice of its intent to discharge him based upon unauthorized outside employment, failing to provide records relating to driving for another company, threats of violence, verbal harassment and abusive conduct toward coworkers, failing to cooperate in interviews, and posting social media videos containing recklessly false statements. On September 7, after Garcia exhausted his pre-disciplinary appeal right, SunLine finalized the termination.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.) However, to the extent that a proposed decision has adequately addressed issues raised by certain exceptions, the Board need not further analyze those exceptions. (*Ibid*.) The Board also need not address alleged errors that would not affect the outcome. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.)

Part I addresses Garcia's claim related to his written warning, while Part II addresses his claim related to his paid administrative leave. Finally, Part III addresses SunLine's exception regarding the proposed remedial order.

I. Written Warning

Except for cases involving alleged facial discrimination, PERB considers a charging party's discrimination or retaliation claim under the framework set forth in *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*) and its progeny. Under the *Novato* framework, the charging party's prima facie case requires each of the following four elements: (1) one or more employees engaged in activity protected by a labor relations statute that PERB enforces; (2) the respondent had knowledge of such protected activity; (3) the respondent took adverse action against one or more employees; and (4) the respondent took the adverse action "because of" the protected activity, which PERB interprets to mean that the protected activity was a substantial or motivating cause of the adverse action. (*Alameda Health System* (2023) PERB Decision No. 2856-M, p. 27 (*Alameda*).) If the charging party establishes a prima facie case, but the evidence also reveals a non-discriminatory reason for the

decision, the respondent may prove, as an affirmative defense, that it would have taken the exact same action even absent protected activity. (*Ibid*.) In such "mixed motive" or "dual motive" cases, the question becomes whether the adverse action would not have occurred "but for" the protected activity. (*Ibid*.)[9]

A. Protected Activity

PERB-administered statutes protect most union and employee speech related to legitimate labor and employment concerns. (*Mt. San Jacinto Community College District* (2023) PERB Decision No. 2865, p. 18 (*San Jacinto*).) For instance, employees normally have a statutory right to criticize working conditions, management, or union leadership, if the criticism relates to advancing employee interests or is a logical extension of group activity. (*Ibid*.) Such speech does not lose protection merely because it is intemperate, disparaging, or inaccurate, or engenders ill feelings and strong responses, unless the employer meets its burden to prove such speech was maliciously dishonest or so insubordinate or flagrant as to create a substantial disruption or the serious risk thereof. (*Id*. at pp. 21-22.) The tests that PERB uses to apply these principles have evolved significantly over time. The initial version of the test, under decisions applying a formulation derived from *Rancho Santiago Community College District* (1986) PERB Decision No. 602, strung together a series of adjectives to describe the types of speech that could lose protection. (*Id*. at p. 13 [speech unprotected if "opprobrious, flagrant, insulting, defamatory,

[9] The proposed decision stated that neither *Novato* nor PERB's framework for cases involving facial discrimination "provides an appropriate framework for evaluating the prima facie case of any of the three reprisal claims in this case." We reverse that conclusion and apply *Novato*.

insubordinate, or fraught with malice"].) Eventually, however, the Board dispatched with this imprecise list of adjectives and clarified that the Board applies one or both of the following two tests, depending on the nature of a respondent's arguments asserting that speech has lost its protection. (See, e.g., *Carpinteria Unified School District* (2021) PERB Decision No. 2797, p. 14 (*Carpinteria*).)

First, if an employer claims that union or employee speech loses protection because it is false, the employer must prove, by clear and convincing evidence, that the speech was maliciously false, meaning that the speaker either knew of its falsity or recklessly disregarded whether it was true or false. (*San Jacinto*, *supra*, PERB Decision No. 2865, p. 23.) Gross or extreme negligence as to a statement's truth does not rise to the level of actual malice. (*Ibid*.)

