STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COSME MONTOYA, Charging Party, v. CITY OF LONG BEACH, Respondent.	Case No. LA-CE-432-M PERB Decision No. 1977-M September 16, 2008

Appearances: Cosme Montoya, on his own behalf; Christina L. Checel, Deputy City Attorney, for City of Long Beach.

Before McKeag, Rystrom and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Cosme Montoya (Montoya) of a Board agent's dismissal of his unfair practice charge. The charge alleged that the City of Long Beach (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by: (1) failing to pay Montoya mileage reimbursement as provided in the memorandum of understanding (MOU) between the City and Montoya's union, the International Association of Machinists and Aerospace Workers (IAM); and (2) retaliating against Montoya for filing a grievance over the mileage reimbursement issue and a discrimination complaint with the Equal Employment Opportunity Commission (EEOC). The Board agent dismissed the charge for failure to state a prima facie case of either unilateral change or retaliation.

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

The Board has reviewed the entire record in this case, including but not limited to, the original and amended unfair practice charge, the City's position statement, the Board agent's warning and dismissal letters, Montoya's appeal and supplemental filings, and the City's response thereto. Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

BACKGROUND

Montoya's position as a Business Systems Specialist for the City requires him to use his personal vehicle to travel to various job sites within a single day. Article Two, section VI(D) of the MOU between the City and IAM provides that employees who use their personal vehicle to travel between job sites are to be reimbursed at a flat monthly rate plus mileage. The City had a past practice of only reimbursing mileage at the flat rate plus mileage when an employee traveled 300 miles or more in a month. The City reimbursed Montoya for actual miles traveled but did not pay him the flat monthly rate.

On January 3, 2007, Montoya filed a grievance with the City claiming that he was entitled to reimbursement at the flat monthly rate plus mileage. After he stopped receiving regular updates on the progress of his grievance, Montoya called the City's human resources department and was told that it was unaware of the grievance.[2] On May 4, IAM informed Montoya that the grievance paperwork had been lost.

On July 30, 2007, IAM re-filed Montoya's mileage reimbursement grievance with the City. The grievance was heard at three levels by various human resources representatives. On December 20, 2007, the City conducted a hearing on Montoya's grievance before Assistant City Manager, Suzanne Frick (Frick). Frick ruled that the City would pay Montoya the flat rate plus mileage whenever he traveled at least 270 miles in a particular month. IAM then

[2]It is unclear from the charge whether IAM or the City was updating Montoya on the progress of his grievance.

requested arbitration of the grievance. On May 21, 2008, the arbitrator issued an award dismissing Montoya's grievance because of the City's past practice of only paying the flat monthly rate when the employee traveled 300 miles or more in a given month.

Meanwhile, sometime prior to July 2007, Montoya filed another charge with the City claiming that the City was discriminating against him by hiring less qualified candidates to fill positions for which he had applied.

On July 12, 2007, Montoya was assigned to provide system support at fire department headquarters on a part-time basis. Montoya considered this to be a demotion. After two months, the fire department ended his assignment there.

On September 14, 2007, Montoya filed a complaint with the EEOC alleging discrimination on the same grounds as in his earlier charge with the City. Sometime in October, the EEOC notified the City of Montoya's September 14 discrimination complaint.

On November 7, 2007, Montoya's Manager, Jerry Wada (Wada), issued Montoya a counseling memorandum addressing his failure to "provide quality customer service" during his assignment to the fire department. The memorandum stated: "Failure to improve in this area may result in disciplinary actions." Wada told Montoya that the memorandum would be placed in Montoya's personnel file.

Unfair Practice Charge and Dismissal

On January 24, 2008, Montoya filed his unfair practice charge. The charge alleged that the City violated MMBA by refusing to reimburse him for mileage pursuant to the MOU. On April 3, 2008, Montoya amended his charge to add an allegation that the City retaliated against him for filing grievances and discrimination claims by demoting him and issuing him a counseling memorandum. The amended charge also acknowledged that "PERB cannot enforce the MOU" but alleged that the City retaliated against Montoya by using a policy not contained in the MOU to deny him mileage reimbursement.

The Board agent dismissed the entire charge on April 17, 2008. The Board agent dismissed the unilateral change allegation because the charge did not allege facts establishing that the City had an obligation to meet and confer with Montoya or that the alleged MOU violation had "a generalized effect or continuing impact on the terms and conditions of employment."

Turning to the retaliation allegation, the Board agent found that Montoya engaged in MMBA-protected activity by filing the mileage reimbursement grievances but not by filing the EEOC complaint. Regarding adverse action, the Board agent noted that any alleged misconduct by the City prior to July 24, 2007, could not support a finding of an unfair practice due to the six-month statute of limitations. As a result, the only timely adverse action alleged was the November 7, 2007 counseling memorandum. The Board agent found the charge failed to establish a nexus between Montoya's protected activity and the counseling memorandum because: (1) too much time elapsed between the protected activity and the counseling memorandum; and (2) the alleged facts did not demonstrate the City deviated from any established practice or treated Montoya differently than similarly situated employees.

Montoya's Appeal and Supplemental Filings

On May 12, 2008, Montoya filed a timely appeal of the dismissal. The appeal sets forth a timeline of Montoya's grievance and discrimination complaint filings, his alleged demotion and the counseling memorandum. Montoya argues the timing of events establishes that the City retaliated against him. He also asserts the charge was timely filed within three and one-half months after the November 7, 2007 counseling memorandum. As for the unilateral change allegation, the appeal states only that the "the mileage arbitration is scheduled for May 20th, 2008." Twelve new exhibits are attached to the appeal. Montoya did not file a proof of service along with his appeal. However, he did provide one after the PERB Appeals Assistant notified him that proof of service was required as part of the filing.

The Appeals Assistant placed this case on the Board's docket on June 23, 2008. On June 26, the City contacted the Appeals Assistant claiming it had not been served with the appeal. The Appeals Assistant faxed the appeal to the City that same day. Also on June 26, the City requested by letter that Montoya's appeal be dismissed because of improper service and that the City be given 20 days from June 26 to file a response. The City faxed and mailed its letter to the Los Angeles Regional Office, but it was not received at the Headquarters Office until July 30, 2008.

On July 10, 2008, Montoya filed a supplement to his appeal. The supplement contains a May 21, 2008 arbitration award in Montoya's mileage reimbursement grievance and a May 30 letter to Montoya from IAM stating that the arbitration award is "final and binding" and therefore IAM has "no other avenues to pursue and shall consider this case closed." The supplement also contains documents previously provided with the amended charge. A proof of service did not accompany the supplemental filing. After prompting by the Appeals Assistant, Montoya provided a proof of service.

On July 30, 2008, the City phoned the Appeals Assistant and stated that it had not been served with the supplemental filing. The Appeals Assistant faxed the supplemental filing to the City on August 1. That same day, the City again asked by letter that Montoya's appeal be dismissed for improper service or, in the alternative, that PERB grant the City 20 days from August 1 to respond. On August 13, the Appeals Assistant informed the parties by letter that the Board had granted the City's request for an extension of time to file a response, which would be due 20 days from the date the letter was served. The City filed its response on August 21, 2008.

On September 8, 2008, Montoya filed an additional 48 pages of documents with the Board, accompanied by a proof of service. After confirming by phone that the City had not received the filing, the Appeals Assistant faxed a copy of the third filing to the City. The filing

consists of e-mails and other printouts from various dates in August and September 2007. The filing also alleges for the first time that on June 11, 2008, Wada gave Montoya a performance evaluation covering the period of May 2005 to May 2008 which rated him as "meets expectations" but also stated that Montoya failed to meet the fire department's expectations.

DISCUSSION

Service of Appeal and Supplemental Filings

Though not raised in its response to the appeal, the City has twice urged the Board by letter to dismiss Montoya's appeal on the ground that it fails to comply with the service requirements in PERB Regulation 32140.[3] Specifically, the City claims that Montoya never served it with the appeal or the July 10, 2008 supplemental filing.[4]

PERB Regulation 32140 states in full:

> (a) All documents referred to in these regulations requiring 'service,' except subpoenas, shall be considered 'served' by the Board or a party when personally delivered, deposited in the mail or with a delivery service properly addressed, or when sent by facsimile transmission in accordance with the requirements of Sections 32090 and 32135(d). All documents required to be served shall include a 'proof of service' declaration signed under penalty of perjury which contains the following information: (1) The name of the declarant; (2) the county and state in which the declarant is employed or resides; (3) a statement that the declarant is over the age of 18 and not a party to the case; (4) the address of the declarant; (5) a description of the documents served; (6) the method of service and a statement that any postage or other costs were prepaid; (7) the name(s), address(es) and, if applicable, fax number(s) used for service on the party(ies); and (8) the date of service.
>
> (b) Whenever 'service' is required by these regulations, service shall be on all parties to the proceeding and shall be concurrent with the filing in question.

