OVERRULED IN PART by Santa Clara Valley Water District (2013) PERB Decision No. 2349- M

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KURT HITCHCOCK, Charging Party, v. COUNTY OF ORANGE, Respondent.	Case No. LA-CE-529-M PERB Decision No. 2155-M January 18, 2011

Appearances: Linda A. Albers, Attorney, for Kurt Hitchcock; Mark R. Howe, Senior Deputy County Counsel, for the County of Orange.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Kurt Hitchcock (Hitchcock) of a dismissal (attached) of his unfair practice charge by a Board agent. The charge alleged that the County of Orange (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by denying him the opportunity to participate in an arbitration. Hitchcock alleged that this conduct constituted a violation of MMBA sections 3502, 3502.1 and 3506.

Hitchcock alleges the County both interfered with his protected rights and retaliated against him for engaging in protected conduct. With regard to the interference claim, the Board agent found that Hitchcock did not have a right to participate in an arbitration proceeding because the memorandum of understanding (MOU) which contained the arbitration clause expired. Therefore, the Board agent concluded that the County's denial of arbitration

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

did not constitute unlawful interference with a protected right. With regard to Hitchcock's retaliation claim, the Board agent concluded that Hitchcock failed to establish the County's denial of arbitration constituted an adverse action. In addition, the Board agent found that Hitchcock failed to establish a nexus between his protected conduct and the alleged adverse action. Finally, the Board agent found the employment termination allegation untimely filed.[2] Accordingly, the Board agent dismissed the charge for failure to state a prima facie case.

We have reviewed the entire record and find the warning and dismissal letters were well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself, subject to the following brief discussion regarding Hitchcock's appeal.[3]

DISCUSSION

Interference

Hitchcock alleges that the County interfered with his right to be represented according to a grievance process contained in the MOU. The MOU, however, expired by its own terms in June 2007. The Board agent found that Hitchcock failed to allege sufficient information to conclude that the arbitration clause in the MOU continued in effect beyond the expiration of

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[2] In the equitable tolling section of the dismissal letter, the Board agent noted that the matter was not rendered timely by operation of *Los Banos Unified School District* (2009) PERB Decision No. 2063 (*Los Banos*). *Los Banos*, however, did not involve equitable tolling. Rather, the Board in *Los Banos* held that in cases involving terminations from employment in retaliation for engaging in protected activities, the statute of limitations begins to run on the date of actual termination, rather than the date of notification of the intent to terminate. In this instant case, Hitchcock was terminated on January 28, 2007, almost fifteen months prior to the filing of his charge. Accordingly, pursuant to *Los Banos*, the charge was not timely filed.

[3] The Board does not adopt the references to *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 and *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 at p. 4 dismissal letter and p. 5 warning letter, as support for the well-established discrimination test set forth in *Novato Unified School District* (1982) PERB Decision No. 210.

the agreement. Based on this finding, the Board agent concluded that Hitchcock did not have a right to participate in an arbitration pursuant to the expired MOU. Accordingly, the Board agent found that Hitchcock failed to establish the County interfered with Hitchcock's protected rights and dismissed this allegation. We agree with the Board agent's analysis and find this allegation was properly dismissed.

In *Trustees of the California State University* (1997) PERB Decision No. 1231-H (*Trustees*), PERB explicitly found that an arbitration clause in a grievance process does not continue in effect after the expiration of the contract except for disputes that:

> (1) involve facts and occurrences that arose before expiration; (2) involve post-expiration conduct that infringes on rights accrued or vested under the agreement; or (3) under normal principles of contract interpretation, survive the expiration of the agreement.

In his appeal, Hitchcock argues that since he served as president of his local SEIU chapter prior to the expiration of the MOU, he satisfied the first exception set forth in the *Trustees* case and, therefore, the arbitration clause in the MOU survived the expiration of the agreement. Notwithstanding his service as president, however, Hitchcock's termination, grievance filing, arbitration request and arbitration denial all occurred after the expiration of the MOU. Consequently, since none of the conduct that allegedly constituted an unfair practice occurred before the expiration of the conduct, the first exception was not met. (*Coachella Valley Federation of Teachers, CFT/AFT (Kok)* (1998) PERB Decision No. 1302.)

