

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DERRICK C. O'KEEFE,

Charging Party,

v.

GOLDEN GATE BRIDGE HIGHWAY &
TRANSPORTATION DISTRICT,

Respondent.

Case No. SF-CE-747-M

PERB Decision No. 2209-M

October 12, 2011

Appearance: Derrick C. O'Keefe, on his own behalf.

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

DECISION

MARTINEZ, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Derrick C. O'Keefe (O'Keefe) of a Board agent's dismissal (attached) of O'Keefe's unfair practice charge. The charge alleges that O'Keefe's employer, the Golden Gate Bridge, