



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD
UNFAIR PRACTICE CHARGE

DO NOT WRITE IN THIS SPACE: Case No.: Tracking No.: 2514E680Q279 Date Filed: 3/25/2007 8:23:04P

INSTRUCTIONS: File the original and one copy of this charge form with proof of service attached to each copy in the appropriate PERB regional office (see PERB regulation 32075). Proper filing includes concurrent service and proof of service of the charge as required by PERB regulation 32615(c). All forms are available from the regional offices or PERB's website at www.perb.ca.gov. If more space is needed for any item on this form, attach additional sheets and number items.

IS THIS AN AMENDED CHARGE? YES NO If yes, Case Number:

1. CHARGING PARTY: EMPLOYEE EMPLOYEE ORGANIZATION EMPLOYER

a. Full name:

MODESTO CITY EMPLOYEES' ASSOCIATION

b. Mailing Address:

P.O. BOX 3047
MODESTO, CA 95353

c. Telephone number:

(209)-342-8247

d. Name, title, and telephone number of person filing charge:

TOM MCCARTHY, PRESIDENT, (209)-342-8247

e. Bargaining unit(s) involved:

GENERAL BARGAINING UNIT REPRESENTED EXCLUSIVELY BY MODESTO CITY EMPLOYEES' ASSOCIATION

2. CHARGE FILED AGAINST: (mark only one) EMPLOYEE ORGANIZATION EMPLOYER

a. Full name:

CITY OF MODESTO

b. Mailing Address:

1010 TENTH STREET
MODESTO, CA 95353

c. Telephone number:

(209)-577-5200

d. Name, title, and telephone number of agent to contact:

ROBIN RENWICK, DIRECTOR OF PERSONNEL, (209)-577-5400

3. NAME OF EMPLOYER (Complete this section only if the charge is filed against an employee organization.)

a. Full name:

b. Mailing Address:

4. APPOINTING POWER: (Complete this section only if the employer is the State of California. See Government Code section 18524.)

a. Full name:

b. Mailing Address:

c. Agent:

5. GRIEVANCE PROCEDURE

Are the parties covered by an agreement containing a grievance procedure which ends in binding arbitration?

Yes No

STATEMENT OF CHARGE

- Educational Employment Relations Act (EERA) (Gov. Code sec. 3540 et seq.)
- Ralph C. Dills Act (Gov. Code sec. 3512 et seq.)
- Higher Education Employer-Employee Relations Act (HEERA) (Gov. Code sec. 3560 et seq.)
- Meyers-Milias-Brown Act (MMBA) (Gov. Code sec. 3500 et seq.)
- Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA) (Pub. Utilities Code sec. 99560 et seq.)
- Trial Court Employment Protection and Governance Act (Trial Court Act) (Article 3; Gov. Code sec. 71630 – 71639.5)
- Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act) (Gov. Code sec. 71800 et seq.)

b. The specific Government or Public Utilities Code section(s), or PERB regulation section(s) alleged to have been violated is/are:
Gov. Code secs. 3500-3512 ("MMBA"); PERB regulation 32602

c. For MMBA, Trial Court Act and Court Interpreter Act cases, if applicable, the specific local rule(s) alleged to have been violated is/are (a copy of the applicable local rule(s) MUST be attached to the charge):

City of Modesto Personnel Rules, Rule 17.2

d. Provide a clear and concise statement of the conduct alleged to constitute an unfair practice including, where known, the time and place of each instance of respondent's conduct, and the name and capacity of each person involved. This must be a statement of the facts that support your claim and not conclusions of law. A statement of the remedy sought must also be provided. *(Use and attach additional sheets of paper if necessary.)*

SEE ATTACHMENT 6(D)

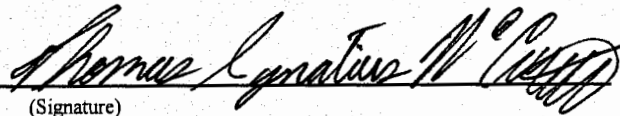
DECLARATION

I declare under penalty of perjury that I have read the above charge and that the statements herein are true and complete to the best of my knowledge

and belief and that this declaration was executed on MARCH 25, 2007 at MODESTO, CA.

TOM MCCARTHY

(Type or Print Name)



(Signature)

Title, if any: **M.C.E.A. PRESIDENT**

Mailing address:

**C/O ROSE LAW FIRM, P.C., 2240 EAST BIDWELL STREET
FOLSOM, CA 95630**

Telephone Number: **(916)-983-7840**

1 State of California
2 Public Employment Relations Board
3 Unfair Practice Charge

4 **Attachment 6(d) to Form PERB-61**

5 **I. STATEMENT OF THE CASE**

6 On August 30, 2006, the City of Modesto (City) notified Tom McCarthy, President of the
7 Modesto City Employees' Association (MCEA), he was under investigation. On December 1,
8 2006, the City notified McCarthy of its intent to suspend him without pay for ten (10) workdays.

9 The City's investigation focused on the following allegations:

- 10 (i) Incorrectly reporting paid release time under Government Code section 3505.3
11 while attending certain MCEA meetings;
- 12 (ii) Incorrectly reporting accrued MCEA leave hours, known as "Time Bank" hours,
13 while attending certain MCEA meetings and conducting MCEA business;
- 14 (iii) "Excess involvement in meetings you [McCarthy] perceived to require your
15 presence, despite the fact the MCEA's paid legal representative was on hand to
16 represent members, and your failure to inform your supervisor that your
17 attendance was an optional choice on your part."; and
- 18 (iv) Insufficient notice to McCarthy's supervisors or managers of his attendance at
19 MCEA meetings and activities.

20 As explained below, by initiating this investigation and imposing discipline against
21 McCarthy, the City discriminated and retaliated against McCarthy for engaging in protected
22 labor activity, in violation of Government Code section 3506, Public Employment Relations
23 Board regulation 32603, subdivision (a), and City of Modesto Personnel Rules, Rule 17.2.

24 During the course of the investigation the City ordered McCarthy to answer questions
25 about and reveal internal MCEA business, operations, and communications with MCEA's
26 attorney, officers, and directors under threat of disciplinary action "up to and including
27 termination." In doing so, it interfered with the administration of MCEA, an unfair practice.

28 The City retroactively revoked 13 hours and 40 minutes of paid release time from
McCarthy's paycheck, reallocating it to "Time Bank" hours. In doing so, it failed to provide
adequate release time for meeting and conferring activities in violation of Government Code
section 3505.3 and Public Employment Relations Board regulation 32603, subdivision (b).
Further, in doing so it also executed a unilateral change in the terms and conditions of
employment for McCarthy and MCEA members, in violation of the meet and confer requirement
contained in Government Code section 3505.

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1 As described below, the December 1, 2006, notice of suspension was the culmination of
2 a continuous, persistent and aggressive pattern of retaliation, discrimination, harassment, and
interference by City officials for over a year.

3 Even following the December 1, 2006, notice of suspension, McCarthy continues to be
4 targeted by City officials for his lawful and protected activities as MCEA's president.

5 **II. FACTS**

6 **A. Introduction of the Parties**

7 Respondent City of Modesto ("City") is a charter city serving a population exceeding
8 203,000. It is the largest city within Stanislaus County and is the county seat. The City is a
public agency within the meaning of Government Code section 3501, subdivision (c).

9 Charging Party Modesto City Employees' Association ("MCEA") is a non-profit mutual
10 benefit association representing approximately 440 administrative, clerical, professional,
11 technical, and public works employees in some 103 City job classifications ranging from
12 Account Clerk to Welder/Fabricator. MCEA is governed by a thirteen member Board of
13 Directors elected from various divisions roughly coinciding with City departments. MCEA is the
exclusively recognized employee organization within the meaning of Government Code section
3501, subdivision (b) for these employees. MCEA is the largest employee organization in the
City of Modesto.

14 Tom McCarthy is a Wastewater Collections Systems Operator employed by the City
15 since March 4, 2003. McCarthy is an MCEA member and was elected MCEA President on
16 November 15, 2005. He began serving a two-year term of office as MCEA President on January
1, 2006. Until December 1, 2006, McCarthy had an unblemished record of service to the City.

17 **B. "Implementation Document" and Memorandum of Understanding**

18 On Monday, August 22, 2005, the Modesto City Employees' Association (MCEA)
19 conducted a walkout because the City of Modesto imposed work rules on MCEA after a failure
20 to reach agreement on a memorandum of understanding. On or about Saturday, September 24,
21 2005, MCEA conducted a second public protest at the dedication of Modesto's newly
constructed 9th Street Bridge. The imposed work rules were known as the "Implementation
22 Document" and became effective September 27, 2005. A copy of this Implementation Document
is attached as Exhibit B.

23 Although not yet the MCEA President, or even an officer of MCEA, McCarthy was a
24 prominent participant in the August 22, 2005 walkout as well as the 9th Street Bridge protest. His
25 photographs appeared in *Modesto Bee* newspaper and he was interviewed by television reporters.
(See Exhibits Y and Z.) In addition, after the 2005 negotiations failed to result in an agreement,
26 McCarthy appeared twice before the Modesto City Council to speak publicly against imposing
work rules and in favor of continued collective bargaining.

27 In 2006, MCEA successfully negotiated a Memorandum of Understanding (MOU) with
28 the City of Modesto covering May 23, 2006 through July 23, 2007. This new MOU superseded

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1 the Implementation Document. McCarthy was on MCEA's negotiating team for this MOU. A
copy of this prevailing MOU is attached as Exhibit A.

2 The grievance procedure under the MOU culminates in advisory arbitration to the City
3 Manager. (Exhibit A, Art. 40, pp. 40-43.) The City Manager's determination is final and binding.
(*Id.* at p. 42.)

4 Under Article 44 of the MOU, MCEA possesses a bank of accrued leave hours "to be
5 used for MCEA business (other than meet and confer and meet and consult items *and routine*
6 *administrative functions dealing with the City*)." (Emphasis added.) This bank of leave hours is
7 derived from a one-half (1/2) hour accrued vacation time contribution per MCEA member twice
8 per calendar year. The MCEA Time Bank has a maximum accrual limit of 250 hours. The City's
Finance Department is responsible for processing MCEA Time Bank requests, keeping track of
the hours used, and maintaining the MCEA Time Bank balance. (Exhibit A, Art. 44, p. 46.)

9 Article 44 of the MOU reads as follows:

10 **ARTICLE 44. TIME BANK**

11 Each employee covered by this Memorandum shall contribute up
12 to one-half (1/2) hour of vacation time to create a pool of two
13 hundred fifty (250) hours to be used for MCEA business (other
14 than meet and confer and meet and consult items and routine
15 administrative functions dealing with the City). At the request of
16 MCEA, the City shall deduct twice yearly at the beginning of
17 September and the beginning of March, an equal amount of hours
or portions thereof of vacation time from each employee covered
by this Memorandum to bring the total remaining pool hours to the
two hundred fifty (250) hour maximum.

18 Use of the time bank shall be accounted for and processed by the
19 Finance Department using a specifically designated payroll code.
20 Association members utilizing the time bank shall be responsible
for reporting the time used on their payroll record.

21 The City Manager or Department Director has the authority to fill
an absence created by use of the time bank.

22 (Exhibit A, Art. 44, p. 46.)

23 Nowhere is the City granted authority to initiate MCEA Time Bank leave requests or to
24 designate the purpose for which MCEA Time Bank hours may be used by any MCEA officer,
25 director, or member. There is no other written City policy or procedure specifically governing
26 how Time Bank may be used, by whom, or what procedures are to be used for use of Time
Bank.

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C. City's Personnel Rules, Rule 17.2

Under the City's Personnel Rules, Rule 17.2, discrimination against any employee because of membership in an employee organization is prohibited. (Exhibit C.) Further, Rule 17.2 expressly guarantees to employees the right to join and participate in the activities of employee or labor organizations. (*Ibid.*)

D. MOU Article 52, "Pending Issue"

McCarthy directly participated in the most recent MOU negotiations between MCEA and the City. During these negotiations, the City granted McCarthy and his fellow MCEA negotiations team members paid release time to attend and travel to and from negotiations sessions with City management. The City also granted McCarthy and his fellow MCEA negotiations team members paid release time to attend and travel to and from a number of two-to four-hour negotiations preparatory meetings not involving City management. The preparatory meetings not involving City management were held at the office of MCEA's then-attorney Bob Phibbs or on City property in a custodial staff meeting room on Elm Street. The City's then-Deputy Director of Personnel Janice Stewart arranged for use of the City facility by MCEA.

Allocation of funds to the City's future financial liabilities for retiree healthcare premiums remained an unresolved issue during 2006 MOU negotiations. Rather than suspend the signing and ratification of an MOU pending final resolution of this issue, the parties agreed to memorialize the unresolved nature of this issue in MOU Article 52 ("Pending Issue") and come back to the bargaining table again in the future, but no later than January 1, 2007. The parties agreed that the City would hire a consultant to analyze the issue and recommend solutions. Thereafter, the parties would again meet and confer.

Article 52 of the MOU reads as follows:

ARTICLE 52. PENDING ISSUE

The parties agree during the term of this MOU to meet and confer regarding the City's retiree Health program once comprehensive information is obtained. In an attempt to reach a mutual agreement regarding the following issue, it is agreed neither party may impose upon the other party any changes of terms and conditions regarding this issue during the term of this MOU.

- (A) Retiree Health: The City will engage the services of an outside consultant to assist in evaluating the design and funding of the City's Retiree Health program, and to recommend alternatives. It is anticipated that the City and MCEA will begin meeting and conferring on any new or modified Retiree Health programs no later than January 1, 2007, provided that comprehensive recommendations are available.

(Exhibit A, Art. 52, p. 50.)

1 In preparation for further meeting and conferring with the City regarding Article 52 and
2 hiring of the outside consultant before the January 1, 2007, deadline McCarthy attended several
3 negotiations preparatory meetings on the subject jointly held by the various City employee
4 organizations on City property at the Police Department. Representatives of the Modesto City
5 Management Association (MCMA), Modesto Police Officers' Association (MPOA), and
6 Modesto Police Non-Sworn Association (MPNSA) were all in attendance. The meetings
7 occurred on June 7, June 28, July 23, and July 26. As before throughout MOU negotiations,
8 McCarthy traveled to, prepared for, and attended these negotiations preparatory meetings using
9 paid release time pursuant to Government Code section 3505.3. On information and belief,
10 certain officers and directors of MCMA, MPNSA, and MPOA also used paid release time to
11 attend these meetings.

12 E. Detailed Chronology of Events

13 Monday, December 19, 2005

14 On Monday, December 19, 2005, McCarthy (then MCEA's President-elect) inquired of
15 then-Deputy Director of Personnel Janice Stewart why individual time cards were not completed
16 by wastewater collections employees but were instead completed in a summary format by the
17 wastewater collections supervisor and thereafter employees were ordered to sign. Stewart said it
18 was her understanding wastewater collection employees did fill out timecards and sign them.

19 Thursday, January 5, 2006

20 On the morning of January 5, 2006, the fourth working day after McCarthy officially
21 assumed office as MCEA's President, McCarthy's supervisor Tony Souza summoned him to a
22 meeting in Souza's office. The meeting lasted from 7:20 a.m. until 7:45 a.m. Only Souza and
23 McCarthy were present. During the meeting Souza initiated a discussion about payroll practices
24 telling McCarthy the method used in wastewater collections to record employee time was
25 appropriate and there would be no change. McCarthy assumed Souza learned about McCarthy's
26 discussion with Janice Stewart on December 19. McCarthy replied he disagreed with Souza and
27 thought employees should fill out and maintain their own time cards. Souza and McCarthy did
28 not agree and there was no resolution of the issue in McCarthy's mind.

After leaving the meeting with Souza on January 5, McCarthy walked directly to his
work truck to start a vehicle inspection. At 7:55 a.m., wastewater collections crew leader Tony
Pascoal approached McCarthy telling him that Souza ordered Pascoal to go check why
McCarthy hadn't left the wastewater treatment plant's yard on time that morning. This had never
happened to McCarthy before. McCarthy replied he just left a meeting called by Souza and was
performing his mandatory daily pre-trip inspection before leaving.

Hearing this, Pascoal asked, "Then why did he send me out here?"

McCarthy replied, "I don't know. You tell me."

1 Friday, January 6, 2006

2 On Friday, January 6, 2006, McCarthy used 3 hours of MCEA Time Bank to conduct
3 association business.

4 Monday, January 9, 2006

5 On Monday, January 9, 2006, McCarthy and ten of the other thirteen MCEA Board of
6 Directors attended an all day MCEA meeting. They all used MCEA Time Bank to attend. During
7 the meeting MCEA's Board discussed the possibility of hiring a new attorney. Later that day
8 McCarthy met privately with MCEA attorney Bob Phibbs¹ and candidly informed him MCEA's
9 Board was considering hiring another attorney to replace him. McCarthy instructed Phibbs not to
10 meet privately with City management unless a member of MCEA's Board of Directors was also
11 present.

12 Tuesday, January 10, 2006

13 On Tuesday, January 10, 2006, McCarthy publicly addressed the Modesto City Council
14 on labor issues as MCEA President.

15 Wednesday, January 11, 2006

16 On Wednesday, January 11, 2006, McCarthy attended a meeting called by Police Chief
17 Roy Wasden at the police department with representatives of MCEA, MCMA, MPOA, MPMA.
18 At the time, MCEA was the exclusively recognized employee organization for approximately 90
19 to 100 non-sworn employees in the Modesto Police Department. (These non-sworn police
20 department employees later decertified MCEA as their exclusively recognized employee
21 organization and became MPNSA.) The meeting began at approximately 7:30 a.m. and
22 concluded at approximately 9:30 a.m. The purpose of the meeting was to address issues relating
23 to the scope of representation of the various employee organizations.

24 McCarthy then attended a Problem Solving Committee meeting from approximately 9:30
25 a.m. to 12:00 noon. The Problem Solving Committee is a labor-management committee created
26 under MOU Article 49 having a stated purpose of exploring "mutual problems," exchanging
27 information, and solving problems of interest to the City and MCEA. (Exhibit A, p. 48.)

28 McCarthy used paid release time pursuant to Government Code section 3505.3 for travel
to, preparation for, and attendance at both of these meetings. McCarthy used 3.25 hours of
MCEA Time Bank for other MCEA business later that day after attending the Problem Solving
Committee meeting.

Tuesday, January 17, 2006

 On Tuesday, January 17, 2006, McCarthy arrived for work a little before 7:00 a.m. and
was seated at a table in the break room with his coworkers. As usual, a crew leader gave out job
assignments to the wastewater collections crews, including McCarthy. Immediately after

¹ MCEA terminated the services of attorney Bob Phibbs effective December 4, 2006. MCEA hired attorney Joe Rose to replace Mr. Phibbs as its attorney.

1 McCarthy was given his job assignment, Souza walked across the break room to within one or
2 two feet of McCarthy who was seated. Souza hovered, standing over McCarthy, and singled him
out in front of everyone present by asking "Do you know what your job assignment is?"

3 McCarthy replied, "Yes."

4 Then, Souza ordered McCarthy to "get to work."

5 This had never happened to McCarthy.

6 Wednesday, January 18, 2006

7 Wednesday, January 18, 2006, McCarthy again arrived a little before 7:00 a.m. for work.
8 He was seated with his coworkers awaiting his job assignment for the day. Immediately after
9 McCarthy received his job assignment, Souza again walked across the break room to within one
10 or two feet of McCarthy and again singled him out, asking in front of everyone present "Do you
know what your job assignment is?"

11 McCarthy replied, "Yes."

12 Souza again ordered McCarthy to "get to work."

13 Thursday, January 19, 2006

14 On Thursday, January 19, 2006, an identical scenario played out for a third time where
15 McCarthy received his job assignment and was immediately singled out, confronted and
admonished by Souza to "get to work."

16 That morning Souza added a directive to McCarthy not to discuss any MCEA business
17 during working hours with anyone.

18 McCarthy left the break room and walked directly to his work truck to conduct a
19 mandatory pre-trip inspection. Within minutes, crew leader Tony Pascoal approached McCarthy
20 and said, "Souza's gunning for you." Pascoal elaborated that during a January 17 meeting for
21 crew leaders he attended involving Souza, acting supervisor Ken Merkle, crew leader Tom
Freitas, and others, Pascoal determined that Souza was "out to get" McCarthy.

22 Pascoal finished the conversation by warning McCarthy, "Watch your back."

23 At 8:45 a.m. on January 19, 2006, crew leader Tom Freitas radioed McCarthy and his
24 partner Gordon Nash. Freitas ordered McCarthy and Nash to divert from their regular work
25 assignment to assist a private plumbing contractor, Tony's Plumbing, in vacuuming sewage from
a trench. McCarthy and Nash complied with the directive. Thereafter, they returned in their truck
to the wastewater treatment plant to wash out.

26 At approximately 10:15 a.m., while at the wastewater treatment plant, acting supervisor
27 Ken Merkle (who is assigned to storm water not wastewater and is not in McCarthy's chain of
28 command), radioed McCarthy to ask why he was at the wastewater plant and not on his usual

1 route. McCarthy explained why they were at the plant. Merkle was at the January 17, 2006 crew
2 leaders meeting with Souza, Pascoal, and Freitas.

3 Later that day at approximately 3:00 p.m., McCarthy had returned from the field to the
4 crew leader's office at the wastewater treatment plant. McCarthy was preparing to leave for the
5 day. Quitting time was 3:15 p.m. Acting supervisor Ken Merkle summoned McCarthy into his
6 office loudly saying (within earshot of the open door of Souza's office) Merkle wanted to talk to
7 McCarthy about a grievance and other MCEA business. McCarthy replied that he could not have
8 that discussion because Souza ordered him that morning not to discuss any MCEA business with
9 anyone during working hours. Merkle replied that it was "okay" to do so, explaining Merkle is
10 an acting supervisor and, as such, gave McCarthy permission in this instance to talk about
11 MCEA business.

12 Monday, January 23, 2006

13 On Monday, January 23, 2006, then-Deputy Personnel Director Janice Stewart
14 summoned McCarthy and MCEA Vice President Cindy Ireta to a meeting at City Hall.
15 Administrative Services Officer Jana McCarron (formerly Jana Coons), MCEA's then-attorney
16 Bob Phibbs, and MCEA representative Tracy McLaughlin were also present. At this meeting
17 Stewart told McCarthy that Souza was unhappy with McCarthy doing any MCEA business as its
18 President while on duty as a Wastewater Collections Systems Operator. Stewart said that Souza
19 does not want McCarthy to make or receive any telephone calls as MCEA's President during the
20 workday.

21 McCarthy replied saying Souza is singling him out, explaining that Souza asked
22 McCarthy several days in row, "What is your work schedule?" and admonished McCarthy to
23 "get to work." McCarthy complained that Souza did not treat other employees this way.
24 McCarthy told Stewart two crew leaders warned him "watch your back" because Souza is
25 "gunning for you." McCarthy complained that he learned Souza told employees in the
26 workplace, "If people are talking about MCEA business I want to know."

27 McCarthy also informed Stewart about Souza's January 19 order not to discuss MCEA
28 business with anyone during work hours. McCarthy shared the January 19 incident involving
acting supervisor Ken Merkle.

McCarthy told Stewart he believed Souza was discriminating against him because of his
office as MCEA President and for engaging in protected concerted labor activity. On
information and belief, Stewart took no action to investigate McCarthy's complaints of Souza's
interference with MCEA business and/or retaliation for McCarthy's protected concerted labor
activities.

During the meeting McCarthy complained to Stewart for a second time about employees
not being allowed to fill out their own weekly time sheets or record their overtime worked on the
weekly time sheet.

Stewart informed McCarthy that he was permitted to use paid release time for meeting
and conferring, attending Problem Solving Committee meetings, meeting with MCEA's attorney
to prepare for meetings, attending meetings with City management, attending meetings as an
employee representative under *Weingarten*, time used for grievance processing, and "prep time"

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1 for meetings. Stewart told McCarthy a good rule of thumb for "prep time" would be one hour
2 before and 30 minutes after each meeting. Stewart directed McCarthy to tell Souza in advance if
3 McCarthy knows he has a meeting or will be involved in MCEA business.

4 Wednesday, January 25, 2006

5 On Wednesday, January 25, 2006, McCarthy attended a 10:00 a.m. meeting with Deputy
6 Director Janice Stewart to discuss procedures for possible layoffs in the Parks and Recreation
7 Department. McCarthy used paid release time pursuant to Government Code section 3505.3 for
8 the time he spent traveling to, preparing for, and attending this meeting during his normal
9 working hours.

10 Thursday, January 26, 2006

11 Three days after McCarthy's meeting with Deputy Personnel Director Janice Stewart,
12 McCarthy and his partner for the day, Pete Vasquez, were given the job assignment to meet with
13 sewer pump mechanics at the Northgate sewer pump station at 9:15 a.m. McCarthy and Vasquez
14 left the wastewater treatment plant at 7:45 a.m. and drove to the City of Modesto's corporation
15 yard to remove garbage and vacuum out the cab of their truck and to use the restroom during the
16 wait for their 9:15 a.m. appointment. McCarthy and Vasquez arrived at the corporation yard at
17 8:10 a.m. There were two other wastewater collections crews also present at the corporation yard
18 at that time. Five minutes later, at 8:15 a.m. McCarthy and Vasquez were leaving the corporation
19 yard when they saw Souza and crew leader Tom Freitas entering in a pickup truck. Within a few
20 minutes Freitas radioed McCarthy inquiring why McCarthy was at the corporation yard. Freitas
21 said he was directed to check up on McCarthy by Souza. McCarthy explained their activities at
22 the corporation yard.

23 Tuesday, January 31, 2006

24 At 10:30 a.m. on Tuesday, January 31, 2006, McCarthy met with newly hired Director of
25 Public Works Nick Pinhey. (Mr. Pinhey was publicly introduced as the City's new Director of
26 Public Works on January 10.) McCarthy used paid release time pursuant to Government Code
27 section 3505.3 for the time he spent traveling to, preparing for, and attending this meeting during
28 his normal working hours. McCarthy used three hours of MCEA Time Bank later that day for
other MCEA business after the meeting with Mr. Pinhey.

Wednesday, February 1, 2006

At approximately 10:30 a.m. on Wednesday, February 1, 2006, McCarthy met at the
Personnel Department with management to discuss a pending grievance over selective denials of
vacation leave requests during the summer months in the Parks and Recreation Department. At
approximately 1:30 p.m. McCarthy attended a Problem Solving Committee. McCarthy used paid
release time pursuant to Government Code section 3505.3 for the time he spent traveling to,
preparing for, and attending these meetings during his normal working hours.

Thursday, February 2, 2006

At 7:15 a.m. on Thursday, February 2, 2006, McCarthy discussed with crew leaders
Merkle and Pascoal the City's practice of denying scheduled overtime for an employee

1 immediately following scheduled sick leave use. The discussion related to a particular employee
2 in the MCEA bargaining unit adversely affected by the practice that day. McCarthy was asked
3 by Merkle to engage in the discussion. The discussion occurred at the wastewater treatment
plant. During the discussion wastewater collections superintendent Adam Denlinger walked
through the crew leader's office and also participated in the discussion.

4 Monday, February 6, 2006

5 On Monday, February 6, 2006, McCarthy used three (3) hours of MCEA Time Bank to
6 meet with a member of the Modesto City Council about labor issues.

7 Tuesday, February 7, 2006

8 On Tuesday, February 7, 2006, McCarthy used three (3) hours of MCEA Time Bank to
9 meet with another member of the Modesto City Council about labor issues.

10 Wednesday, February 8, 2006

11 On Wednesday, February 8, 2006, McCarthy and MCEA Vice President Cindy Ireta
12 briefly encountered Modesto Mayor Ridenour during a lunch break and introduced themselves.

13 At approximately 2:20 p.m. on or around February 8, 2006, McCarthy was driving into
14 the wastewater treatment plant yard in a City vehicle when he encountered superintendent Adam
15 Denlinger (Souza's and Merkle's immediate supervisor) who was driving the other direction.
16 Denlinger motioned out his window for McCarthy to stop, which McCarthy did. McCarthy
17 rolled down his window to hear Denlinger. Denlinger told McCarthy he wanted to furnish him a
18 City of Modesto laptop computer to use for MCEA business. McCarthy thanked Denlinger for
the offer of a City computer and politely declined. Denlinger asked McCarthy to reconsider,
adding McCarthy could take up to an hour of paid release time near the end of each shift to read
and respond to MCEA related e-mail messages and conduct MCEA business using the City
computer.

19 Thursday, February 9, 2006

20 On or around Thursday, February 9, 2006, Souza called McCarthy into his office at 7:25
21 a.m. to discuss McCarthy's activities as MCEA's President and his obligations as a Wastewater
22 Collections Systems Operator. Souza expressed concern about McCarthy's concerted labor
23 activities as MCEA President claiming "they" were putting pressure on him to keep track of
McCarthy. McCarthy was unsure who Souza meant when he referred to "they" and Souza would
not elaborate.

24 Souza also told McCarthy that he now seemed to be acting "cocky" and changed the way
25 he walked around since McCarthy was elected MCEA President and was "rubbing shoulders
26 with politicians." The meeting lasted until approximately 8:00 a.m.

27 Friday, February 10, 2006

28 On Friday, February 10, 2006, at the start of the shift (7:00 a.m.) crew leader Tony
Pascoal called McCarthy into the crew leader's office at the wastewater treatment plant to ask a

1 question about Article 14 of the Implementation Document relating to paid time off for fatigued
2 employees. McCarthy answered the question and said he disagreed with how management
3 applied Article 14 of the Implementation Document to several employees that day. Acting
4 supervisor Ken Merkle angrily ordered McCarthy to telephone MCEA's attorney Bob Phibbs to
5 get his legal opinion on the Implementation Document question. McCarthy told Merkle that it
6 was not his place as an acting supervisor to order McCarthy to obtain a legal opinion from the
7 MCEA attorney.

8 Later that afternoon, McCarthy met at City Hall with Deputy Director of Personnel
9 Janice Stewart², the City's private human resources consultant Barbara Santos³, MCEA attorney
10 Bob Phibbs, MCEA representative Tracy McLaughlin⁴, and MCEA Board member Gary Dull.
11 The purpose of the meeting was to discuss as change in the fluctuating work schedule for
12 wastewater treatment plant operators covered by Appendix E of the Implementation Document.
13 McCarthy and Dull used paid release time pursuant to Government Code section 3505.3 for
14 travel to, preparation for, and attendance at this meeting.

15 Monday, February 13, 2006

16 On Monday, February 13, 2006, acting supervisor Ken Merkle and the pump mechanic's
17 supervisor Alan Cosby cornered McCarthy at approximately 7:15 a.m. in the break room as all
18 other employees were leaving. Merkle demanded to know where McCarthy "got his
19 information" regarding Article 14 of the Implementation Document for fatigued employees.
20 Merkle was red in the face, his voice was raised, and he scoffed at McCarthy's answers.
21 McCarthy asked Cosby to direct all future MCEA related questions to Tony Pascoal, the MCEA
22 Director for wastewater collections, not to him.

23 Tuesday, February 14, 2006

24 At 10:00 a.m. on Tuesday, February 14, 2006, McCarthy met with Modesto's Mayor
25 Ridenour. McCarthy used three (3) hours of MCEA Time Bank for the meeting and other
26 MCEA business. The two men discussed labor issues, specifically retirement benefits.

27 After work that day at approximately 5:00 p.m., McCarthy met with the MCEA
28 negotiations team and MCEA attorney Bob Phibbs. Later, McCarthy attended the City Council
meeting at 5:45 p.m. where he spoke to Director of Public Works Nick Pinhey about MCEA
issues and suggested a labor-management meeting in Public Works once per month much like
Police Chief Wasden holds. Pinhey responded favorably and promised to follow through with
McCarthy about the monthly meeting idea, but never did.

² Deputy Director of Personnel Janice Stewart retired from the City of Modesto. The City then promptly re-hired her as an "hourly employee" to conduct internal affairs investigations in the Public Works Department. Stewart conducted the internal affairs investigation culminating in McCarthy's 10-day suspension without pay noticed December 1, 2006. Stewart remains employed by the City of Modesto as an internal affairs investigator.

³ Private consultant Barbara Santos was hired by the City of Modesto on May 16, 2006, to replace Janice Stewart as its Deputy Director of Personnel. Santos remains the City's Deputy Director of Personnel.

⁴ Tracy McLaughlin is a human resources professional who worked for MCEA as an independent contractor through the office of MCEA's attorney Bob Phibbs.

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1 three dates where McCarthy spent too much time at the wastewater treatment plant on MCEA
2 business. McCarthy explained on each of the three instances it was management who initiated
3 the conversation with McCarthy about application of fatigue time pay under the MCEA
4 Implementation Document. Referring to a paper he held, Denlinger said there were more dates
5 McCarthy spent too much time on MCEA business but he would "hang on to them for now."

6 Denlinger then complained McCarthy was hostile and abrupt when declining Denlinger's
7 offer to supply McCarthy with a City of Modesto laptop on which McCarthy could conduct
8 MCEA business. McCarthy denied being hostile, but admitted he did not want a City computer
9 on which to conduct MCEA business.

10 Referring back to the fatigue time pay issue, Denlinger and Souza complained McCarthy
11 told employees on February 10 to leave work without notifying their supervisors. Denlinger and
12 Souza said they heard this from acting supervisor Ken Merkle. McCarthy denied this allegation.

13 McCarthy again complained (for a third time now) that individual time cards are not
14 completed by wastewater collections employees but are instead completed in a summary format
15 by the wastewater collections supervisor and thereafter employees are ordered to sign the
16 summary. McCarthy said he believed employees should have individual time cards. Denlinger
17 replied that there are too many payroll codes for employees to understand and the current time
18 tracking system is best for employees.

19 Tuesday, February 21, 2006

20 On Tuesday, February 21, 2006, McCarthy attended the first day of collective bargaining
21 with the City of Modesto for a memorandum of understanding to supersede the Implementation
22 Document. McCarthy used eight (8) hours of paid release time to attend these negotiations.

23 Thursday, February 23, 2006

24 At approximately 8:00 a.m. on February 23, 2006, McCarthy, Phibbs, and MCEA
25 Director Tony Pascoal met and conferred with Deputy Director of Personnel Janice Stewart,
26 Dennis Turner, and Jana McCarron (Coons) about certification requirements and job description
27 changes for pump mechanics proposed by the City. McCarthy told Stewart he would meet with
28 the affected employees within the next week about the City's proposal and get back to her.
Stewart agreed and scheduled a second meet and confer session on the proposal for March 1,
2006.

Later that day, McCarthy used two (2) hours of MCEA Time Bank to attend to other
MCEA business.

Friday, February 24, 2006

As agreed the previous day, McCarthy met at approximately 10:00 a.m. with the pump
mechanics to discuss the City's proposed changes to their job descriptions and certification
requirements. McCarthy used paid release time to attend this meeting.

Later the same day at approximately 3:00 p.m., McCarthy met with Public Works
Director Nick Pinhey to discuss the fluctuating work schedule for wastewater treatment plant

1 operators as provided under Appendix E of the Implementation Document. McCarthy also
2 complained (now for a fourth time) that individual time cards are not completed by wastewater
3 collections employees but are instead completed in a summary format by the wastewater
4 collections supervisor and thereafter employees are ordered to sign the summary. McCarthy said
5 he believed employees should have individual time cards. Finally, McCarthy informed Pinhey of
6 the existence of several pending investigations involving MCEA members in Public Works
7 relating to allegations of religious discrimination and workplace harassment.

8
9 Wednesday, March 1, 2006

10 On Wednesday, March 1, 2006, McCarthy attended a MCEA negotiating team meeting at
11 a public works building from approximately 8:30 a.m. to 1:30 p.m. McCarthy used paid release
12 time for the time he spent traveling to, preparing for, and attending this meeting during his
13 normal working hours.

14 Monday, March 6, 2006

15 On Monday, March 6, 2006, McCarthy attended the second day of collective bargaining
16 with the City of Modesto for a memorandum of understanding. McCarthy used eight (8) hours of
17 paid release time to attend these negotiations.

18 Tuesday, March 14, 2006

19 Immediately after a training session on Tuesday, March 14, 2006, Souza summoned
20 McCarthy to Souza's office to discuss McCarthy's annual performance evaluation. Souza told
21 McCarthy his performance rating in two performance dimensions was downgraded from
22 "exceeds standards" to "meets standards" because McCarthy frequently "stuck his MCEA nose"
23 into matters where it did not belong. Souza cited the February 10 discussion about Article 14 of
24 the Implementation Document ("Fatigued Employees") and another instance where an employee
25 was instructed by crew leader Tom Freitas to complete and submit an equipment request form to
26 obtain a note pad as two examples where McCarthy "stuck his MCEA nose" where it did not
27 belong. Souza told McCarthy he had a written report from acting supervisor Ken Merkle in
28 which Merkle claims McCarthy told MCEA members to go home without supervisor. McCarthy
29 protested Souza's use of his protected concerted labor activities as a basis to downgrade his
30 performance evaluation and refused to sign the evaluation for that reason. Souza did not give
31 McCarthy a copy of his performance evaluation and the meeting concluded.

32 Later that day at approximately 3:00 p.m., McCarthy attending a meet and confer session
33 with Janice Stewart concerning driver's license requirements for mechanics at the bus terminal.
34 McCarthy used paid release time pursuant to Government Code section 3505.3 for travel to,
35 preparation for, and attendance at this meeting.

36 Wednesday, March 15, 2006

37 On Wednesday, March 15, 2006, McCarthy attended the third day of collective
38 bargaining with the City of Modesto for a memorandum of understanding. McCarthy used eight
39 (8) hours of paid release time to attend these negotiations.

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1 Thursday, March 16, 2006

2 At 7:00 a.m. on Thursday, March 16, McCarthy hand delivered a letter to Souza
3 requesting a copy of his performance evaluation. The letter was copied to Deputy Personnel
Director Janice Stewart and Public Works Director Nick Pinhey. (Exhibit GG.)

4 Friday, March 17, 2006

5 On the morning of Friday, March 17, Souza summoned McCarthy to his office to again
6 discuss his performance evaluation. This time in view of Souza's statements at the March 14
7 meeting, former MCEA President Blair Bradley attended with McCarthy as his representative.
8 Wastewater collections superintendent Adam Denlinger was also present. Denlinger said he
9 wished he didn't have to attend the meeting and McCarthy should place more trust in Souza.
10 McCarthy's rating in two performance dimension was indeed downgraded as threatened by
11 Souza on March 14. Souza again referenced the written report by Ken Merkle regarding the
12 February 10 discussion with McCarthy over Article 14 of the MOU as a basis for downgrading
13 McCarthy's performance ratings. (McCarthy has requested that the City of Modesto furnish him
14 with a copy of this written report about McCarthy by Merkle, but Stewart and Souza refuse to
15 supply it asserting he is not entitled to see it. McCarthy also asked MCEA attorney Bob Phibbs
16 to write a letter requesting the Merkle but Phibbs declined.)

17 McCarthy used three hours of MCEA Time Bank on March 17 to conduct MCEA
18 business later that day.

19 Tuesday, March 21, 2006

20 On Tuesday, March 21, 2006, McCarthy attended the fourth day of collective bargaining
21 with the City of Modesto for a memorandum of understanding. McCarthy used eight (8) hours of
22 paid release time to attend these negotiations.

23 After negotiations McCarthy told Stewart about Souza's statement that McCarthy no
24 longer meets performance expectations because, in Souza's words, McCarthy sticks his MCEA
25 nose where it does not belong. McCarthy told Stewart he felt he was being discriminated against
26 for his MCEA activities. McCarthy asked Stewart for a copy of Merkle's report complaining
27 about McCarthy.

28 Wednesday, March 22, 2006

 On Wednesday, March 22, 2006, McCarthy used one hour of MCEA Time Bank to
conduct MCEA business.

Monday, March 27, 2006

 On Monday, March 27, 2006, McCarthy attended a Problem Solving Committee meeting
at 1:30 p.m. with Janice Stewart. McCarthy used paid release time pursuant to Government Code
section 3505.3 for travel to, preparation for, and attendance at this meeting.

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1 Tuesday, March 28, 2006

2 On Tuesday, March 28, 2006, McCarthy used 45 minutes of MCEA Time Bank to
3 conduct MCEA business.

4 Wednesday, March 29, 2006

5 A fifth day of collective bargaining was scheduled for Wednesday, March 29, 2006.
6 However, this meeting was canceled because McCarthy complained to Janice Stewart about a
7 City negotiating team member violating the ground rules by discussing negotiations with others.
8 Specifically, a member of the MCEA negotiating team, Brian Nevitt, revealed to McCarthy that
9 Nevitt's supervisor, Jeremy Damas, was told by Dennis Turner, a member of the City
10 negotiating team, that negotiations should be over soon because the City had no intention of
11 giving MCEA anything. Instead, a meeting was held to investigate and discuss this topic.
12 McCarthy used paid release time to attend this meeting, and returned to work after it concluded.

13 Thursday, March 30, 2006

14 On Thursday, March 30, 2006, McCarthy used four hours of MCEA Time Bank to
15 conduct MCEA business.

16 Monday, April 3, 2006

17 On Monday, April 3, 2006, McCarthy attended a MCEA negotiations team meeting
18 beginning at 8:30 a.m. in the law office of MCEA attorney Bob Phibbs. McCarthy used paid
19 release time for travel to, preparation for, and attendance at this meeting.

