

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



PAUL MAURIELLO,

Charging Party,

v.

BAY AREA AIR QUALITY MANAGEMENT
DISTRICT,

Respondent.

Case No. SF-CE-175-M

PERB Decision No. 1807-M

January 13, 2006

Appearance: Peter Rogosin, Representative, for Paul Mauriello.

Before Whitehead, Shek and Neuwald, Members.

DECISION

SHEK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Paul Mauriello (Mauriello) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Bay Area Air Quality Management District (District) violated the Meyers-Milias-Brown Act (MMBA)¹ by failing to follow the grievance procedure outlined in the memorandum of understanding (MOU) between the District and the Bay Area Air Quality District Employees Association.

The Board has reviewed the entire record, including the original unfair practice charge, the amended unfair practice charge, the warning and dismissal letters of the Board agent, and Mauriello's appeal. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

¹MMBA is codified at Government Code section 3500, et seq.

DISCUSSION

On appeal, Mauriello reframes his charge to allege that the District conducted the Step 1 grievance meeting with him without a representative being present. Mauriello also alleges that the District had never disclosed the purpose of the telephone conversation with his Supervisor, Yelena Karshtedt (Karshtedt), on January 27, 2004, was for conducting the Step 1 grievance meeting, thus depriving him of his right to representation. Mauriello further alleges that the District departed from the procedures established in the MOU regarding the District's obligation to provide a written response to his grievance, time limits for the filing of a Step 2 grievance, and dismissal of his grievance for Untimeliness.

Mauriello alleged in the original charge that he had filed a grievance on January 21, 2004. Filing a grievance is protected activity. The District's knowledge of Mauriello's grievance was demonstrated by the facts that Karshtedt and Mauriello had a telephone meeting regarding the grievance on January 27, 2004, and that Human Resources Officer, Michael Rich, dismissed the grievance as untimely on March 5, 2004. However, there are no facts to support the allegation that the District interfered with, restrained, or coerced Mauriello because of the exercise of his protected rights.

In the amended charge, Mauriello alleges that because he filed the January 21, 2004 grievance, the District interfered with his right to representation at the Step 1 informal meeting. However, the telephone conversation was consistent with the requirements of the informal Step 1 grievance procedures under the MOU. It was not the District's responsibility to inform Mauriello of his right to representation. Since Mauriello never requested representation during the telephone conversation with Karshtedt, the District could not have denied Mauriello his right to be represented. The District therefore did not deny Mauriello the right to have his representative present at the Step 1 grievance meeting.

The right to representation at the informal Step 1 grievance meeting and the right to submit the grievance to the next higher step are guaranteed by the MOU. The charge and grievance allege that denial of representation at the Step 1 grievance meeting, and dismissal of the Step 2 grievance, constituted at least two unilateral changes by the District. If Mauriello is asserting that the District unilaterally changed the terms and conditions of employment when it allegedly violated the MOU, he lacks standing to do so. PERB has held that individual employees do not have standing to allege unilateral change violations (Oxnard School District (Gorcey and Tripp) (1988) PERB Decision No. 667), nor allege violations of sections which protect the collective bargaining rights of employee organizations. (State of California (Department of Corrections) (1993) PERB Decision No. 972-S.) Thus, Mauriello does not have standing to allege a unilateral change of the MOU provisions.

ORDER

The unfair practice charge in Case No. SF-CE-175-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neuwald joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027



January 11, 2005

Peter Rogosin, Representative
351 Lovell Avenue
Mill Valley, CA 94941

Re: Paul Mauriello v. Bay Area Air Quality Mngmnt Dist
Unfair Practice Charge No. SF-CE-175-M
DISMISSAL LETTER

Dear Mr. Rogosin:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 9, 2004. The charge alleges that the Bay Area Air Quality Management District violated the Meyers-Milias-Brown Act (MMBA)¹ by failing to follow the grievance procedure outlined in the Memorandum of Understanding between the District and the Bay Area Air Quality District Employees Association.

I indicated to you in my attached letter dated September 2, 2004, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. An amended charge was filed on September 20, 2004.

As stated in my September 2nd letter, the initial charge was deficient in that it lacked facts demonstrating that the employer dismissed the grievance filed by Mr. Mauriello on January 21, 2004, because of his protected activities, which appeared to be limited to the filing of the grievance itself.

In the amended charge, you state that Mr. Mauriello, who was on paid administrative leave at the time, requested the Human Resources Department to facilitate the meeting between himself and his immediate supervisor, Yelena Karshedt. This meeting was Step 1 of the grievance procedure in the MOU. The District "refused to facilitate the meeting and took no action on the request." You assert that Mr. Mauriello's request was protected activity for which he was retaliated against. However, you fail to state any facts in support of this assertion.