Second, if the employer claims that speech was flagrant or insubordinate and therefore disruptive, PERB conducts a fact-intensive inquiry that considers all relevant circumstances, including but not limited to: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of what occurred; and (4) the extent to which the speech or conduct at issue can fairly be said to have been provoked by the employer. (*San Jacinto*, *supra*, PERB Decision No. 2865, p. 22.) Where speech about workplace issues occurs off duty, it is normally more difficult for the employer to show that it loses protection. (*Ibid*.; but see *Carpinteria*, *supra*, PERB Decision No. 2797, p. 14, fn. 10 [employer can take adverse action against employee who threatens physical harm against a colleague, no matter when or by what means the employee conveys the threat].)

When SunLine decided to issue Garcia a written warning, it did so because of his social media videos, which concerned workplace complaints and related criticism of management. SunLine does not claim that the videos leading to his written warning were maliciously false, meaning it must show that the videos were so flagrant or insubordinate as to disrupt operations.

The proposed decision adequately analyzed this issue, and we affirm the ALJ's conclusions, but we highlight multiple flaws in SunLine's position. First, SunLine did not introduce into evidence the videos for which Garcia received a written warning, or transcripts thereof. Because there is no dispute that these videos related to protected topics, SunLine had the burden to show Garcia lost protection, and SunLine certainly could not do so without putting into evidence the videos and/or transcripts thereof.

Even if SunLine had created an adequate record regarding the videos for which Garcia received a written warning, there are more factors undercutting SunLine's argument. To begin, the only disruption that SunLine has claimed is that the public might be confused. Specifically, Vizcarra testified that Garcia's videos merited discipline because they showed him wearing a SunLine uniform and he failed to warn viewers that he was giving his own opinions rather than SunLine's views. But SunLine points to no precedent suggesting that an employee's speech about workplace issues loses MMBA protection merely because the employee is in uniform and/or fails to state that the views expressed are personal ones. To the contrary, precedent supports the opposite conclusion: it is unlikely that anyone viewing a YouTube video criticizing SunLine management would mistakenly believe the video represented SunLine's opinion. (See *Chula Vista Elementary School District* (2018) PERB Decision No. 2586,

pp. 22-23 [finding it "unlikely that speech by teachers about their union or working conditions—especially speech that is critical of the [employer]—would be perceived as representing the [employer's] viewpoint"] (*Chula Vista*).)[10]

All relevant factors support this conclusion, including the place of the discussion (videos posted to a personal YouTube channel called "Anthony G."), as well as the videos' subject matter and nature (e.g., a driver walking through a field searching for a restroom, in the video Garcia uploaded on October 30, 2021). We need not consider the fourth factor noted above—provocation—since SunLine cannot show that Garcia received a written warning for posting flagrant videos. We therefore express no opinion as to whether SunLine provoked Garcia by making it difficult for MCOs to find a restroom during their shifts, or by ignoring the means Garcia used to raise concerns before he began posting YouTube videos.

SunLine also ignores another aspect of precedent barring an employer from limiting protected speech. Even when employees use the employer's own e-mail system, an employer can only restrict such activity based on a showing of "special circumstances necessary to maintain production or discipline." (*Napa Valley Community College District* (2018) PERB Decision No. 2563, p. 19 (*Napa*).) The same rule applies here. Indeed, while we held in *Napa* that e-mail is "a fundamental forum for employee communication in the present day, serving the same function as

[10] Following similar reasoning, federal district courts have found no material risk of confusion when a union uses an employer's name, logo, or other trademark as part of criticizing the company or attempting to organize its employees. (See, e.g., *Trader Joe's Company v. Trader Joe's United* (C.D.Cal.) 2024 WL 305697; *Medieval Times USA, Inc. v. Medieval Times Performers United* (D.N.J. 2023) 695 F.Supp.3d 593, 602-603 [collecting cases].)