20 Tuesday, April 4, 2006

21 On Tuesday, April 4, 2006, McCarthy received a telephone call from MCEA Director
22 Charles Bush who informed McCarthy a supervisor in the Parks Department, Kelly Gallagher,
23 was conducting a disciplinary investigation to determine whether MCEA member Kevin Parsons
24 used an expletive in the workplace. Bush said Gallagher refused requests for representation by
25 MCEA members being interviewed in his office. According to Bush, Gallagher said he didn't
26 like being threatened with the name Bob Phibbs and didn't care about MCEA. McCarthy
27 telephoned Janice Stewart to inform her of this event and that he believed this was an unfair
28 labor practice. On information and belief, Stewart took no action to investigate McCarthy's
29 complaint.

30 Later that day, McCarthy publicly addressed the City Council about MCEA issues.

31 Friday, April 7, 2006

32 On Friday, April 7, 2006, McCarthy attended the sixth day of collective bargaining with
33 the City of Modesto for a memorandum of understanding. Negotiations took place between
34 approximately 1:00 p.m. and 4:00 p.m. McCarthy took paid release time for the time he spent
35 traveling to, preparing for, and attending this meeting during his normal working hours.

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1 Tuesday, April 11, 2006

2 On Tuesday, April 11, 2006, McCarthy attended for the third time the monthly meeting
3 called by Police Chief Roy Wasden at the police department with representatives of MCEA,
4 MCMA, MPOA, MPMA. The meeting began at approximately 7:30 a.m. and concluded at
5 approximately 9:30 a.m. The purpose of the meeting was, as before, to address issues relating to
6 the scope of representation of the various employee organizations. McCarthy used paid release
7 time pursuant to Government Code section 3505.3 for travel to, preparation for, and attendance
8 at this meeting.

9 Friday, April 14, 2006

10 On Friday, April 14, 2006, McCarthy used four hours of MCEA Time Bank to conduct
11 MCEA business.

12 Wednesday, April 19, 2006

13 On Wednesday, April 19, 2006, McCarthy used one hour of MCEA Time Bank to
14 conduct MCEA business.

15 Thursday, April 27, 2006

16 On Thursday, April 27, 2006, McCarthy attended the seventh day of collective
17 bargaining with the City of Modesto for a memorandum of understanding. Negotiations took
18 place between approximately 8:00 a.m. and 12:00 noon. McCarthy took paid release time for the
19 time he spent traveling to, preparing for, and attending this meeting during his normal working
20 hours.

21 Wednesday, May 3, 2006

22 On Wednesday, May 3, 2006, McCarthy attended a Medical Benefits Committee meeting
23 from approximately 1:00 p.m. to 4:00 p.m. McCarthy used paid release time pursuant to
24 Government Code section 3505.3 for travel to, preparation for, and attendance at this meeting.

25 Tuesday, May 9, 2006

26 At 7:15 a.m. on Tuesday, May 9, 2006, Adam Denlinger called McCarthy and MCEA
27 Director Tony Pascoal into his office and directed McCarthy and Pascoal to remove posted
28 notices regarding an upcoming MCEA meeting and ratification of the new MOU. These notices
were posted in locations MCEA long used to inform its members of upcoming events and
information. McCarthy replied he would have the MCEA Director for that area, Gary Dull,
remove the notices. Denlinger said that was not acceptable because Deputy Director of Public
Works Dan Wilkowsky specifically insisted McCarthy personally remove the notices. Denlinger
said Wilkowsky does not like looking at union notices in "his" building. McCarthy replied it was
not for the City to dictate who in MCEA would remove the notices and that McCarthy would
make arrangements for Gary Dull to remove them. As ordered, the MCEA notices were
removed.

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1 In ordering MCEA to remove all meeting notices the City of Modesto violated MCEA's
2 right of reasonable access to the worksite in violation of Government Code section 3503 and
City of Modesto Personnel Rules, Rule 17. and Rule 17.15.

3 At 5:30 p.m., MCEA held a contract ratification meeting and voted to approve the new
4 newly negotiated MOU.

5 McCarthy publicly addressed the City Council that night as MCEA's President.

6 Wednesday, May 10, 2006

7 On Wednesday, May 10, 2006, McCarthy attended for the fourth time the monthly
8 meeting called by Police Chief Roy Wasden at the police department with representatives of
9 MCEA, MCMA, MPOA, MPMA. The meeting began at approximately 7:30 a.m. and concluded
10 at approximately 9:30 a.m. The purpose of the meeting was, as before, to address issues relating
11 to the scope of representation of the various employee organizations. McCarthy used paid
release time pursuant to Government Code section 3505.3 for travel to, preparation for, and
attendance at this meeting.

12 On or about Wednesday, May 10, 2006, a former wastewater treatment plant operator
13 encountered MCEA's immediate past president Blair Bradley. Bradley remains a shop steward
14 for MCEA and was directly involved on MCEA's MOU negotiating team. The plant operator
15 briefly asked Bradley a question about a 24-hour shift work schedule pilot program for operators
16 negotiated between MCEA and the City. Dan Wilkowsky overheard Bradley talking about the
24-hour shift schedule. Wilkowsky interrupted telling Bradley he had no right to speak to the
employee about it and had no right to be there.

16 Friday, May 12, 2006

17 On Friday, May 12, 2006, Dan Wilkowsky scheduled a meeting with McCarthy to occur
18 at 3:00 p.m. at the wastewater treatment plant. McCarthy arrived for the meeting to find
19 Wilkowsky had cancelled. McCarthy used paid release time pursuant to Government Code
section 3505.3 for travel to this meeting.

20 Tuesday, May 16, 2006

21 On Tuesday, May 16, 2006, the City of Modesto hired private consultant Barbara Santos
22 as its Deputy Director of Personnel, replacing Janice Stewart.

23 At 1:30 p.m. on Tuesday, May 16, 2006, McCarthy met with City Manager George
24 Britton in his office to discuss MOU ratification and the fact that MCEA was searching for new
25 representation. During the meeting Britton expressed happiness with the MOU ratification and
26 asked McCarthy several times whether there was anything Britton could do for McCarthy
27 personally, emphasizing "personally" twice. Britton then escorted McCarthy into Deputy City
28 Manager Judith Ray's office and introduced McCarthy to Ray. McCarthy told Britton he and
Ray already met.

Britton said, "Judy, I was just telling Tom if there is ever anything he needs..."

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1 Interrupting, Ray said, "Oh yes. Tom, if you ever need anything just telephone - anything
at all."

2 McCarthy replied, "If MCEA ever needs anything I will give you a call."

3 This meeting lasted for approximately 30 minutes. McCarthy used paid release time
4 pursuant to Government Code section 3505.3 for travel to, preparation for, and attendance at this
5 meeting.

6 At 3:00 p.m. the same day, McCarthy met with Dan Wilkowsky in Wilkowsky's office at
the wastewater treatment plant. This meeting was called by Wilkowsky and originally scheduled
7 for Friday, May 12, but Wilkowsky cancelled it and rescheduled to May 16. McCarthy
understood Wilkowsky called the meeting to discuss MCEA matters with McCarthy as its
8 President.

9 McCarthy entered Wilkowsky's office and said hello. Wilkowsky replied angrily, "Sit
10 down!" while pointing at the chair in front of is desk. McCarthy remained standing.

11 McCarthy replied he was there as President of MCEA and began addressing a concern
about Blair Bradley being chastised for briefly answering a scheduling question as a shop
12 steward for an MCEA member on or about May 10. Wilkowsky interrupted, stood up, and asked
McCarthy why he (Wilkowsky) had to look at union notices in "his" hallway? He ordered
13 McCarthy to go look at one specific notice in the hallway and ordered McCarthy to remove it
immediately. McCarthy replied he would have Gary Dull, the MCEA Director for that region,
14 remove it. Although the notice was posted in a location MCEA had frequently used in the past
for similar notices, the notice was removed.
15

16 In ordering MCEA to remove the meeting notice the City of Modesto violated MCEA's
right of reasonable access to the worksite in violation of Government Code section 3503 and
17 City of Modesto Personnel Rules, Rule 17. and Rule 17.15.

18 Friday, June 2, 2006

19 On Friday, June 2, 2006, McCarthy had a family medical emergency and was off duty
20 using family sick leave.

21 Monday, June 5, 2006

22 On Monday June 5, 2006, McCarthy used four (4) hours of MCEA Time Bank (from
23 11:00 a.m. to 3:15 p.m.) to prepare for and meet from approximately 12:00 noon to 1:30 p.m.
with Councilmember Janice Keating, and conduct computer research on subsidized employee
24 housing programs for public employees from 1:30 p.m. to 3:30 p.m. in preparation for a later
meeting after work hours at 4:00 p.m. that afternoon with Councilmember Hawn. MCEA Vice
25 President Cindy Ireta attended both meetings with the City Council members, returning to work
in between. McCarthy had given advance written notice to his supervisors and managers at 7:00
26 a.m. that morning regarding his request for MCEA Time Bank in the form of a City of Modesto
leave request form. The leave request was signed and approved by supervisor Tony Souza, dated
27 June 5, 2006. (See Exhibit AA.)
28

1 Despite Souza's approved leave request dated June 5, 2006, for four (4) hours of MCEA
2 Time Bank, Deputy Director Dan Wilkowsky notified McCarthy in writing on December 1,
3 2006, that he intends to suspend McCarthy without pay for ten (10) days because, among other
4 things, McCarthy was "absent without leave" on June 5, 2006, McCarthy did not give Souza
5 adequate notice of the requested leave, and McCarthy did not reveal to Janice Stewart an
6 adequate or sufficiently detailed explanation of the exact nature of his MCEA business. (Exhibit
7 I, pp. 6-8; Exhibit H, pp. 16-20)

8 By demanding a detailed explanation of McCarthy's MCEA activities on June 5, 2006,
9 and disciplining him on December 1, 2006, for failing to provide such an explanation the City of
10 Modesto has interfered with the administration of MCEA in violation of Government Code
11 section 3503 and City of Modesto Personnel Rules, Rule 17.2.

12 Further, in doing so it discriminated against McCarthy for engaging in protected
13 concerted labor activity, in violation of Government Code section 3506, Public Employment
14 Relations Board regulation 32603, subdivision (a), and City of Modesto Personnel Rules, Rule
15 17.2.

16 Further, in doing so it executed a unilateral change in the terms and conditions of
17 employment for McCarthy and MCEA members, in violation of the meet and confer requirement
18 contained in Government Code section 3505.

19 Finally, in doing so it breached MOU Article 44.

20 Wednesday, June 7, 2006

21 On Wednesday, June 7, 2006, McCarthy attended for the fifth time the monthly meeting
22 called by Police Chief Roy Wasden at the police department with representatives of MCEA,
23 MCMA, MPOA, MPMA. The meeting began at approximately 7:30 a.m. and concluded at
24 approximately 9:30 a.m. The purpose of the meeting was, as before, to address issues relating to
25 the scope of representation of the various employee organizations with management. Just as he
26 had done on January 11, February 15, April 11, and May 10, McCarthy used paid release time
27 pursuant to Government Code section 3505.3 for travel to, preparation for, and attendance at this
28 meeting with the Police Chief.

Immediately following the Police Chief's monthly meeting with the labor associations,
McCarthy remained at the police department to attend a meeting of MCEA, MCMA, MPOA,
and MPMA relating to upcoming continued negotiations with the City regarding the "Pending
Issue" described in MOU Article 52. This meeting was organized by Kevin Finnerty, a
management negotiations team representative, specifically to address the "Pending Issue"
contained in Article 52 of MCEA's MOU (and similar provisions in other MOUs).⁵ Finnerty
attended this meeting. Just as he had done on February 24 when meeting with the pump
mechanics, and on March 1 and April 3 when meeting with the MCEA negotiations team,
McCarthy used paid release time while attending the June 7 meeting regarding the Article 52
"Pending Issue."

⁵ Kevin Finnerty is a Police Lieutenant who represented the City of Modesto at the bargaining table for the current
MOU with MCEA. Finnerty's signature for the City is shown on page 52 of the MOU. (See Exhibit A, p. 52.)

1 McCarthy had given advance written notice of these meetings to his supervisors and
2 managers at 7:00 a.m. on June 6, 2006, in the form of a handwritten memo and a leave request
3 form. (See Exhibit K, p. 1 and Exhibit BB.)

4 Later, during Stewart's investigative interview of Jill Peltier on September 1, 2006,
5 Stewart asked Peltier the following series of questions relating to these two meetings on June 7.

6 Q: [By Stewart.] Okay. And if, in fact, um, we had information that
7 uh Mr. McCarthy had met fairly frequently with other members of
8 other associations to um discuss their strategies for um some
9 upcoming negotiations. Um, would you consider that to be
10 something that would be City time or time bank time?

11 A: [By Peltier.] I would say that would [sic] time bank time.

12 Q: Okay.

13 A: Because in my mind, that would be something that's not related to
14 City business, that's related to association business.

15 Q: Okay. And I have a little bit of a chronology here for the months of
16 June, July, and August, for what Mr. uh McCarthy has listed to his
17 supervisor as meetings that he would be attending. And I see a
18 meeting in, uh on the 6th [sic] of June where it's that joint meeting
19 at the Police Department on that uh retirement subject? Another
20 one on June 28th, uh another one on July 26th, another one on July
21 23rd, um, and each of those meetings lasted 2 to 3 hours uh, and I
22 will just state that into the record as that is our understanding of the
23 facts. Um, if I were to tell you that and then if I were also to tell
24 you that on his timesheets between the first of June and now, Mr.
25 McCarthy has listed a total of 3 hours as time bank and the rest of
26 his time has been listed as City time, would you feel that was
27 appropriate?

28 A: You're saying the the [sic] meetings at the PD were related to the
retirement issue and the other associations; no I don't think that's
appropriate.