Rather, you submit various arguments and conclusions which purport to show that the District and the exclusive representative colluded to deny Mr. Mauriello his rights under the MOU and

¹The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

have his grievance dismissed.² The only fact submitted in support of these arguments is that the District sent notice of his Skelly hearing to the wrong address, claiming it to be the only one on file. The exclusive representative informed the District of its error, a new notice with extended timelines was sent to the correct address, leaving Mr. Mauriello unharmed by the District's error. This is clearly an insufficient basis for finding a prima facie case of unlawful conduct.³ For the reasons stated above and in the attached letter, this charge is dismissed.

Right to Appeal

Pursuant to PERB Regulations,⁴ you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

² Also included in the amended charge are allegations of misconduct by the exclusive representative, which are not properly raised in this forum and will therefore not be addressed.

³ It should also be noted that the District has agreed to take to arbitration a second grievance filed by Mr. Mauriello on February 20, 2004, relating to the same underlying matter. §§§

⁴ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Jerilyn Gelt

Labor Relations Specialist

Attachment

cc: Michael K. Rich

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027



September 2, 2004

Peter Rogosin, Representative
351 Lovell Avenue
Mill Valley, CA 94941

Re: Paul Mauriello v. Bay Area Air Quality Management District
Unfair Practice Charge No. SF-CE-175-M
WARNING LETTER

Dear Mr. Rogosin:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 9, 2004. The charge alleges that the Bay Area Air Quality Management District violated the Meyers-Milias-Brown Act (MMBA)¹ by failing to follow the grievance procedure outlined in the Memorandum of Understanding between the District and the Bay Area Air Quality District Employees Association.

The charge was filed by Paul Mauriello, who was employed by the District as a webmaster at all times relevant. On January 21, 2004, Mr. Mauriello initiated a grievance according to step one of the MOU grievance procedure with his supervisor, Yelena Karshtedt. Mr. Mauriello and Ms. Karshtedt had a telephone meeting regarding the grievance on January 27, 2004. At no time did Ms. Karshtedt respond to the grievance in writing. MOU.²

On February 23, 2004, Mr. Mauriello filed the grievance with Human Resources Officer Michael Rich pursuant to step two of the grievance procedure. A meeting to discuss the grievance was held between Mr. Rich and Mr. Mauriello on March 4, 2004. On March 5, 2004, Mr. Rich dismissed the grievance as untimely.³ The charge alleges that the dismissal of the grievance is "arbitrary and specious," and requests that it be overturned.

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² Section 4.05 (Procedure) of the MOU states:

Step 1.: The grievant shall discuss the grievance with his or her immediate supervisor and/or section manager who shall meet with the employee and Association representative(s) and respond to the grievance within the proper time limits as set forth in Section 4.03.2 above. The response shall be in writing and set forth the reason(s) therefore.

³Section 4.03 (Time Limits) of the MOU states, relevant part:

The only violation of MMBA that may be argued here is one of discrimination by the District against Mr. Mauriello because of his protected activities, i.e., which appears to be limited to the filing of the grievance.⁴

To establish a prima facie case of discrimination in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee - exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employee **because of** the exercise of those rights. (Campbell Municipal Employees Association v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Association v. City of San Leandro (1976) 55 Cal.App.3d 553.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action in protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following nexus factors should be present: (1) the employer's disparate treatment of the employee (Campbell, supra); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro Police Officers Association, supra); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro

2. At each step District representatives shall have fifteen (15) working days from the filing of the grievance to meet with the grievant and Association representative(s) and to respond to the grievance in writing. In the event that the District fails to respond to a grievance within specified timelines the grievant has the right to continue to process the grievance at the next higher step in the process.

3. If a grievance is not resolved to the satisfaction of the grievant at each step below, the grievant may within fifteen (15) working days, submit the grievance in writing to the next higher step. Failure of the grievant to act within the specified time limits, unless such time limits are extended, shall dismiss and nullify the grievance.

⁴ If Charging Party is asserting that the District unilaterally changed terms and condition of employment when it allegedly violated the MOU, he lacks standing to do so. PERB has held that individual employees do not have standing to allege unilateral change violations, (Oxnard School District (Gorcey/Tripp) (1988) PERB Decision No. 667) nor allege violations of sections which protect the collective bargaining rights of employee organizations.⁴ (State of California (Department of Corrections) (1993) PERB Decision No. 972-S.)

Police Officers Association, supra.); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) employer animosity towards union activists (San Leandro Police Officers Association, supra; Los Angeles County Employees Association v. County of Los Angeles (1985) 168 CalApp.3d 683.).

This charge alleges no facts which would demonstrate that the District dismissed Mr. Mauriello's grievance because of his protected activities and, therefore, the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before September 20, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Jerilyn Gelt
Labor Relations Specialist

JAG