In addition, Hitchcock argues on appeal that since his protected conduct occurred prior to the expiration of the MOU, he accrued the right to arbitration pursuant to the MOU and, therefore, he satisfied the second exception set forth in the *Trustees* case. However, the MOU provided that discharges may be appealed directly to arbitration. Since Hitchcock was

terminated after the MOU expired, his contractual right to arbitrate his termination never accrued. Accordingly, the second exception in the *Trustees* case was not met.

Because none of the exceptions in the *Trustees* case were met, Hitchcock did not have a right to participate in an arbitration and, therefore, failed to establish the County's failure to arbitrate his claim constituted unlawful interference with his protected rights.

ORDER

The unfair practice charge in Case No. LA-CE-529-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member Wesley joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2804
Fax: (818) 551-2820

October 15, 2009

Linda Albers, Attorney
27794 Hidden Trail Road
Laguna Hills, CA 92653

Re: *Kurt Hitchcock v. County of Orange*
Unfair Practice Charge No. LA-CE-529-M
DISMISSAL LETTER

Dear Ms. Albers:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 21, 2009. Kurt Hitchcock (Hitchcock or Charging Party) alleges that the County of Orange (County or Respondent) violated sections 3502, 3502.1, and 3506 of the Meyers-Milias-Brown Act (MMBA or Act)[1] by interfering with his ability to participate in a grievance arbitration.

Charging Party was informed in the attached Warning Letter dated September 17, 2009, 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 that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to September 29, 2009, the charge would be dismissed. You received an extension of time until October 12, 2009 to file an amended charge. On that day, the Amended Charge was filed.

In the Amended Charge, Hitchcock corrects certain factual representations made in the September 17, 2009 Warning Letter. According to the Amended Charge, Hitchcock was the president of the local chapter of Service Employees International Union (SEIU) that represented the employees in Hitchcock's bargaining unit before it was decertified on September 26, 2007 and replaced by the Alliance of Orange County Workers (AOCW).[2]

On December 27, 2007, Hitchcock was involved in an accident at work that "occurred at least in part because of supervisor failure."[3] After the accident, Hitchcock's supervisor, Jeff

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[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] The September 17, 2009 Warning Letter had misrepresented that Hitchcock served as SEIU's vice president.

[3] In the Amended Charge, Hitchcock sometimes alleges that this incident occurred on December 27, 2007 and at other times on December 27, 2008. Given the allegations in the

Southern, shouted at Hitchcock and did not permit Hitchcock to explain his account of the events.[4]

On January 28, 2008, the County terminated Hitchcock's employment. Hitchcock filed a grievance over his termination and the parties scheduled an arbitration for November 5, 2008. When the parties appeared for the November 5, 2008 arbitration, the County informed Hitchcock that it would not participate in the arbitration because Hitchcock's representative was from SEIU and not from AOCW. The County then cancelled the arbitration. The County is apparently willing to schedule a different arbitration date, but has not done so as of the date of the amended charge.[5]

I. Interference

Hitchcock alleges that the County interfered with his right to be represented according to a grievance process contained in a Memorandum of Understanding (MOU) between the County and SEIU even though the MOU expired by its own terms in June 2007 and SEIU had been decertified as the exclusive representative in September 2007. As explained in the September 17, 2009 Warning Letter, PERB has explicitly found that the arbitration clause in a grievance process does not continue in effect after the expiration of the contract except for disputes that:

> (1) involve facts or occurrences that arose before expiration; (2) involve post-expiration conduct that infringes on rights that accrued or vested under the agreement; or (3) under normal principles of contract interpretation, survive the expiration of the agreement.

(*State of California, Department of Youth Authority* (1992) PERB Decision No. 962-S; see also *Trustees of the California State University* (1997) PERB Decision No. 1231-H.)[6]

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charge, it makes logical sense that the incident occurred in 2007 rather than 2008. For example, if the incident occurred on December 27, 2008, then the accident would have occurred after both Hitchcock's termination and after he filed his grievance even though the accident precipitated each of these events.

[4] The September 17, 2009 Warning Letter described this incident generally as "a loud verbal altercation."