 Stewart did not inform Peltier of the fact Police Chief Wasden attended the earlier
meeting to discuss scope of representation issues with the labor associations. Stewart did not
inform Peltier the later meeting (and the others on June 28, July 23, and July 26) were organized
and attended by Peltier's fellow management negotiations team member, Kevin Finnerty,
specifically to further address, in part, the "Pending Issue" described in MCEA's Article 52.⁶

 On December 1, 2006, Dan Wilkowsky notified McCarthy in writing that he intends to
suspend McCarthy without pay for ten (10) days because, among other things, McCarthy

⁶ Jill Peltier is an Employee Relations Specialist who represented the City of Modesto at the bargaining table for the
current MOU. Peltier's signature for the City is shown on page 52 of the MOU. (See Exhibit A, p. 52.)

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1 inappropriately used paid release time to attend these meetings, did not adequately explain where
2 he was and what MCEA business he was doing, and failed to provide advance written notice to
3 his supervisors. Wilkowsky asserts, "In notes taken during the June 29th Clarification Meeting,
4 you acknowledged at that time that monthly meetings with the Chief of Police were to be
charged to MCEA time bank time." (Exhibit I, p. 8, ¶ 3.) Amazingly, the so-called "clarification
meeting" Wilkowsky refers to occurred a little more than three weeks after (not before)
McCarthy's attendance at these two meetings on June 7.

5 In his December 1, 2006, notice of intent to discipline McCarthy, Wilkowsky also wrote
6 he made a unilateral deduction from MCEA Time Bank of four (4) hours for McCarthy's
attendance at these two meetings.

7 Jill Peltier authored a memorandum dated July 24, 2006, to McCarthy, Cindy Ireta,
8 Phibbs, Adam Denlinger, and Dan Wilkowsky with copies to Barbara Santos, Blair Bradley, and
9 Julie Hendee. (Exhibit J.) Peltier purported to memorialize in her memo the substance of the so-
called "clarification meeting" of June 29, 2006. Peltier wrote that "meetings with management"
10 are a category of meetings for which McCarthy's use of paid release time is appropriate, further
11 explaining this category by writing, "• Meetings called by management relating to a personnel
issue or to discuss an MCEA issue; Tom will provide the manager's name to verify his
attendance at the meeting, if needed [¶]• These meetings may be formal or informal meetings".

12 By disciplining McCarthy on December 1, 2006, for appropriately using paid release
13 time to attend these June 7, 2006, meetings and by unilaterally deducting four (4) hours of
14 MCEA Time Bank the City of Modesto has failed to provide adequate release time for meeting
and conferring activities in violation of Government Code section 3505.3 and Public
15 Employment Relations Board regulation 32603, subdivision (b). Further, in doing so it also
executed a unilateral change in the terms and conditions of employment for McCarthy and
16 MCEA members, in violation of the meet and confer requirement contained in Government
Code section 3505. Further, in doing so it discriminated against McCarthy for engaging in
17 protected concerted labor activity, in violation of Government Code section 3506, Public
Employment Relations Board regulation 32603, subdivision (a), and City of Modesto Personnel
18 Rules, Rule 17.2. Finally, in doing so it breached MOU Articles 44 and 52.

19 On information and belief, representatives of other employee organizations were granted
20 paid release time to attend the "Pending Issue" meetings on June 7. On information and belief,
21 the City never investigated (or disciplined) any other employee organization representative for
22 use of paid release time while attending the "Pending Issue" meeting on June 7. By failing to
provide McCarthy with adequate paid release time to attend this meeting while providing other
23 employee organization representatives with release time the City showed a preference to other
employee organizations in violation of the MMBA, PERB Regulation 32603, subdivision (d),
and City Personnel Rule 17.2.

24 Thursday, June 8, 2006

25 On Thursday, June 8, 2006, McCarthy used three (3) hours of MCEA Time Bank to
26 conduct MCEA banking business from 1:00 until 1:30 p.m., meet with Councilmember Olsen at
27 1:30 p.m., and meet with Councilmember O'Brien from 2:00 p.m. until 3:30 p.m. McCarthy
provided advance written notice to his supervisors, Tony Souza and Tom Freitas, on June 6,
28 2006. (See Exhibit K, p. 1.)

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1 Tuesday, June 13, 2006

2 On Tuesday, June 13, 2006, McCarthy was notified at 6:30 a.m. of a meeting with the
3 City's Personnel Department from 12:30 p.m. to 3:30 p.m. McCarthy provided advance written
4 notice to his supervisors Tom Freitas and Tony Souza. McCarthy attended the meeting in the
5 Personnel Department using paid release time. (See Exhibit K, p. 2.) While in the Personnel
6 Department McCarthy briefly encountered Director of Personnel Robin Renwick who stated she
7 heard McCarthy is conducting MCEA affairs on City time. McCarthy asked her to explain what
8 she meant by this and she refused to elaborate.

7 Friday, June 16, 2006

8 On Friday, June 16, 2006, Steve Lumpkin (a City management representative) called a
9 1:00 p.m. meeting with McCarthy as MCEA's President. MCEA's immediate past president and
10 shop steward Blair Bradley also attended. The subject of the meeting was MCEA employee
11 performing work within the scope of a private contract with Grover Landscaping. As usual,
12 McCarthy provided advance written notice to Souza and Freitas on June 14. (See Exhibit K, p.
13 3.) McCarthy used paid release time under Government Code section 3505.3 to attend the
14 meeting.

12 Wednesday, June 28, 2006

13 On Wednesday, June 28, 2006, McCarthy met again with representatives of MCMA,
14 MPOA, and MPMA relating to upcoming continued negotiations with the City regarding the
15 "Pending Issue" described in MOU Article 52. As before, this meeting was organized by Kevin
16 Finnerty, a management negotiations team representative, specifically to address the "Pending
17 Issue" contained in Article 52 of MCEA's MOU (and similar provisions in other MOUs).
18 Finnerty attended this meeting. This meeting began at approximately 7:30 a.m. and continued
19 until approximately 10:00 a.m. Just as he had done on June 7, 2006, McCarthy again used paid
20 release time while preparing for, traveling to and attending the June 28 meeting regarding the
21 Article 52 "Pending Issue."

19 At the conclusion of this meeting, McCarthy and MCEA attorney Bob Phibbs met with
20 MCEA members in the engineering department and MCEA Director Bud Heintz to discuss filing
21 a grievance regarding pay inequities for engineering assistants. Just as he had done on February
22 24 when meeting with the pump mechanics regarding job description changes, and on March 1
23 and April 3 when meeting with the MCEA negotiations team, McCarthy used paid release time
24 while attending this meeting with the engineering assistants.

23 Even though notes taken by management at the so-called "Clarification Meeting" on
24 January 23, 2006, provide that meetings for "prep time," "grievances" and "mtg. w/ Bob
25 [Phibbs] for prep" are appropriate occasions to use paid release time, Dan Wilkowsky informed
26 McCarthy on December 1, 2006, that he is to be suspended without pay for ten (10) days for,
27 among other things, using paid release time for these two June 28 meetings.

27 In his December 1, 2006, notice of intent to discipline McCarthy, Wilkowsky also wrote
28 he made a unilateral deduction from MCEA Time Bank of three (3) hours for McCarthy's
attendance at these two meetings.

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1 By disciplining McCarthy on December 1, 2006, for appropriately using paid release
2 time to attend these June 28, 2006, meetings and by unilaterally deducting three (3) hours of
3 MCEA Time Bank the City of Modesto has failed to provide adequate release time for meeting
4 and conferring activities in violation of Government Code section 3505.3 and Public
5 Employment Relations Board regulation 32603, subdivision (b). Further, in doing so it also
6 executed a unilateral change in the terms and conditions of employment for McCarthy and
7 MCEA members, in violation of the meet and confer requirement contained in Government
8 Code section 3505. Further, in doing so it discriminated against McCarthy for engaging in
9 protected concerted labor activity, in violation of Government Code section 3506, Public
10 Employment Relations Board regulation 32603, subdivision (a), and City of Modesto Personnel
11 Rules, Rule 17.2. Finally, in doing so it breached MOU Article 44.

8 On information and belief, representatives of other employee organizations were granted
9 paid release time to attend the "Pending Issue" meeting on June 28. On information and belief,
10 the City never investigated (or disciplined) any other employee organization representative for
11 use of paid release time while attending the "Pending Issue" meeting on June 28. By failing to
12 provide McCarthy with adequate paid release time to attend this meeting while providing other
13 employee organization representatives with release time the City showed a preference to other
14 employee organizations in violation of the MMBA, PERB Regulation 32603, subdivision (d),
15 and City Personnel Rule 17.2.

13 Thursday, June 29, 2006

14 On Thursday, June 29, 2006, McCarthy was called to a 12:30 p.m. meeting at the
15 wastewater treatment plant to discuss McCarthy's MCEA activities. Also present were Cindy
16 Ireta, Bob Phibbs, Blair Bradley, Adam Denlinger, and Jill Peltier. Barbara Santos and Julie
17 Hende arrived approximately 30 minutes late. Dan Wilkowsky attended by telephone. As
18 instructed, McCarthy provided advance written notice of this meeting to his supervisors Tom
19 Freitas and Tony Souza the day prior, June 28. (See Exhibit K, p. 4.)

18 City management questioned McCarthy why he did not have advance approval of his
19 supervisor to attend MCEA related meetings on June 5, 2006. McCarthy replied he believed he
20 had supervisory approval in writing. (McCarthy did have written approval. See Exhibit AA.)
21 City management informed McCarthy that his written notices to his supervisors Tom Freitas and
22 Tony Souza were no longer sufficient. Now, McCarthy was instructed to also provide advance
23 written notice to Deputy Director of Public Works Dan Wilkowsky and Public Works
24 Superintendent Adam Denlinger.

23 On information and belief, no president or representative of any other employee
24 organization in the City of Modesto is or was required to make such extensive notification and
25 no prior MCEA President was required to make such extensive notification. By imposing upon
26 McCarthy different and more onerous reporting requirements for paid release time and MCEA
27 Time Bank use, the City showed a preference to other employee organizations in violation of the
28 MMBA, PERB Regulation 32603, subdivision (d), and City Personnel Rule 17.2.

27 Blair Bradley, MCEA's immediate past-President who was at the June 29 meeting said
28 the requirements being imposed on McCarthy were "ridiculous" and were far more than
anything ever required by the City when he was MCEA's President.

1 McCarthy protested that this is the third meeting he has been summoned to regarding his
2 activities as MCEA's President. He said he believed he was in compliance with everything the
3 City expected of him as an employee and as MCEA President, was appropriately recording his
4 time, and was providing as much advance notice to his supervisors as reasonably possible.

4 The meeting concluded after Adam Denlinger promised to get McCarthy computer
5 access to GroupWise as quickly as possible so McCarthy can use this as a tool to efficiently
6 inform his supervisors of his meeting schedule.

6 Friday, June 30, 2006

7 On Friday, June 30, 2006, McCarthy was scheduled to meet at 1:00 p.m. with the
8 Personnel Department to meet and confer regarding the City's proposal to contract out tree
9 trimming and layoff tree trimmers in MCEA's bargaining unit. As instructed, McCarthy
10 provided advance written notice of this meeting to his supervisors Tom Freitas and Tony Souza
11 two days prior on June 28. (See Exhibit K, p. 4.)

11 At some point the meeting was cancelled by MCEA attorney Bob Phibbs. During an
12 investigative interview conducted over two months later on September 5, 2006, by Janice
13 Stewart she asked whether McCarthy had "any recollection" of whether he informed his
14 supervisors, Freitas and Souza, that the meeting was cancelled. McCarthy replied he "probably
15 would have tried" and went on to explain he wasn't sure when the June 30 meeting was
16 cancelled, sometimes he has difficulty reaching Freitas on the radio, he would have notified
17 Freitas if he remembered, and he would have just continued working that day. (See Exhibit H, p.
18 32-33.)

16 In his December 1, 2006, notice of intent to suspend McCarthy for ten (10) days,
17 Wilkowsky concludes that McCarthy's answers during the interview on this subject "constitute
18 dishonesty" and "insubordination." (Exhibit I, p. 13, ¶ 7.)

18 During the interview, Stewart asked whether what McCarthy put on his memo and what
19 he actually took on his timesheet for June 30 would "jibe." McCarthy explained that it would
20 make no difference because it would all be recorded under the same column either way. In fact,
21 McCarthy's timesheet for June 30 shows 8 hours of "regular hours" just as it would had
22 McCarthy attended this meeting on paid release time. (See Exhibit FF.) Responding to whether
23 McCarthy's timesheet would "jibe" with his memo to his supervisors McCarthy explained, "I've
24 never been told that was as issue. It's never been addressed to me." (Exhibit H, pp. 32-33.)

23 In his December 1, 2006, notice of intent to suspend McCarthy for ten (10) days,
24 Wilkowsky concludes that McCarthy's answer regarding the "jibing" of timesheets with his
25 memos is "insincere and untruthful." (Exhibit I, p. 13, ¶ 8.)

25 Wilkowsky added McCarthy has a "nonchalant attitude about not reporting changes" in
26 his schedule to his supervisors and perceives himself to be "exempt from the rules of behavior
27 that apply to all City employees..." (Exhibit I, p. 13-14.)

1 Monday, July 10, 2006

2 On Monday, July 10, 2006, McCarthy attended an 11:15 a.m. meeting in the Personnel
3 Department regarding a 'wall to wall' classification study negotiated by MCEA and contained at
4 MOU Article 5, subsection (D). McCarthy used paid release time pursuant to Government Code
5 section 3505.3 for travel to, preparation for, and attendance at this meeting. As usual, McCarthy
6 provided advance written notice of the meeting to his supervisors, Souza and Freitas, on July 10.
7 (Exhibit K, p. 6.)

8 Tuesday, July 11, 2006

9 In the later morning on Tuesday, July 11, 2006, McCarthy and Cindy Ireta met with labor
10 lawyer Joe Rose⁷ and Dennis Turner regarding settlement of a disciplinary arbitration involving
11 Kenneth Thornberry, Jr. Dennis Turner is a management representative of the City of Modesto.
12 The meeting lasted approximately 20 minutes. McCarthy used paid release time pursuant to
13 Government Code section 3505.3 for travel to, preparation for, and attendance at this meeting.
14 This meeting was called at the last minute during an arbitration hearing.