[3]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[4]The City also told the Appeals Assistant that it was not served with a copy of the September 8, 2008 filing but has not asked the Board to dismiss the appeal on that ground.

The Board has excused a party's failure to comply with PERB Regulation 32140 when: (1) the opposing party received actual notice of the filing; and (2) defective service did not prejudice the opposing party. (Fontana Unified School District (2003) PERB Order No. Ad-324.)

The record does not establish conclusively that the City had actual notice of Montoya's appeal and July 10, 2008 supplemental filing before it received copies of the filings from PERB. However, "[d]ocuments accompanied by a valid proof of service, signed under penalty of perjury, are presumed to have been properly served. (Evidence Code sec. 641; Glasser v. Glasser (1998) 64 Cal.App.4th 1004 [75 Cal.Rptr.2d 621] (Glasser).) The party claiming that service was invalid bears the burden of rebutting the presumption of validity. (Glasser, pp. 1010-1011.)" (United Teachers of Los Angeles (Kestin) (2003) PERB Order No. Ad-325 (UTLA).)

Montoya provided PERB with a valid proof of service showing that he served his appeal on the City by mail and facsimile on May 27, 2008. Similarly, he provided a valid proof of service showing service of the July 10, 2008 supplemental filing on the City by mail and facsimile on July 28, 2008. Thus, Montoya is entitled to the presumption that he served both filings on the City. (UTLA.) The City has provided no evidence to rebut the presumption other than its unsupported assertion that it never received copies of the filings. Because the assertion standing alone is insufficient to rebut the presumption, we must presume that Montoya served the City with both filings. (See UTLA ["uncorroborated, unsworn" assertion that dismissal letter was "lost in the mail" did not rebut presumption of service].) From this, we conclude that the City had actual notice of the filings.

Nonetheless, Montoya's service was still defective because both filings were served on the City after they were served on the Board. "When considering the charging party's non-compliance with the Board's service requirements, we should read and apply PERB regulations in light of their intended purpose, that is, to protect a respondent from stale claims or to prevent

prejudice because a respondent was unable to defend itself due to the late service." (San Diego Community College District (1988) PERB Decision No. 662.) In State of California (Department of Developmental Services) (1996) PERB Decision No. 1150-S, the Board excused a party's failure to concurrently serve its appeal on the Board and the opposing party because it found the late service did not impair the opposing party's ability to adequately defend itself. Here, the Board granted the City's request for a 20-day extension to file its response to Montoya's appeal and the City has responded to the appeal.[5] Thus, though Montoya did not concurrently serve the City, his late service of both filings resulted in no prejudice to the City.[6] Accordingly, we excuse Montoya's failure to comply with PERB Regulation 32140.[7]

New Allegations and Supporting Evidence on Appeal

Montoya's appeal and supplemental filings each contain allegations and supporting evidence not presented to the Board agent. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b).) The Board has found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (Sacramento City Teachers Association (Ferreira) (2002) PERB Decision No. 1503.)

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[5]In granting the extension, the Board exercised its discretion under PERB Regulation 32136 to excuse a late filing for good cause. Because good cause is determined on a case-by-case basis, the Board's action should not be interpreted as establishing an entitlement to an extension in all cases where an appeal is served late on the opposing party.

[6]The City did not request an opportunity to respond to the September 8, 2008 filing. Nonetheless, in light of our finding below that Montoya has not established good cause for the Board to consider the contents of that filing, we find the City was not prejudiced by the September 8 filing.

[7]The City also contends that Montoya's May 27, 2008 proof of service was defective because it failed to include the address and facsimile number used to serve the City. This is precisely the type of technical violation the Board has excused in the absence of prejudice to the opposing party. (See e.g., California School Employees Association (Kotch) (1992) PERB Decision No. 953 [excusing proof of service signed by charging party because defect caused no prejudice].)

Attached to Montoya's appeal are 12 new exhibits not presented to the Board agent. The date on each exhibit indicates that it existed prior to the dismissal of the charge. The record fails to show that Montoya could not have obtained the documents before the charge was dismissed. Consequently, there is no good cause to consider these exhibits on appeal.