[5] The September 17, 2009 Warning Letter misrepresented that the County rescheduled the arbitration for October 2009.

[6] 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.)

Hitchcock filed a grievance over his termination, which occurred on January 28, 2008, more than six months after the SEIU MOU had expired. As explained in more detail in the September 17, 2009 Warning Letter, Hitchcock has not provided sufficient information to conclude that the arbitration clause in the expired MOU should continue in effect. Therefore, Hitchcock does not establish that he was entitled to participate in an arbitration pursuant to the expired MOU.

Hitchcock argues that the County should be required to apply the grievance arbitration procedure contained in the expired SEIU MOU because the County is prohibited from changing the terms and conditions of employment without first negotiating those changes with the exclusive representative. This argument ignores the fact that, as explained above, PERB has a well-established rule regarding when an arbitration clause will survive the expiration of a negotiated agreement. (See *State of California, Department of Youth Authority*, *supra*, PERB Decision No. 962-S; see also *Trustees of the California State University*, *supra*, PERB Decision No. 1231-H.) These Board decisions relied, in part, on United States Supreme Court precedent which also expressly found that arbitration clauses only continue in effect after the expiration of a contract under limited circumstances. (*Litton Business Systems, Inc. v. NLRB* (1991) 501 U.S. 190, 209.) Here, Hitchcock does not establish that the MMBA protects his right to participate in an arbitration pursuant to the SEIU MOU.[7] Thus, Hitchcock does not establish that the County's actions interfered with a protected right and this allegation is dismissed.

II. Retaliation

Hitchcock also alleges that the County retaliated against him because he served as president of SEIU. Specifically, Hitchcock alleges that his termination on January 28, 2008, the delay in scheduling the arbitration, and the requirement that Hitchcock be represented by AOCW in the arbitration were all the result of unlawful discrimination by the County.

As explained in the September 17, 2009 Warning Letter, to demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 3506 and PERB Regulation 32603(a),[8] the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action <u>because of</u> the exercise of those rights. (*Novato Unified School District* (1982) PERB

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[7] To the extent that Hitchcock alleges that the County unilaterally changed a policy within the scope of representation, Hitchcock—as either an individual employee or as a representative of a non-exclusive representative—does not have standing to raise this claim. (See *Alum Rock Union Elementary School District* (2005) PERB Decision No. 1748.) An employer's duty to bargain in good faith is owed only to the exclusive representative. (*Ibid.*)

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

Decision No. 210 (*Novato*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) 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.)

A. Termination Allegation

Hitchcock also alleges that the County terminated him because of his protected activity. As explained in the September 17, 2009 Warning Letter, PERB is precluded from issuing a complaint regarding allegations occurring more than six months prior to filing the charge. (PERB Regulation 32615(a)(5); *Coachella Valley Mosquito and Vector Control District v. PERB* (2005) 35 Cal.4th 1072.) In this case, the charge was filed on April 21, 2009, meaning that the statutory period extends back until October 21, 2008. Hitchcock does not establish that the allegations regarding his January 28, 2008 termination were filed within PERB's six month statute of limitations.

1. Continuing Violation Doctrine

Hitchcock contends that the allegations regarding his termination should not be dismissed as untimely because of the continuing violation doctrine. Under this rule, "a violation within the statute of limitations period may 'revive' an earlier violation of the same type that occurred outside of the limitations period." (*Trustees of the California State University (Kyrias)* (2009) PERB Decision No. 2038-H; *Compton Community College District* (1991) PERB Decision No. 915.) The violation within the statute of limitations period must, however, constitute an independent violation without reference to the earlier violations. (*Trustees of the California State University (Kyrias)*, *supra*, PERB Decision No. 2038-H, citing *North Orange County Community College District* (1999) PERB Decision No. 1342.)

In *State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization)* (1998) PERB Decision No. 1279-S, an employer enacted a policy to block certain employees from using e-mail, computers, or the fax machine for union related business. Even though the policy was first applied outside of the statutory period, the employer continued to deny that equipment to the employees well into the statutory period. The Board held the employer's actions constituted a continuing violation because each

time the policy was applied, the same actions by the employer interfered with the employees' rights.