15 Wednesday, July 12, 2006

16 On Wednesday, July 12, 2006, McCarthy attended a 3:00 p.m. meeting at the wastewater
17 treatment plant to meet and confer regarding the 24-hour shift work schedule for wastewater
18 treatment plant operators covered by Appendix E of the MOU. McCarthy used paid release time
19 pursuant to Government Code section 3505.3 for travel to, preparation for, and attendance at this
20 meeting. As usual, McCarthy provided advance written notice of the meeting to his supervisors,
21 Souza and Freitas, on July 10. (Exhibit K, p. 6.)

22 Friday, July 21, 2006

23 As instructed on June 29, McCarthy notified his supervisors, Freitas, Souza, Wilkowksy,
24 and Denlinger, by a written memo on July 21 of a meeting scheduled to occur on Tuesday, July
25 25, 2006, from 11:30 a.m. to 1:00 p.m. using MCEA Time Bank. (Exhibit K, p. 7.)

26 Monday, July 24, 2006

27 On Monday, July 24, 2006, Jill Peltier issued her memorandum purporting to chronicle
28 the so-called "clarification meeting" of June 29. McCarthy received a copy of this memo
sometime later the same week via e-mail. He telephoned Phibbs and asked Phibbs to write a
letter refuting some inaccuracies contained in the memo. Phibbs advised McCarthy it was better
not to respond to the memo from a legal standpoint.

 Early that morning, Tony Souza mentioned the July 11 settlement agreement between
MCEA and the City of Modesto regarding Kenneth Thornberry, Jr. The settlement agreement
between MCEA and the City provided for Thornberry to be reinstated to his former position as a
Senior Equipment Operator and transferred to wastewater collections. Referring to this
agreement, Souza announced in the wastewater collections break room to the crew, "We always

⁷ Joe Rose was initially hired by MCEA solely to represent Kenneth Thornberry, Jr. in a disciplinary appeal. Rose was later hired as MCEA's general counsel effective December 4, 2006.

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1 get the screw ups from other departments.” McCarthy was present and made a note of Souza’s
2 remark in his pocket calendar book.

3 As instructed on June 29, McCarthy notified his supervisors, Freitas, Souza, Wilkowsky,
4 and Denlinger, at 7:35 a.m. on July 24 of the cancellation of the meeting scheduled to occur on
5 Tuesday, July 25, 2006, from 11:30 a.m. to 1:00 p.m.

6 Wednesday, July 26, 2006

7 On Wednesday, July 26, 2006, McCarthy met again with representatives of MCMA,
8 MPOA, MPMA, and MPNSA relating to upcoming continued negotiations with the City
9 regarding the “Pending Issue” described in MOU Article 52. Again, City negotiations team
10 member Kevin Finnerty was present. This meeting began at approximately 8:00 a.m. and
11 continued until approximately 10:00 a.m. McCarthy used one hour before the meeting for
12 preparation and travel, as authorized by Janice Stewart on January 23. Just as he had done on
13 June 7 and June 28 McCarthy again used paid release time pursuant to Government Code section
14 3505.3 while preparing for, traveling to, and attending the July 26 meeting regarding the Article
15 52 “Pending Issue.” As instructed on June 29, McCarthy gave his supervisors, Freitas, Souza,
16 Denlinger and Wilkowsky, advance written notice of the meeting by a memo dated July 21.
17 (Exhibit K, p. 7.)

18 Another meeting was scheduled for 11:00 a.m. the same day with the Personnel
19 Department regarding the City’s proposal to contract out tree trimming and layoff tree trimmers
20 in MCEA’s bargaining unit. As instructed on June 29, McCarthy gave his supervisors, Freitas,
21 Souza, Denlinger and Wilkowsky, advance written notice of the meeting by a memo dated July
22 21. (Exhibit K, p. 7.) However, this meeting was cancelled.

23 During Janice Stewart’s investigative interview of McCarthy on September 5, 2006,
24 Stewart asked McCarthy the following series of questions relating to this latter meeting on July
25 26. (See Exhibit H, pp. 34-35.)

26 Q: [By Stewart.] Okay. How ‘bout July 26?

27 A: [By McCarthy, reading from a copy of his pocket calendar.] Yeah.
28 Retiree health, um, at the Police Department and, um, then we had
Forestry at 11 to 1:30 at Personnel. (See Exhibit EE.)

Q: Okay. And, uh, the meeting at the Police Department, the, do you
know what time that meeting was?

A: Um, think it was startin’ at 8 o’clock.

Q: Okay. And do you know about when it ended?

A: No, I don’t remember. Probably somewhere between 10 and 11?

Q: Okay. And, and if my understanding is that the meeting went from
8 to 10, would there be any reason why you would, um, have

1 needed to have both an hour before and an hour after for that
meeting?

2 A: Well, I don't know that it did end at 10, but, um, I woulda taken
3 the hour before for prep time because I woulda wanted some
4 information on MCEA that woulda had to have prepared for that
meeting, so.

5 Q: Okay.

6 A: And that woulda been computer work at home.

7 Q: And, again, that would have been, in your mind, then City time?

8 A: Sure.

9 Q: And the meeting from 1 to 11:30 [sic] with Forestry, it, was that,
10 did that include management employees?

11 A: Is that Bill Dufresne? I don't know. I honestly don't remember. I
12 think that was the meeting, uh, yeah, *I honestly don't remember*
13 *that meeting at all.* [Emphasis added.]

14 Q: Okay. Any recollection of whether anybody from Personnel was in
that meeting?

15 A: *I, if I don't remember the meeting at all, I don't remember the*
16 *meeting at all.* [Emphasis added.]

17 Q: [Referring to Exhibit K, p. 7.] Okay. Well, the reason I'm asking is
18 that, uh, what you've listed on your, um, sheet is, uh, on the memo
19 for the date July 21st 2000 and 6 [sic], you've listed 11 to 1:30
p.m., meeting at Personnel.

20 A: Mm hm.

21 Q: Um, so what you're saying is, even though you don't remember it,
22 yet, you think it was Forestry and you think it was, uh, at Tenth
Street Place. Is that correct?

23 A: Yeah.

24 Q: Do you recall anyone else who might have been at that meeting
25 with you besides possibly, Bill Dufresne?

26 A: *I really don't remember that meeting.* [Emphasis added.]
27 Actually, I'm not even sure if possibly Bill, Bill Dufresne, 'cause
28 I'm thinkin', I'm thinkin' that was a different meeting with Bill
Dufresne.

1 Q: Okay.

2 Later in the interview McCarthy further clarified that the meeting was cancelled and
3 moved to August 9, 2006, because Bob Tate was unable to attend on July 26.

4 In his December 1, 2006, notice of intent to suspend McCarthy for ten (10) days,
5 Wilkowsky asserts that McCarthy inappropriately used paid release time to attend the first
6 meeting and failed to prove to the City's satisfaction he provided adequate notice to his
7 supervisors regarding the meetings. (Exhibit I, p. 14-16.) (McCarthy gave five days advance
8 notice of both meetings. See Exhibit K, p. 7.) Wilkowsky also wrote he made a unilateral
9 deduction from MCEA Time Bank of two and a half (2½) hours for McCarthy's attendance at
10 the first meeting. (Exhibit I, p. 1.)

11 By disciplining McCarthy on December 1, 2006, for appropriately using paid release
12 time to attend the first July 26, 2006, meeting and by unilaterally deducting two and a half (2½)
13 hours of MCEA Time Bank the City of Modesto has failed to provide adequate release time for
14 meeting and conferring activities in violation of Government Code section 3505.3 and Public
15 Employment Relations Board regulation 32603, subdivision (b). Further, in doing so it also
16 executed a unilateral change in the terms and conditions of employment for McCarthy and
17 MCEA members, in violation of the meet and confer requirement contained in Government
18 Code section 3505. Further, in doing so it discriminated against McCarthy for engaging in
19 protected concerted labor activity, in violation of Government Code section 3506, Public
20 Employment Relations Board regulation 32603, subdivision (a), and City of Modesto Personnel
21 Rules, Rule 17.2. Finally, in doing so it breached MOU Articles 44 and 52.

22 On information and belief, representatives of other employee organizations were granted
23 paid release time to attend the "Pending Issue" meeting on July 26. On information and belief,
24 the City never investigated (or disciplined) any other employee organization representative for
25 use of paid release time while attending the "Pending Issue" meeting on July 26. By failing to
26 provide McCarthy with adequate paid release time to attend this meeting while providing other
27 employee organization representatives with release time the City showed a preference to other
28 employee organizations in violation of the MMBA, PERB Regulation 32603, subdivision (d),
and City Personnel Rule 17.2.

21 Monday, July 31, 2006

22 At approximately 9:00 a.m. on Monday, July 31, Dawn Perez, a paralegal in the City
23 Attorney's office, arranged for McCarthy to be paged. McCarthy responded to the page by
24 calling Perez. Perez inquired whether McCarthy intended to file harassment charges against
25 anyone in the wastewater collections division for anything. Perez said she had heard McCarthy
26 might have a complaint to make. McCarthy replied he did not know how to answer a question
27 like that and quipped the City Attorney's office didn't need to drum up any more business.

28 The same day, on July 31, Stewart sent a two-page Email to Barbara Santos regarding
McCarthy's concerted labor activities. Stewart later listed this Email as 'exhibit D' to the
September 1, 2006 interview transcript of Jill Peltier. Stewart inquired whether McCarthy met
with anyone at the Personnel Department on July 26. Santos replied writing McCarthy met with
neither her nor Peltier. (See Exhibit F, pp. 6-7.)

1 The same day, on or about July 31, MCEA representative Tracy McLaughlin spoke to
2 MCEA attorney Bob Phibbs on the telephone. During the conversation Phibbs told McLaughlin
3 he knew McCarthy was being scrutinized by City management for use of paid release time and
4 MCEA Time Bank, and wished someone could warn him. McLaughlin wondered how Phibbs
5 knew this and why he did not warn McCarthy himself. McLaughlin wondered whether Phibbs
6 intended for McLaughlin to share this information with McCarthy, but was unsure of whether
7 she should.

8 MCEA and McCarthy have since requested copies of all Email communications between
9 Stewart, Santos, Peltier, and Phibbs occurring on or around July 31. (See Exhibit O.) The City
10 refuses to produce the information requested. (See Exhibit W.) MCEA, through its attorney, has
11 met and conferred with the City regarding its refusal to produce the requested information
12 without success. (See Exhibit X.) By refusing to produce the information requested, the City has
13 committed an unfair labor practice.

14 Tuesday, August 1, 2006

15 On Tuesday, August 1, Barbara Santos sent an Email to Janice Stewart regarding
16 McCarthy's concerted labor activities. Stewart would later mark this Email as 'exhibit E' to the
17 September 1, 2006, interview of Barbara Santos. (See Exhibit E, pp. 7-8.)

18 The same day, August 1, McCarthy spoke to Deputy City Attorney Carol Schmidt,
19 asking why Dawn Perez made an unsolicited inquiry of McCarthy on July 31 regarding whether
20 he had any complaints to file. Schmidt replied she did not know why.

21 Wednesday, August 2, 2006

22 On Wednesday, August 2, 2006, from 6:00 a.m. to 7:30 a.m. McCarthy met with
23 wastewater treatment plant operators regarding the 24-hour shift work schedule for wastewater
24 treatment plant operators covered by Appendix E of the MOU. This meeting was in preparation
25 for a meeting with Barbara Santos and Dan Wilkowsky the next day. McCarthy used paid
26 release time pursuant to Government Code section 3505.3 for travel to, preparation for, and
27 attendance at this meeting during his normal working hours. As usual, McCarthy provided
28 advance written notice of this meeting to his supervisors and managers on July 28. (See Exhibit
K, p. 8.)

Thursday, August 3, 2006

On Thursday, August 3, 2006, at 9:00 a.m. McCarthy met in the Personnel Department
with the Barbara Santos, Dan Wilkowsky, Jill Peltier, Gary Dull and Bob Phibbs to meet and
confer regarding the 24-hour shift work schedule for wastewater treatment plant operators
covered by Appendix E of the MOU. McCarthy used paid release time pursuant to Government
Code section 3505.3 for travel to, preparation for, and attendance at this meeting. As usual,
McCarthy provided advance written notice of this meeting to his supervisors and managers on
July 28. (See Exhibit K, p. 8.)

The same day, August 3, at 12:59 p.m. Santos sent an Email to Stewart regarding
McCarthy, including this meeting. Santos' opinion was McCarthy did not need to be at the

1 meeting because MCEA's attorney, Bob Phibbs, was there and she felt the subject of the meeting
2 didn't impact McCarthy's work unit. Later, during Santos' interview with Stewart she gave the
3 opinion McCarthy's use of release time to attend this meeting was "kind of iffy." (See Exhibit E,
pp. 9-12.) Santos admitted Dan Wilkowsky questioned the legitimacy of McCarthy's presence at
the meeting. (*Ibid.*)

4 MCEA and McCarthy have since requested copies of all Email communications between
5 Stewart, Santos, Peltier, and Wilkowsky occurring on August 3, 2006. (See Exhibit O.) The City
6 refuses to produce the information requested. (See Exhibit W.) MCEA, through its attorney, has
7 met and conferred with the City regarding its refusal to produce the requested information
without success. (See Exhibit X.) By refusing to produce the information requested, the City has
committed an unfair labor practice.

8 Monday, August 14, 2006

9 From 10:00 a.m. to 11:00 a.m. on Monday, August 14, 2006, McCarthy attended an
10 investigative interview conducted by Janice Stewart and Robert Sarhad.

11 Tuesday, August 22, 2006

12 Cheryl Detmar held a meeting with MCEA members in her department on Wednesday,
13 August 22, 2006, at 9:00 a.m. The purpose of the meeting was to discuss a "flex staffing"
14 arrangement that would allow selected employees to promote to a higher classification based
upon work performance rather than the civil service promotional testing process. Detmar
15 personally invited Bob Phibbs to attend the meeting. Detmar invited Phibbs to represent MCEA
members during the meeting.