Montoya's July 10, 2008 supplemental filing consists of a May 21, 2008 arbitration award, a May 30, 2008 letter to him from IAM regarding the award, and several other documents that were part of the amended charge. By their dates, it is clear that the arbitration award and letter from IAM did not exist at the time the charge was dismissed. Thus, Montoya has established good cause for the Board to consider this evidence on appeal. However, the Board will only consider these two documents to the extent they are relevant to the allegations in the amended charge. Moreover, the remaining documents in this filing are already part of the record on appeal and thus may be considered without a showing of good cause.

The September 8, 2008 supplemental filing contains 48 pages of documents from various dates in August and September 2007. Montoya's name appears on most of them as a sender or recipient. Since these documents also existed prior to the dismissal of the charge and Montoya was aware of them before that time, there is no good cause to consider them on appeal.

In addition to new supporting evidence, each of Montoya's supplemental filings includes an allegation raised for the first time on appeal. The July 10, 2008 filing alleges that in the May 21, 2008 arbitration award, the arbitrator improperly added terms to the MOU by considering the City's past practice regarding mileage reimbursement. The September 8, 2008 filing alleges that on June 11, 2008, Montoya's Manager, Wada, issued him a performance evaluation for the period May 2005 through May 2008 that rated him as "meets expectations" but also stated that Montoya failed to meet the fire department's expectations.

"The purpose of PERB Regulation 32635(b) is to require the charging party to present its allegations and supporting evidence to the Board agent in the first instance, so that the Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case." (Regents of the University of California (2006) PERB Decision No. 1851-H.) When a charging party raises for the first time on appeal unfair practice allegations based on conduct that occurred after the charge was dismissed, the Board has not found good cause to consider the allegations on appeal. Nonetheless, under these circumstances the charging party may file a new unfair practice charge based on the post-dismissal conduct. (Sacramento City Unified School District (1992) PERB Decision No. 952.)

The Board agent dismissed Montoya's unfair practice charge on April 17, 2008. The allegations raised for the first time in Montoya's supplemental filings are based on conduct that occurred on May 21 and June 11, 2008. Thus, there is no good cause for the Board to consider the new allegations on appeal. Indeed, to find otherwise would directly contravene the purpose of PERB Regulation 32635(b) by allowing a charging party to add new allegations to the charge as long as the appeal remained before the Board. However, the Board's finding does not preclude Montoya from filing an unfair practice charge based on the post-dismissal conduct, provided all of the requirements for filing a charge, including timeliness, are met.

MOU Violation/Unilateral Change

The unfair practice charge alleged that the City violated the MMBA by not reimbursing Montoya for mileage pursuant to Article Two, section VI(D) of the MOU between the City and IAM. PERB has no jurisdiction to remedy a violation of a collective bargaining agreement unless the violation also constitutes an unlawful unilateral change. (Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant); see County of Riverside (2003) PERB

Decision No. 1577-M [applying Grant under MMBA].)[8] Thus, to the extent the charge alleged an isolated breach of the MOU, PERB had no jurisdiction over the charge. Further, Montoya does not have standing to allege a unilateral change because the City has no statutory duty to meet and confer in good faith with him as an individual. (City of Beverly Hills (Transportation Department) (2007) PERB Decision No. 1913-M.) For these reasons, the Board agent properly dismissed the allegation that the City violated the MMBA by breaching the parties' MOU.

Retaliation

The amended charge alleged that the City retaliated against Montoya for filing grievances and an EEOC complaint by demoting him and issuing him a counseling memorandum. On appeal, he argues that the timing of these events demonstrates the City took the adverse actions against him because of his protected activity. For the following reasons, we affirm the Board agent's dismissal of the retaliation allegation.

To establish a prima facie case of retaliation in violation of MMBA section 3506 and PERB Regulation 32603(a), Montoya must show that: (1) he exercised rights under MMBA; (2) the City had knowledge of the exercise of those rights; and (3) the City imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced him because of the exercise of those rights. (Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416 [182 Cal.Rptr. 461] (Campbell); San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 [127 Cal.Rptr. 856] (San Leandro).)

[8]When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

Protected Activity

The charge alleged that Montoya engaged in two separate activities protected by the MMBA: (1) filing the January 3, 2007 and July 30, 2007 mileage reimbursement grievances; and (2) filing the September 14, 2007 EEOC complaint. Filing a grievance is protected activity under the MMBA. (Bay Area Air Quality Management District (2006) PERB Decision No. 1807-M.) However, filing an EEOC complaint is not protected activity. (San Diego Unified School District (1991) PERB Decision No. 885.) Thus, the Board agent properly found that the mileage grievances, but not the EEOC complaint, constituted protected activity under MMBA.