The Board reached the opposite conclusion under different facts in *Sacramento City Teachers Association*, *supra*, PERB Decision No. 1959. In that case, the charging party alleged that several different actions by her union, such as the failure to return telephone calls, the failure to inform her of a grievance meeting, and misrepresenting the events of a grievance meeting constituted breaches of the duty of fair representation. The union's alleged misrepresentation occurred outside of the statutory period. Even though all the allegations concerned the duty of fair representation, the Board found no continuing violation because the alleged misrepresentation was not of the same "type" as the charging party's other, timely allegations.

In this case, Hitchcock contends that allegations related to his termination should be considered timely under the continuing violation doctrine due to the County's subsequent conduct with respect to arbitrating his grievance. Hitchcock does not demonstrate that the County's decision to terminate him qualifies as "the same type" of conduct as the County's decision to either postpone Hitchcock's arbitration or to restrict who Hitchcock may select as a representative at the arbitration. Accordingly, Hitchcock does not establish that the County's actions constitute a continuing violation.[9]

2. Equitable Tolling

Because Hitchcock filed a grievance regarding his termination, it is appropriate to address whether the statute of limitations should be tolled during the time that Hitchcock has been participating in the grievance process. In *Solano County Fair Association* (2009) PERB Decision No. 2035-M, the Board recognized the doctrine of equitable tolling under the MMBA. In that case, the Board found that the statute of limitations:

> "is tolled during the period of time the parties are utilizing a non-binding dispute resolution procedure if: (1) the procedure is contained in a written agreement negotiated by the parties; the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4)

[9] Hitchcock argues that the standard for a continuing violation set forth in *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798 should apply in this case. In that case, the court found that the continuing violation doctrine should apply to cases arising under the Fair Employment and Housing Act where: (1) the unlawful actions at issue are similar in kind; (2) the violations occurred with a degree of frequency: and (3) the violations had not achieved a degree of permanence. (*Id.* at 802.) PERB has not adopted this analysis for the continuing violation doctrine. However, even under this standard, Hitchcock has not demonstrated that a continuing violation exists. Namely, Hitchcock does not demonstrate that his termination was "similar to" the County's later conduct regarding his grievance.

> tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent."

(*Solano County Fair Association*, *supra*, PERB Decision No. 2035-M, quoting *Long Beach Community College District* (2009) PERB Decision No. 2002.)

In this case, as discussed above, Hitchcock does not establish that the grievance procedure used by Hitchcock was contained in a written agreement. Thus, Hitchcock does not demonstrate that the doctrine of equitable tolling applies. Therefore, because Hitchcock's termination occurred outside of the statutory period and no valid exception applies, this allegation is dismissed as untimely.

This case is also distinguishable from the facts considered by the Board in *Los Banos Unified School District* (2009) PERB Decision No. 2063 (*Los Banos*). In that case, the Board found a retaliation allegation timely, even though filed more than six months after notice of termination had been given, because the charge was filed within six months of the date the Commission on Professional Competence issued its decision dismissing the employee. (*Ibid.*) In the *Los Banos* case, the employee was exercising his statutory right to a hearing before the Commission on Professional Competence. (*Ibid.*) No similar circumstances have been demonstrated here, such that the date of the notice of termination would not serve to trigger the start of the six-month statute of limitations period. As discussed above, Hitchcock has not alleged sufficient facts to establish that he was entitled to a hearing on his termination under the MMBA.

B. The County's Conduct During Hitchcock's Grievance

Hitchcock also alleges that the County retaliated against him by postponing the arbitration of his grievance and by refusing to allow him to select an SEIU representative at the arbitration. As already discussed above, Hitchcock does not demonstrate that he was entitled to participate in an arbitration with the County under the expired SEIU MOU. In *Coachella Valley Unified School District* (1998) PERB Decision No. 1303, the Board found that it was not an adverse action for an employer to refuse to arbitrate a grievance, in part, because the contract containing the grievance process had already expired. Similarly in this case, Hitchcock does not establish that a reasonable person would find a delay or limit to a grievance process he or she was not entitled to participate in to be adverse to employment.