16 Days before the meeting, MCEA employees asked Detmar that Finance Technicians be
17 excluded from attending. Cindy Ireta, MCEA Vice President, is a Finance Technician. Ireta
18 might typically represent MCEA members as an MCEA officer at such a meeting, but in this
instance because of the employees' requests to exclude Finance Technicians, it was decided
19 McCarthy would attend on behalf of MCEA rather than Ireta.

20 Several times throughout the year, McCarthy and Ireta asked Phibbs not to attend
21 meetings with City management unless at least one MCEA officer or director accompanied him.
They made this request to address MCEA member concerns that Phibbs might be making
22 agreements with City management without authority from the MCEA Board of Directors.

23 McCarthy arrived on August 22 at the Finance Department for the 9:00 a.m. meeting.
24 Detmar asked McCarthy what he was doing there. Detmar said, "You have no business here"
asserting the meeting was not an MCEA meeting. Detmar conceded, however, that she
personally invited MCEA's attorney to attend to represent the MCEA members present.

25 McCarthy disagreed, explaining that since the meeting involved MCEA members, the
26 topic of discussion was within MCEA's scope of representation, and Detmar invited MCEA's
attorney to attend, then McCarthy considered it to be an MCEA meeting that he had a right to
27 attend as its President.

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1 McCarthy attended the meeting and recorded his time during the meeting with
management as paid release time pursuant to Government Code section 3505.3.

2 Janice Stewart would later question McCarthy on September 5 about his attendance at
3 this meeting in the following series of questions. (See Exhibit H, p. 40-41.)

4 Q: Do you recall a discussion you had with Cheryl Detmar about
5 the 9 a.m. meeting?

6 A: Um, she seemed to insist that it was not an MCEA meeting, uh,
7 which I didn't agree with her on that. I, you know, if MCEA's
8 paid representative is there to talk to workers, it is an MCEA-
9 Personnel meeting, I mean, so. Um, other than that, no.

10 Q: Okay. And how do you make, how do you make a decision on
11 whether or not your paid representative attends a meeting, um,
12 by himself and whether you attend a meeting with him?

13 A: Uh, for the most part, if our paid representative's attending a
14 meeting, unless it's where he has, um, confidentiality issue with
15 a client, uh, somebody from MCEA's elected board is gonna be
16 there. More than likely it's gonna be either myself or another
17 executive board member.

18 Q: Okay. Um, and, would that, in your mind, be City time or would
19 that be time bank time?

20 A: If the City has an issue that we're discussing, that's City time. I
21 mean, if it's for a City issue.

22 Q: Okay. And did Cheryl Detmar mention to you that she felt that
23 you were not invited to the meeting, that it was a staff meeting
24 that she had purposely invited Bob Phibbs to solely, so that in-
25 people could individually speak with him confidentially if they
26 wanted to?

27 A: She did.

28 Q: And what was your response to that?

 A: That Bob is MCEA's paid representative and we choose, not the
 City, where his talents are best used.

 Q: Alright. So because of that then did you attend the meeting in
 place of Bob Phibbs?

 A: No, I sat as an observer.

 Q: Okay. On City time?

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1 A: Yes.

2 By inquiring into how MCEA decides when and whether to use its attorney, the City of
3 Modesto interfered in the business of MCEA, an unfair labor practice.

4 At 10:00 a.m. on August 22, McCarthy met with Deputy Assistant City Manager Judith
5 Ray. In attendance also were Bob Phibbs and MCEA Director Bud Heintz. The meeting
6 concerned salary inequities for engineering assistants and related to the preparatory meeting
7 McCarthy and Phibbs attended on Wednesday, June 28. He recorded his time during the meeting
8 with management as paid release time pursuant to Government Code section 3505.3.

9 After the 10:00 a.m. meeting with Judith Ray, McCarthy and Phibbs met with Barbara
10 Santos, personnel analyst Cherree Platt, and MCEA members Rodney Nelson and Dave
11 Shackelford at 10:30 a.m. Nelson and Shackelford are electricians and the purpose of the
12 meeting was to discuss proposed job specification changes. McCarthy recorded his time during
13 the meeting with management as paid release time pursuant to Government Code section 3505.3.

14 After the meeting regarding the electricians, McCarthy told Santos he disagreed with the
15 content of Jill Peltier's July 24 memorandum regarding the so-called "clarification meeting" on
16 June 29. Santos replied she did not remember the July 24 memo and would go and look for a
17 copy of it.

18 The same day, Stewart sent an Email to Peltier inquiring about McCarthy's activities in
19 the Personnel Department that day. Peltier replied the following day, August 23, writing she saw
20 McCarthy in the lobby of City Hall talking with a couple of people she did not recognize,
21 apparently having just descended the stairs. (See Exhibit F, pp. 8-9.)

22 MCEA and McCarthy have since requested copies of all Email communications between
23 Stewart, Santos, and Peltier occurring on or about August 23. (See Exhibit O.) The City refuses
24 to produce the information requested. (See Exhibit W.) MCEA, through its attorney, has met and
25 conferred with the City regarding its refusal to produce the requested information without
26 success. (See Exhibit X.) By refusing to produce the information requested, the City has
27 committed an unfair labor practice.

28 Thursday, August 24, 2006

Out of concern that then-MCEA attorney Bob Phibbs was making decisions without
consent of MCEA's Board of Directors and attending meetings with management without
MCEA's knowledge, McCarthy sent an e-mail message on August 24 to City Manager George
Britton with copies to all City department heads, Bob Phibbs, and MCEA representative Tracy
McLaughlin. In the e-mail message McCarthy cited the recognition clause contained at Article 3
of the MCEA MOU (at p. 1) and asked that City management deal directly with MCEA's
officers and directors rather than going directly to MCEA's attorney. Although McCarthy
confirmed the e-mail message was successfully delivered, he received no reply from anyone.

Monday, August 28, 2006

1
2 On Monday, August 28, 2006, McCarthy again met with Bob Phibbs, Rodney Nelson
3 and Dave Shackelford from 10:30 a.m. to 12:00 noon at Phibbs' office to discuss proposed job
4 specification changes for electricians represented by MCEA. This meeting was scheduled in
5 preparation for a 1:00 p.m. meet and confer session with Barbara Santos and Cherree Platt in the
6 Personnel Department on the same issue. As instructed on June 29, McCarthy gave his
7 supervisors, Freitas, Souza, Denlinger and Wilkowsky, advance written notice of the meeting by
8 a memo dated August 25. During the preparatory meeting McCarthy discussed requesting a
9 salary increase to compensate electricians for the additional duties in the proposed job
10 description. Phibbs said a salary adjustment proposal was out of the question. Because McCarthy
11 and Phibbs were unable to agree on this point, McCarthy telephoned Barbara Santos to postpone
12 the 1:00 p.m. meeting to another day. McCarthy then went to lunch from 12:00 noon to 12:30
13 p.m. and then returned to work.

9 At approximately 1:00 p.m. Barbara Santos telephoned McCarthy on his MCEA issued
10 cellular telephone and asked him to come to the Personnel Department to sign a waiver for
11 bilingual pay for an MCEA member working in engineering. McCarthy obliged, meeting the
12 MCEA Director for that area, Bud Heintz, at Personnel

12 McCarthy recorded his time during the preparatory meeting from 10:30 a.m. to 12:00
13 noon as well as the time spent reviewing and signing the waiver at the Personnel Department as
14 paid release time pursuant to Government Code section 3505.3.

14 In his December 1, 2006, notice of intent to suspend McCarthy for ten (10) days,
15 Wilkowsky asserts that McCarthy inappropriately used paid release time to attend the
16 preparatory meeting and failed to provide adequate advance written notice to his supervisors.
(Exhibit I, p. 14-16.)

17 During the September 5 interview conducted by Janice Stewart, McCarthy answered he
18 did not remember whether he informed his supervisors of the cancelled 1:00 p.m. meeting on
19 August 28. Yet, Wilkowsky wrote in his December 1 notice of suspension McCarthy admitted
20 he did not contact his supervisors and deemed McCarthy to be "insubordinate" and dishonest,
describing McCarthy's truthful answers during the interview as "border[ing] on absurd."
(Exhibit I, p. 17-19.)

21 Wilkowsky also wrote he made a unilateral deduction from MCEA Time Bank of one
22 hour and ten minutes for McCarthy's attendance at this meeting. (Exhibit I, p. 1.)

23 By disciplining McCarthy on December 1, 2006, for appropriately using paid release
24 time to attend this August 28, 2006, meeting and by unilaterally deducting one hour and ten
25 minutes of MCEA Time Bank the City of Modesto has failed to provide adequate release time
26 for meeting and conferring activities in violation of Government Code section 3505.3 and Public
27 Employment Relations Board regulation 32603, subdivision (b). Further, in doing so it also
28 executed a unilateral change in the terms and conditions of employment for McCarthy and
MCEA members, in violation of the meet and confer requirement contained in Government
Code section 3505. Further, in doing so it discriminated against McCarthy for engaging in
protected concerted labor activity, in violation of Government Code section 3506, Public

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1 Employment Relations Board regulation 32603, subdivision (a), and City of Modesto Personnel
Rules, Rule 17.2. Finally, in doing so it breached MOU Article 44.

2 Wednesday, August 30, 2006

3
4 On August 30, 2006, the City notified McCarthy that he was under investigation for
5 "misuse of City time over the last few months." (Exhibit D, ¶ 1.) In truth, McCarthy had already
6 been under scrutiny for at least a month (and likely much longer) as Stewart, Santos, Peltier,
7 Wilkowsky, and others secretly exchanged Email communications to each other about his
concerted labor activities. On information and belief, the question of what it would take to fire
McCarthy came up in Email communications during 2006 among executive management in
water quality control and the Personnel Department.

8 MCEA and McCarthy have since requested copies of all such Email communications.
9 (See Exhibit O.) The City refuses to produce the information requested. (See Exhibit W.)
10 MCEA, through its attorney, has met and conferred with the City regarding its refusal to produce
the requested information without success. (See Exhibit X.) By refusing to produce the
information requested, the City has committed an unfair labor practice.

11
12 McCarthy was ordered to appear for an investigative interview on Tuesday, September 5
at 8:30 a.m. McCarthy was ordered to bring with him any documents in his possession showing
13 his schedule of meetings during normal work hours for the months of June, July, and August
2006. Incredibly, Janice Stewart, a percipient witness, would be the investigator.

14
15 On information and belief, earlier that day MCEA attorney Bob Phibbs received a
telephone call at his office from Janice Stewart. MCEA representative Tracy McLaughlin was
16 present in Phibbs' office during the phone call. Stewart told Phibbs McCarthy would receive a
notice of investigation regarding his use of time for MCEA business. Phibbs hung up the
17 telephone and shared with McLaughlin the substance of Stewart's phone call. Phibbs remarked
they should expect a phone call from McCarthy any time now.

18
19 As expected, McCarthy telephoned Phibbs immediately upon receiving the notice of
investigation. Phibbs feigned surprise as McCarthy told him about the interview on September 5.
20 McCarthy, concerned and worried, asked Phibbs to represent him at the interview. Phibbs
agreed.

21 Tuesday, September 5, 2006 Investigative Interview

22
23 Janice Stewart conducted McCarthy's interview. MCEA attorney Bob Phibbs represented
McCarthy during the interview. The City's transcript of the interview is attached as Exhibit H.

24
25 Stewart began by claiming, "...I have no [intent] to delve into the subject of Association
or what we would call Union activities, but in general we will be discussing dates and very broad
subject matter of the meetings so you know that." (Exhibit H, p. 3.)

26
27 Stewart retreated from her stated intend rather quickly. For example, she soon asks:

28 Q: [By Stewart.] Okay. Great. Um, when it comes to the meeting that
you attend and those types of things, can you give me your

1 understanding of what is the role of....uh for you as the president
2 of MCEA versus um the role of one of your directors or what
3 might, more commonly be called a shop steward, what you're
involved in versus what they're involved in, those types of
meetings.

4 *By Mr. Phibbs:*

5 You break that down a little bit please.

6 A: [By McCarthy.] Yeah.

7 Q: Yes. Okay. What types of meetings uh or activities would a shop
8 steward or director be called in um to assist with on city time or
9 time bank time that you can think of. And are, is there a distinction
between that versus what the president gets called in.

10 (Exhibit H, pp. 10-11.)

11 [...]

12 Q: [By Stewart.] Okay. Other than if a member of yours is asking for someone as a
13 representative, and as you mentioned, they have the right to ask anybody they
14 want, do you actually as stewards to attend the meetings. Are they asked by city
15 management? *I'm trying, I'm trying to find out how you decide whether you're*
16 *how it's decided that you're going to a meeting versus how it's decided that a*
steward might go to a meeting. Is there any particular way that happens?
[Emphasis added.]

17 A: [By McCarthy.] Well, anything that's gonna have to be signed off on by MCEA I
18 need to attend the meetings, and I need to be aware of what's going on.

19 Q: And if a steward attends a type of meeting, whether it's a committee meeting or
20 job description or representing an employee, *do they generally come back and*
report to you then what's happened at that meeting or not? (Emphasis added.)

21 A: It depends. I mean, depends on kinds of things. I don't know. Sometimes
22 stewards represent people and I never hear anything about it.

23 (Exhibit H, pp. 11-12.)

24 By compelling McCarthy's answers to questions regarding the internal affairs of MCEA
25 under threat of disciplinary action, such as how MCEA divides the responsibilities of
26 representing its members between and among the MCEA President, Directors, and shop
stewards, the City interfered with MCEA's administration, an unfair labor practice.

27 Stewart concluded the interview by ordering McCarthy under threat of firing not to
28 discuss it with anyone except Bob Phibbs; McCarthy could not even discuss it with his fellow
MCEA officers, directors, or shop stewards, she admonished. (*Id.* at p. 45.)

1 Tuesday, September 18, 2006

2 Concerned that he was being targeted for firing by City officials and falsely accused of
3 abusing City time while functioning as MCEA's President, McCarthy submitted a memo to his
4 supervisors, Freitas, Souza, Denlinger, and Wilkowsky, on Tuesday, September 18, 2006,
5 cancelling all future labor meetings. This memo is attached as Exhibit DD.