As for the City's knowledge of Montoya's protected activity, the charge alleges that the July 30, 2007 grievance proceeded through several different levels of review by City human resources as provided for in the MOU. Thus, the City clearly had knowledge of this grievance. As for the January 3, 2007 grievance, the charge alleges that human resources was not aware of the grievance. However, the charge also alleges that Montoya's Manager, Wada, called IAM sometime prior to May 31, 2007, regarding the grievance because he believed Montoya's mileage reimbursement had been authorized. Thus, the City also had knowledge of Montoya's January 3, 2007 grievance.

Adverse Action

Evidence of adverse action is also required to support a claim of retaliation. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

The charge alleged that the City took two adverse actions against Montoya: (1) demoting him to a part-time assignment at the fire department on July 12, 2007; and (2) issuing him a counseling memorandum on November 7, 2007. A counseling memorandum that threatens future disciplinary action is an adverse action. (Los Angeles Unified School District (2007) PERB Decision No. 1930.) Moreover, placing a document that could support future discipline in an employee's personnel file is also an adverse action. (Alisal Union Elementary School District (2000) PERB Decision No. 1412.) The November 7, 2007 counseling memorandum noted Montoya's failure to "provide quality customer service" during his assignment to the fire department and warned that "[f]ailure to improve in this area may result in disciplinary actions." Montoya's Manager, Wada, told Montoya that the memorandum would be placed in his personnel file. For both of these reasons, the counseling memorandum constituted an adverse action.

As for the alleged demotion, we need not determine whether it amounted to an adverse action because the allegation is untimely. PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd. (2005) 35 Cal.4th 1072 [29 Cal.Rptr.3d 234].) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) A charging party bears the burden of alleging that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

Montoya filed his unfair practice charge on January 24, 2008. Thus, any conduct by the City before July 24, 2007, cannot form the basis for a complaint. The charge alleged that Montoya was assigned to the fire department on July 12, 2007. Accordingly, even if the

assignment was an adverse action, it occurred outside of the six-month statute of limitations period and therefore cannot support the issuance of a complaint.

Nexus

To establish a prima facie case of retaliation, Montoya must demonstrate a "nexus" between his protected activity and the City's adverse action. In other words, Montoya must show that the City acted with discriminatory intent. Because direct evidence of discriminatory intent is rarely possible, the Board has held that "unlawful motive can be established by circumstantial evidence and inferred from the record as a whole." (Novato Unified School District (1982) PERB Decision No. 210.)

The occurrence of the adverse action close in time to the employee's protected activity is an important indicia of unlawful motive. (North Sacramento School District (1982) PERB Decision No. 264.) However, timing alone is insufficient to establish retaliation. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (Campbell); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro); (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; Los Angeles County Employees Assn. v. County of Los Angeles (1985) 168 Cal.App.3d 683 [214 Cal.Rptr. 350]).

The Board agent concluded that the ten month lapse between Montoya's January 3, 2007 mileage grievance and the November 7, 2007 counseling memorandum was insufficient to establish the timing factor. However, Montoya re-filed his grievance on July 30, 2007, approximately three months before he received the counseling memorandum.

Arguably, this still does not establish sufficient closeness in time to support an inference of retaliation. (See Los Angeles Unified School District (1998) PERB Decision No. 1300 [lapse of five months insufficient to establish timing factor]; Jurupa Community Services District (2007) PERB Decision No. 1920-M [two months sufficient to establish timing].)

However, even if the charge establishes timing, it fails to establish any of the other factors that would demonstrate a nexus between Montoya's grievances and the counseling memorandum. The charge alleges no facts showing that Montoya was treated differently from other similarly situated employees or that the counseling memorandum in any way departed from established procedures. While Montoya argues on appeal that the memorandum was not justified, he fails to allege facts showing that the City gave him inconsistent, contradictory, exaggerated, vague, or ambiguous reasons for issuing him the memorandum or placing it in his personnel file. Nor does the charge contain any allegation that the City harbored animus against IAM or its members. For these reasons, the charge did not establish a nexus between Montoya's protected activity and the City's adverse action against him. Accordingly, the retaliation allegation was properly dismissed by the Board agent.

ORDER

The unfair practice charge in Case No. LA-CE-432-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Rystrom joined in this Decision.