Moreover, even if Hitchcock was entitled to arbitrate his grievance under the expired MOU, he does not show that the County's actions adversely affected his ability to do so. The County has agreed to arbitrate his grievance and has agreed to allow Hitchcock to be represented by his attorney. In a similar context, the Board has found that an employee organization did not violate the MMBA when it took four years to process an employee's grievance, but preserved all of its rights to advance the grievance to arbitration. (*Service Employees International*

Union, Local 250 (Hessong) (2004) PERB Decision No. 1693-M.)[10] Hitchcock does not establish that the County's actions adversely affected his ability to either arbitrate the grievance or to be represented at the grievance. Therefore, he does not demonstrate that the County took adverse action against him and these allegations are dismissed.

Right to Appeal

Pursuant to PERB Regulations, Charging Party 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. (Cal. Code Regs, tit. 8, § 32635, subd. (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 during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB 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. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
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. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

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[10] In that case, the Board considered whether the employee organization breached its duty to represent its members equally and fairly. The Board found no violation because, like here, the delays did not interfere with the employee's ability to arbitrate the grievance. (*Service Employees International Union, Local 250 (Hessong)*, *supra*, PERB Decision No. 1693-M.)

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 Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (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. (Cal. Code Regs, tit. 8, § 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,

TAMI R. BOGERT
General Counsel

By _____
Eric J. Cu
Regional Attorney

Attachment

cc: Mark R. Howe

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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September 17, 2009

Linda Albers
The Law Offices of Linda A. Albers
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Laguna Hills, CA 92653

Re: *Kurt Hitchcock v. County of Orange*
Unfair Practice Charge No. LA-CE-529-M
WARNING LETTER

Dear Ms. Albers:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 21, 2009. Kurt Hitchcock (Hitchcock or Charging Party) alleges that the County of Orange (County or Respondent) violated sections 3502, 3502.1, and 3506 of the Meyers-Milias-Brown Act (MMBA or Act)[1] by interfering with his ability to participate in a grievance arbitration.

Prior to January 2008, Hitchcock was employed at the County as a Landfill Equipment Operator II for 18 years. This job classification, among others, is in a bargaining unit that was exclusively represented by the Service Employees International Union (SEIU) until SEIU was decertified on September 26, 2007. At that time, the Alliance of Orange County Workers (AOCW) was selected as the exclusive representative of the bargaining unit in question. At a time not specified by Hitchcock, Hitchcock served as vice president of SEIU. Shortly after AOCW was certified, it began negotiations with the County over a Memorandum of Understanding (MOU) concerning the terms and conditions of employment. The MOU in place between the County and SEIU expired by its own terms in June 2007.

On or around December 27, 2007, Hitchcock was involved in an accident at work. At the time of the accident, Hitchcock and his supervisor were involved in a loud verbal altercation. On January 28, 2008, the County terminated Hitchcock's employment because of his role in the December 27, 2007 accident. At a time not specified by Hitchcock, he filed a grievance over his termination. Hitchcock and the County agreed to advance the grievance to arbitration. The arbitration was scheduled for November 5, 2008.

In June 2008, the County and AOCW each ratified an MOU concerning the terms and conditions of employment for the bargaining unit in question. This MOU contains a grievance process that states, in Article X, Section 4(A), "An employee may represent himself or herself

[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.

or may be represented by the Union in the formal grievance/appeal procedure." Prior to that, in February 2008, the County had imposed certain terms and conditions of employment on the bargaining unit. The parties do not specify whether the imposed terms included some sort of grievance procedure.

On November 5, 2008, Hitchcock and the County appeared at the agreed upon location for the arbitration of his grievance. However, the County would not agree to participate in the arbitration because Hitchcock had brought a representative from SEIU, as opposed to AOCW, to represent him in the arbitration. The County stated that it would proceed with the arbitration if Hitchcock agreed to be represented by AOCW. Hitchcock would not agree to this arrangement and the arbitration was postponed so that Hitchcock could retain a private attorney. Ultimately, the arbitration was rescheduled for October 2009, though Hitchcock wanted an earlier date. Prior to the November 5, 2008 meeting, Hitchcock had informed the County through correspondence that he intended to have an SEIU representative assist him in the arbitration.