[employee] lunch rooms" (*ibid*.), the same is true for social media. (See, e.g., *Alameda*, *supra*, PERB Decision No. 2856-M, pp. 7 & 34 [MMBA protected Facebook, Instagram, and Twitter posts showing employee wearing a garbage bag when there were insufficient gowns during COVID-19 pandemic].) If anything, it is normally more challenging to show special circumstances in restricting off-duty posts to a platform such as YouTube, which SunLine neither owns nor operates.[11]

SunLine did not establish special circumstances. In fact, SunLine provided no evidence that viewers of Garcia's videos, or viewers of any social media posts about SunLine, have ever been at significant risk of confusion because employees wore SunLine uniforms or failed to state that they were not speaking for SunLine.

Lastly, aside from the other flaws in its argument, SunLine also did not show that Garcia was insubordinate in his fall 2021 social media posts. Insubordination means an intentional refusal to follow directions. (*San Jacinto*, *supra*, PERB Decision No. 2865, p. 22, fn. 15.) To prove insubordination, therefore, an employer must prove

[11] An employer normally must permit off-duty protected activities, including activity in nonwork times and/or nonwork areas. (*County of Tulare* (2020) PERB Decision No. 2697-M, p. 20.) Thus, an employer acts unlawfully if it bars protected communications "during the workday" or on the employer's "premises" or "property," because the employer must tolerate such communications to the same extent as it tolerates other nonofficial activities, such as during breaks. (*Ibid*.) Here, SunLine has not alleged that Garcia filmed or posted any videos during his work hours. Nor has SunLine argued that ATU waived any employee rights, and the record does not suggest that such an argument would be tenable. A union can contractually waive certain statutory rights, but only if the waiver is clear and unmistakable and does not seriously impair employees' right to communicate about protected matters. (*Regents of the University of California (Irvine)* (2018) PERB Decision No. 2593-H, p. 10 & p. 11, fn. 9.) Moreover, a non-contractual policy such as the Personal Blogs/Social Media Policy cannot support a contractual waiver defense. (*City of Culver City* (2020) PERB Decision No. 2731-M, p. 18.)

willfulness. (*Ibid*.) But SunLine failed to establish that Garcia knew of its social media policy prior to receiving the NID.

B. Remaining Elements of Retaliation Analysis

Having found that the MMBA protected Garcia's fall 2021 social media videos, we note that SunLine admits sufficient facts to establish the additional required elements of retaliation—that it knew of these videos and took adverse action against Garcia because of them. Moreover, as discussed further below, SunLine has not proven that it would have issued the NID and written warning in the absence of protected activity.

The complaint's first claim does not present a true mixed motive case. It is possible for a single video, e-mail, text message, or flyer to have certain protected parts and other unprotected parts. If the employer takes adverse action based upon such mixed speech, PERB must resolve whether the employer would have taken exactly the same action based solely on the unprotected portions of the speech. (*Carpinteria*, *supra*, PERB Decision No. 2797, pp. 18-20.) But the facts here do not fall into that pattern, because SunLine has not introduced any of the videos that gave rise to the written warning, nor has it proven that any part of those videos were unprotected. Accordingly, there is no non-discriminatory reason for discipline. (*San Diego Unified School District* (2019) PERB Decision No. 2634, p. 13, fn. 7 [no need to separately assess affirmative defense if charging party has already disproven it in as part of prima facie case]; *County of Riverside* (2018) PERB Decision No. 2591-M, p. 18 [where all speech was protected, there was no basis for a mixed motive defense].)

Finally, it is beyond dispute that an employer cannot establish an affirmative defense based on applying a policy in a manner that infringes on protected rights. (See, e.g., *Arrow Elec. Co., Inc. v. National Labor Relations Bd.* (6th Cir. 1998) 155 F.3d 762, 766-767 [where employer had policy barring "neglect of duty," it could not rely on that policy as a non-discriminatory basis for terminating employees, because employees' alleged neglect was in fact protected strike activity].)

For the foregoing reasons, SunLine violated the MMBA when it issued Garcia an NID and related written warning.