6 Friday, September 22, 2006

7 At approximately 1:00 p.m. on Friday, September 22, 2006, McCarthy met with Dawn
8 Perez, a paralegal in the City Attorney's office, to complain he was being harassed,
9 discriminated against, and unfairly targeted for firing by Janice Stewart and others.

10 McCarthy explained to Perez he was ordered by Janice Stewart at the conclusion of her
11 September 5 interview not to discuss her investigation with anyone other than attorney Bob
12 Phibbs or the disclosure could result in his firing. McCarthy, therefore, asked Perez for written
13 assurances he would not be fired for revealing information relating to that investigation to her
14 because the facts of his complaint were overlapping and involved the investigation itself.

15 Perez refused to provide such assurances saying, "I can't say that you would be
16 disciplined regarding the complaint that you have, but I cannot put that in writing. I'm sorry. I
17 just cannot do it." Perez said this was McCarthy's chance to "put it all out there."

18 Without these assurances, McCarthy discontinued the interview.

19 Friday, November 17, 2006

20 On Friday, November 17, 2006, Tony Souza summoned McCarthy into his office for a
21 "coaching session." McCarthy asserted his *Weingarten* right to representation. Souza denied
22 McCarthy's request asserting he was not entitled to representation. Souza continued by
23 questioning McCarthy about a conversation between McCarthy and crew leader Tom Freitas
24 earlier in the day in which McCarthy asked who gave a particular job assignment to him. Souza
25 showed McCarthy the written performance standards for his classification stating McCarthy was
26 failing to meet the standard.

27 In *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251 (*Weingarten*), the court held an
28 employee has a right to union representation at an investigative interview the employee
reasonably believes may result in disciplinary action.

 In *Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159
Cal.App.3d 617, the court extended the *Weingarten* right of representation to an interview with
"highly unusual circumstances" even if the element of discipline is absent.

 A *Weingarten* violation occurs when an employee requests union representation during a
meeting with management and the request is denied. The charging party must demonstrate: (a)
the employee requested representation, (b) for an investigative meeting, (c) which the employee
reasonably believed might result in disciplinary action, and (d) the employer denied the request.

1 (Burton v. Los Angeles County Office of Education (Nov. 3, 1999) Case No. LA-CE-4046,
PERB Decision No. 1360.)

2 Here, McCarthy asserted his *Weingarten* right to representation reasonably believing the
3 subject matter of the meeting was disciplinary, and it was. Thus, Souza, acting as a City official,
4 deliberately and knowingly denied to McCarthy his right to representation under *Weingarten* and
5 to engage in lawful, protected labor activities in violation of Government Code section 3502,
Public Employment Relations Board regulation 32602, and City of Modesto Personnel Rules,
Rule 17.2.

6 Friday, December 1, 2006

7 On December 1, 2006, Tony Souza smiled as he handed McCarthy a notice of intent to
8 suspend him for 10-days without pay signed by Deputy Director of Public Works Dan
9 Wilkowsky. This notice is attached as Exhibit I.

10 Sunday, December 10, 2006

11 On December 10, 2006, MCEA attorney Joe Rose made an information request to the
12 City under the MMBA. A copy of this request is attached as Exhibit O. The City refuses to
13 produce the information requested. (See Exhibit W.) MCEA, through its attorney, has met and
14 conferred with the City regarding its refusal to produce the requested information without
success. (See Exhibit X.) By refusing to produce the information requested, the City has
committed an unfair labor practice.

15 Thursday, December 21, 2006

16 At 3:48 p.m. on Thursday, December 21, 2006, Jill Peltier in the City's personnel
17 department telephoned MCEA's new attorney Joe Rose to investigate whether McCarthy
18 circulated MCEA petitions at the wastewater treatment plant at around 7:00 a.m. the preceding
morning. Peltier was unable to reach Rose and left a voice mail message at his office.

19 Tuesday, January 2, 2007

20 Jill Peltier in the City's personnel department spoke with MCEA attorney Joe Rose
21 questioning him about whether Rose knew in advance McCarthy would be circulating an MCEA
22 petition on December 20, 2006, and whether this was an "MCEA sanctioned activity." Peltier
23 stated she was "concerned" that the petitions were being "selectively handed out" by McCarthy
and appeared to be retaliatory "for all that is going on." Peltier said the handing out of the
24 petitions "ruffled some feathers" and threatened she "could investigate." Rose replied the City of
Modesto's prosecutorial mentality against its employees had to end.

25 Monday, January 8, 2007

26 On January 8, 2007, Director of Personnel Robin Renwick wrote a letter to MCEA
27 attorney Joe Roe asserting McCarthy had tape recorded meeting and interviews "on various
occasions" requesting copies of any such tapes. (Exhibit R.)

28 Rose replied on January 13, 2007. (Exhibit U.)

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1
2 Wednesday, January 17, 2007

3 On Wednesday, January 17, 2007, Tony Souza summoned McCarthy into his office for
4 another "coaching session." McCarthy asserted his *Weingarten* right to representation. Souza
5 denied McCarthy's request asserting he was not entitled to representation. Souza continued
6 regarding whether McCarthy used an expletive in the workplace. Souza said he received a call
7 from "downtown" and "did some checking." Souza said he learned McCarthy said the F-word
8 once or twice in connection with another employee wearing McCarthy's rain boots. Souza told
9 McCarthy, "Consider yourself warned."

10 Here, McCarthy asserted his *Weingarten* right to representation reasonably believing the
11 subject matter of the meeting was disciplinary, and it was. Thus, Souza, acting as a City official,
12 deliberately and knowingly denied to McCarthy his right to representation under *Weingarten* and
13 to engage in lawful, protected labor activities in violation of Government Code section 3502,
14 Public Employment Relations Board regulation 32602, and City of Modesto Personnel Rules,
15 Rule 17.2.

16 Thursday, February 1, 2007

17 On Thursday, February 1, 2007, McCarthy arrived at work shortly before 7:00 a.m.
18 While waiting in the break room to receive his daily job assignment, McCarthy was approached
19 by Damien Clayton, an MCEA member, who asked to speak to him privately outside. McCarthy
20 stepped outside where there was another MCEA member, Marvin Cain. Clayton and Cain asked
21 McCarthy a question about eligibility for acting pay under the MOU. McCarthy answered the
22 question and returned to his seat inside the break room within five minutes. When McCarthy
23 returned Tony Souza was standing within one to two feet of McCarthy's chair. McCarthy was
24 still awaiting his daily job assignment and began writing notes in his pocket calendar as Souza
25 watched over McCarthy's shoulder.

26 At approximately 7:11 a.m. crew leader Tom Freitas told McCarthy his job assignment
27 and left the break room immediately as did Souza. One minute later Freitas came back into the
28 break room where McCarthy was still seated writing a note in his pocket calendar. Freitas
ordered McCarthy to get to work and stop writing notes in his calendar. Freitas said he was
ordered to do this by Souza. McCarthy immediately complied with the instructions and stated he
felt this was continuing harassment.

29 Friday, February 2, 2007 "Coaching Session" by Souza

30 At approximately 7:25 a.m. on Friday, February 2, 2007, Freitas confronted McCarthy at
31 the wastewater treatment plant saying, "Tony wants to see you now." McCarthy was walking
32 next to Blair Bradley, former MCEA President, and asked Bradley to accompany him as a
33 representative. McCarthy and Bradley walked to Souza's office. Souza was standing outside of
34 his office and ordered McCarthy to come into the nearby conference room with him alone for a
35 "coaching session." Souza said McCarthy was not entitled to have a representative present.
36 McCarthy told Souza he believed the "coaching session" might lead to discipline and asserted
37 his right to have Bradley attend as his representative. Bradley agreed.

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1 Souza then summoned supervisor Alan Cosby as a "witness." McCarthy asked Souza to
2 wait a moment while he grabbed a note pad, to which Souza replied he would not wait for
3 McCarthy to get a note pad. Souza told McCarthy he is not allowed to write notes during work
4 hours as he had witnessed McCarthy do the previous morning. Souza said, "The problem is
5 having a working MCEA President down here, it was a problem before and it's a problem now."
6 Souza angrily described having MCEA officers in the workplace as "a problem." Souza told
7 McCarthy, "It is not your job to educate crew leaders or interpret the MOU." Souza said he
8 "knew for a fact" McCarthy recently discussed the MOU with acting crew leader Dave Steely.
9 Souza demanded that McCarthy agree that he is not allowed to take any notes during work
10 hours. Souza became angrier when McCarthy acknowledged he heard Souza's statement but
11 would not agree it was correct.

12 Friday, February 2, 2007 "I'm a Democrat" Meeting with Dan Wilkowsky

13 At 10:00 a.m. the same day, crew leader Tom Freitas radioed McCarthy and his partner,
14 Marvin Cain, instructing him meet Freitas at Riverside Park during McCarthy's morning rest
15 break. McCarthy and Cain arrived at 10:15 a.m. as instructed. Freitas parked a short distance
16 away but did not approach McCarthy's truck. Minutes later, superintendent Dan Wilkowsky
17 drove up and Freitas quickly drove away. Wilkowsky walked up to the truck and spoke briefly
18 with McCarthy and Cain for several minutes before asking Cain to leave him and McCarthy
19 alone to talk in private.

20 After Cain left, Wilkowsky told McCarthy he was aware of the "note taking incident"
21 yesterday and the other incident during which McCarthy used an expletive at work. Wilkowsky
22 said "Souza isn't trying to build a case against you, Tom." Wilkowsky reminded McCarthy that
23 Souza is McCarthy's supervisor and McCarthy must do what Souza tells him to do. Wilkowsky
24 confided he is a "Democrat" and "pro-union" before warning, "You're not a business agent for
25 MCEA and you don't represent MCEA members, Tom. That's what your lawyer is for."

26 Wilkowsky told McCarthy the statements of wastewater collections supervisors he read
27 justified, in his mind, McCarthy's 10-day suspension without pay. When McCarthy pointed out
28 he had received no statements from any wastewater collection supervisors with the disciplinary
materials given to him by the City of Modesto, Wilkowsky replied that McCarthy was entitled to
see them. Wilkowsky concluded the conversation by telling McCarthy not to take notes
concerning MCEA business during work hours and to do whatever is necessary to get on
Souza's good side.

MCEA and McCarthy have requested copies of all witness statements relating to the ten-
day suspension without pay of McCarthy. (See Exhibit O.) The City refuses to produce the
information requested. (See Exhibit W.) MCEA, through its attorney, has met and conferred with
the City regarding its refusal to produce the requested information without success. (See Exhibit
X.) By refusing to produce the information requested, the City has committed an unfair labor
practice.

Blair Bradley's Friday, February 2, 2007 Meeting with Dan Wilkowsky

An hour after McCarthy's "coaching session" with Souza concluded, Blair Bradley
received a telephone call from his supervisor, John Riviera, instructing Bradley to attend a
meeting in Wilkowsky's office at 3:30 p.m. that afternoon.

1 Bradley arrived as instructed in Wilkowsky's office at 3:30 p.m. Wilkowsky questioned
2 Bradley about why he represented McCarthy during the "coaching session." Wilkowsky said
3 McCarthy was not entitled to any representation during that "coaching session." Wilkowsky told
4 Bradley he may need to escalate McCarthy's future "coaching sessions" into "warning sessions."
Wilkowsky told Bradley it is inappropriate for MCEA officers to take notes about MCEA
business during working hours.

5 Thursday, February 8, 2007

6 Tom Freitas radioed McCarthy saying Souza is out looking for him. Freitas warned
7 McCarthy to be sure he was wearing his hardhat and vest.

8 The same day, City Attorney Susana Alcala Wood responded to Joe Rose's December 10
9 information request, refusing to produce substantially all of the documents requested relating to
10 the 10-day suspension of McCarthy. A copy of Wood's February 8 letter is attached as Exhibit
W.

11 Thursday, February 15, 2007

12 On February 15, 2007, Rose wrote a meet and confer letter to City Attorney Wood
13 attempting to resolve the disagreement over the City's refusal to produce substantially all of the
information requested. A copy of Rose's February 15 letter is attached as Exhibit X.

14 The City has not responded to Rose's February 15 letter. By refusing to produce the
15 information requested, the City has committed an unfair labor practice.

16 Mid-February 19, 2007

17 In mid-February 2007, Barbara Santos telephoned MCEA's human resources consultant
18 Tracy McLaughlin and offered her employment in the City's Personnel Department.
McLaughlin had not applied for any civil service job with the City of Modesto and was on no
19 hiring list. Santos knew McLaughlin worked for MCEA's. McLaughlin declined citing her
existing relationship with MCEA. Santos persisted, asking if McLaughlin would reconsider if
20 McLaughlin wasn't assigned work on MCEA matters. McLaughlin again declined.

21 **III. REMEDIES**

22 The Association respectfully requests the Board grant all of the following remedies:

- 23
- 24 1. Order the City to cease and desist discriminating and retaliating against Tom
25 McCarthy and all MCEA officers, directors, shop stewards, and members for
engaging in protected concerted labor activity.
 - 26 2. Order the City to post a notice that it violated the Meyers-Milias Brown Act by
27 the foregoing acts.
 - 28 3. Order the City to rescind and expunge the December 1, 2006, notice of intent to
suspend McCarthy for ten (10) days without pay.

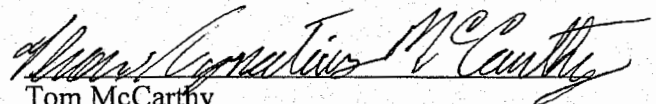
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4. Order the City to comply with MCEA's information request dated December 10, 2006.
5. For any other relief in favor of the Association the Public Employment Relations Board deems just and proper.

IV. VERIFICATION

I declare under penalty of perjury that I have read the above charge and that the statements herein are true and complete to the best of my knowledge and belief and that this declaration was executed on March 25, 2007, at Folsom, California.


Tom McCarthy
MCEA President