Discussion:

PERB Regulation 32615(a)(5)[2] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) 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 and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) 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.)

I. Interference

Hitchcock alleges that the County interfered with his right to be represented by SEIU at his arbitration hearing. The test for whether a respondent has interfered with the rights of

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

employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons.

(*Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807.) Under the above-described test, a violation may only be found if the MMBA provides the claimed rights. (*Ibid.*; *Los Rios Community College District* (1998) PERB Decision No. 1274; *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S.)

The Board has previously held that the filing and processing of grievances under a negotiated agreement constitutes protected activity under the MMBA. (MMBA, § 3502; *City of Modesto* (2008) PERB Decision No. 1994-M; *City of Long Beach* (2008) PERB Decision No. 1977-M.) The Board has also held, however, that the protected right of an individual employee to pursue contractual grievances did not extend to allowing the employee to be represented by an employee organization that is not the exclusive representative and is not a party to the contract. (*Los Rios Community College District* (1998) PERB Decision No. 1274, citing *Mt. Diablo Unified School District* (1978) PERB Decision No. 68; *Mount Diablo Unified School District, et al.* (1977) EERB Decision No. 44.)[3] In this case, Hitchcock does not establish that the grievance he filed was pursuant to any negotiated agreement. It is unclear whether Hitchcock contends that the grievance was filed pursuant to the terms of the expired MOU between the County and SEIU, the MOU between the County and AOCW, or some other process altogether.[4] This is further complicated by the fact that Hitchcock does not specify when the grievance was actually filed.

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[3] Although these cases were decided under the Educational Employment Relations Act (EERA), found at Government Code section 3540 et seq., the Board has interpreted the language in MMBA section 3502 similarly to that found in EERA section 3543, as evidenced by *City of Modesto*, *supra*, PERB Decision No. 1994-M and *City of Long Beach*, *supra*, PERB Decision No. 1977-M. 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.)

[4] Hitchcock includes with his charge documents describing some, but not all, of a grievance procedure he allegedly used but there is insufficient information in these documents to determine whether this process is part of one of the two MOUs referenced above, or some other process.

Assuming that Hitchcock's grievance was filed pursuant to the MOU with AOCW, Hitchcock does not establish that the County unlawfully interfered with his ability to pursue the grievance. At the time the grievance was filed, AOCW, not SEIU was the exclusive representative of Hitchcock's bargaining unit. Accordingly, Hitchcock does not demonstrate that he is entitled to representation by SEIU. (See *Los Rios Community College District* (1998) PERB Decision No. 1274 [other citations omitted].) In addition, according to the terms of that grievance process, Hitchcock was entitled to pursue the grievance without representation or with a representative of "the Union," which presumably in this case is AOCW.[5] Thus, Hitchcock does not establish that he has the right to be represented by SEIU at his arbitration according to the terms of the MOU. Because Hitchcock does not establish that he was entitled to have an SEIU representative present during his arbitration, he does not establish that the County interfered with any rights protected by the MMBA.

Assuming that Hitchcock's grievance was filed pursuant to the expired MOU with SEIU, Hitchcock does not establish that the County was obligated to pursue this grievance. While Hitchcock does not specify when he filed the grievance, it is clear that it was filed sometime after September 26, 2007, the date the MOU between the County and SEIU had already expired. PERB has held that the arbitration clause in a grievance procedure does not continue in effect after the expiration of the contract except for disputes that:

> (1) involve facts or occurrences that arose before expiration; (2) involve post-expiration conduct that infringes on rights that accrued or vested under the agreement; or (3) under normal principles of contract interpretation, survive the expiration of the agreement.

(*State of California, Department of Youth Authority* (1992) PERB Decision No. 962-S; see also *Trustees of the California State University* (1997) PERB Decision No. 1231-H.)