II. Placement on Paid Leave Pending Investigation

Placing an employee on involuntary paid leave pending a misconduct investigation constitutes adverse action. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 18.) Accordingly, Garcia's paid leave pending investigation, as well as his protected activity known to the District, establish the first three *Novato* elements. We must therefore decide whether Garcia's protected activity was a substantial or motivating cause for the District's decision to investigate him, and the closely related question of whether the District would have done so even absent any protected activity. To do so, we rely on the following principles that apply when an employer investigates a complaint concerning potential misconduct during arguably protected activity.

An employer does not retaliate against or interfere with employee rights when it conducts an initial investigation of arguably protected activity based upon receiving a facially plausible complaint, provided that: (1) the nature of the complaint legitimately calls into question whether the employee conduct was protected; and (2) if the

employer acquires information indicating that the alleged conduct was protected, the employer immediately ceases the investigation and notifies all affected employees regarding its outcome. (*Chula Vista*, *supra*, PERB Decision No. 2586, pp. 30-31.) Moreover, during its investigation, the employer must narrowly tailor its questions to the business necessity at hand—investigating a facially plausible complaint—while minimizing, to the greatest degree possible, inquiries that tend to chill protected activity. (See, e.g., *William S. Hart Union High School District* (2018) PERB Decision No. 2595, pp. 7-8 [employer exceeded scope of permissible inquiry by seeking identity of unit members who attended union meeting and substance of conversations with union steward].) Thus, PERB looks at the specific circumstances not only to determine whether the employer had adequate cause to commence an investigation despite its potential to chill protected activity, but also whether the employer unduly continued the investigation or otherwise violated the MMBA during its course. (*Trustees of the California State University (Northridge)* (2019) PERB Decision No. 2687-H, p. 4 & p. 5, fn. 6 (*Trustees*).)

Garcia has not shown that SunLine violated these principles. Moore complained to SunLine that the April 27 YouTube video falsely accused her of misusing SunLine's funds and/or credit card, violated her privacy by disclosing that she had COVID, and created a hostile work environment. This was a sufficiently plausible complaint to warrant beginning an investigation, even though the investigation involved off-duty

social media activity that related to workplace concerns. SunLine thus did not necessarily violate the MMBA when it asked Wyatt to commence the investigation.[12]

While an employer cannot continue its investigation after acquiring information indicating that the alleged conduct was protected, Garcia has not shown that SunLine violated this principle. Indeed, Garcia's failure to cooperate made him less able to provide Wyatt with information showing that the MMBA protected his conduct.[13]

We therefore dismiss the allegation that SunLine violated the MMBA when it placed Garcia on paid administrative leave pending investigation.

III. Remedy

The ALJ directed SunLine to rescind and expunge its NID, make Garcia whole for any losses resulting from the NID or paid leave, and cease and desist from:

[12] To the extent Garcia's April 27 video contained certain material that the MMBA clearly protected and other potentially unprotected material, we conclude that SunLine would have investigated based solely on the latter content. Depending on what instructions SunLine gave Wyatt, its initial step in hiring him to conduct the second investigation could have been unlawful. But if that is true, the record does not show it. Moreover, in the circumstances of this case we find no cause to separately analyze SunLine's decision to place Garcia on paid leave, especially as the aspect of SunLine's overall decision that was most clearly an adverse action was the decision to commence a misconduct investigation. (*Trustees*, *supra*, PERB Decision No. 2687-H, adopting proposed decision at p. 30.)

[13] For example, Garcia might have been able to provide sufficient information to show that he was at most grossly negligent, and not reckless, in believing and publishing his sister's allegation that Moore misused funds. (See *San Jacinto*, *supra*, PERB Decision No. 2865, p. 23 [even gross or extreme negligence as to a statement's truth does not rise to the level of actual malice].)

(1) "[i]mposing reprisals against employees because of their protected social media activity"; and (2) "[m]aintaining and/or enforcing unlawful restrictions on employee blogging and social media activity."