In this case, Hitchcock was given notice of his termination on January 28, 2008, based on his conduct on December 27, 2007. Both the accident and the termination occurred at a time after the MOU with SEIU expired. Similarly, any right Hitchcock had to participate in an arbitration accrued or vested upon his termination, again, after the MOU expired. Finally, Hitchcock does not provide any other facts or argument demonstrating any other reason why the grievance procedure in the MOU with SEIU should survive the expiration of that

[5] Although the term "the Union" is not defined by any of the contract provisions provided by either party, it is reasonable to interpret that term to mean the union that is a party to the MOU, i.e., AOCW.

agreement. Thus, Hitchcock does not establish that he was entitled to arbitrate his grievance under the MOU with SEIU.[6]

Assuming that Hitchcock's grievance was filed pursuant to some other process entirely separate from either the MOU with SEIU or the MOU with AOCW, Hitchcock does not provide sufficient detail about this grievance process. Unlike the circumstances considered in *City of Modesto*, *supra*, PERB Decision No. 1994-M or *City of Long Beach*, *supra*, PERB Decision No. 1977-M, Hitchcock does not demonstrate that his grievance was filed pursuant to a negotiated grievance procedure or filed to enforce a contractual right. Accordingly, Hitchcock does not establish that he has an MMBA-protected right to file and pursue this grievance. Moreover, Hitchcock does not discuss the terms of this process and whether he is entitled to have an SEIU representative at the grievance arbitration. For these reasons, Hitchcock has not met his burden to establish that the County interfered with Hitchcock's protected rights.

II. Retaliation

Hitchcock also alleges a violation of MMBA section 3502.1, which prohibits the County from taking punitive action against Hitchcock because of "lawful action as an elected, appointed, or recognized representative of an employee bargaining unit." To demonstrate that an employer discriminated or retaliated against an employee 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; (3) the employer took adverse action against the employee; and (4) the employer took the action <u>because of</u> the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) 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 <u>adverse impact on the employee's employment</u>.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

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[6] Even if the expired SEIU MOU did apply, Hitchcock does not provide sufficient information to conclude that he had the right to be represented at the grievance by anyone other than the incumbent exclusive representative.

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*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 (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; *Campbell*, *supra*, 131 Cal.App.3d 416); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104; *San Leandro*, *supra*, 55 Cal.App.3d 553); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S; *San Leandro*, *supra*, 55 Cal.App.3d 553); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (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 (*County of San Joaquin (Health Care Service)* (2001) PERB Order No. IR-55-M); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

In this case, Hitchcock makes no specific reference to any lawful action he took "as an elected, appointed, or recognized representative of an employee bargaining unit." (MMBA, § 3502.1.) Hitchcock does allege that he was the president of SEIU at some point prior to its decertification in September 2007. To the extent that Hitchcock alleges that either his termination on January 28, 2008 or the County's conduct during the arbitration on November 5, 2008, was in retaliation for his activities as SEIU president, there is insufficient information to establish a violation. Hitchcock does not describe any activities he engaged in while he was SEIU president. More importantly, SEIU's role as the representative of the bargaining unit ended when it was decertified in September 2007, several months before either the termination or the first arbitration date. Thus, any activities Hitchcock could have engaged in as "an elected, appointed, or recognized representative of an employee bargaining unit" (MMBA, § 3502.1) ended at the latest in September 2007. The time period between these events is not sufficiently close to support a nexus. (*Los Angeles Unified School District* (1998) PERB Decision No. 1300.) In addition, Hitchcock does not provide other facts demonstrating a connection between his service as SEIU president and the County's actions. Therefore, Hitchcock does not establish a violation of MMBA section 3502.1.[7]

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[7] In addition, to the extent that Hitchcock alleges that his termination was made in retaliation for protected activities, he has not met his burden of showing that this allegation was filed within PERB's six-month statute of limitations period. (See *Los Angeles Unified School District*, *supra*, PERB Decision No. 1929; *City of Santa Barbara*, *supra*, PERB

For these reasons the charge, as presently written, does not state a prima facie case.[8] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may 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 an authorized agent of 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 an amended charge or withdrawal is not filed on or before September 29, 2009,[9] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Eric J. Cu
Regional Attorney

Decision No. 1628-M.) In this case, the charge was filed on April 21, 2009, and he was notified of his termination more than one year prior, on January 28, 2008. Charging Party provides insufficient information to establish that an exception to the statute of limitations applies.

[8] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[9] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)