SunLine argues that even if the ALJ were correct to find it liable for issuing Garcia an NID, we should nonetheless reverse the ALJ's second cease-and-desist order, which would bar SunLine from prospectively enforcing its social media policy. SunLine acknowledges it was on notice that it was defending a claim that it retaliated against protected social media activity, but it asserts it was not on notice of any claim that could entirely bar its Personal Blogs/Social Media Policy. We agree. The amended complaint did not include any such allegation. Indeed, it did not contain any interference claim at all, whether derivative or independent. Nor has Garcia sought to show that the unalleged violations doctrine would apply. (See, e.g., *State of California (California Correctional Health Care Services)* (2019) PERB Decision No. 2637-S, pp. 13-14.) In any event, the first cease-and-desist order bars further unlawful action akin to the NID and written warning that SunLine issued Garia.

Accordingly, we omit from our remedy the second cease-and-desist order in the proposed decision. We maintain the remainder of the proposed remedy, other than its reference to losses incurred because of Garcia's paid administrative leave.

ORDER

Based upon the foregoing analysis and the record in the case, the Public Employment Relations Board (PERB) finds that Respondent SunLine Transit Agency violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by proposing to issue Charging Party Anthony Garcia a written warning, and

issuing such a warning, in retaliation for social media activity that the MMBA protects. All other claims are DISMISSED.

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

A. CEASE AND DESIST FROM imposing reprisals against employees for social media activities that the MMBA protects.

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

1. Rescind and expunge from all SunLine records, including Garcia's personnel file, the original and all copies of the Notice of Impending Discipline (NID) dated January 26, 2022, and any separate document finalizing or otherwise imposing the written warning mentioned in the NID.

2. Make Garcia whole for any and all monetary losses suffered as a result of the NID and/or written warning referenced in paragraph B(1) above.

3. Augment any monetary relief owed with daily compound interest, at an annual rate of seven percent, accrued from the date of harm until payment.

4. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations where SunLine posts notices to its employees, copies of the Notice attached hereto as an Appendix. An authorized agent of SunLine must sign the Notice, indicating that SunLine will comply with the terms of this Order. SunLine shall maintain the posting for a period of 30 consecutive workdays. SunLine shall take reasonable steps to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. In addition to physically posting this

Notice, SunLine shall communicate it by electronic message, intranet, internet site, and other electronic means SunLine uses to communicate with its employees.[14]

5. Notify OGC of the actions SunLine has taken to follow this Order by providing written reports as directed by OGC and concurrently serving such reports on Garcia.

Chair Banks and Member Nazarian joined in this Decision.

[14] Either party may ask PERB's Office of the General Counsel (OGC) to alter or extend the posting period, require further notice methods, or otherwise supplement or adjust this Order to ensure adequate notice. Upon receipt of such a request, OGC shall solicit input from all parties and, if warranted, provide amended instructions to ensure adequate notice.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-1536-M, *Anthony Garcia v. Sunline Transit Agency*, in which all parties had the right to participate, the Public Employment Relations Board found that the SunLine Transit Agency violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by proposing to issue Charging Party Anthony Garcia a written warning, and issuing such a warning, in retaliation for social media activity that the MMBA protects.

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

A. CEASE AND DESIST FROM imposing reprisals against employees for social media activities that the MMBA protects.

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

1. Rescind and expunge from all our records, including Garcia's personnel file, the original and all copies of the Notice of Impending Discipline (NID) dated January 26, 2022, and any separate document finalizing or otherwise imposing the written warning mentioned in the NID.

2. Make Garcia whole for any and all monetary losses suffered as a result of the NID and/or written warning referenced in paragraph B(1) above.

3. Augment any monetary relief owed with daily compound interest, at an annual rate of seven percent, accrued from the date of harm until payment.

Dated: _____ SunLine Transit Agency

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.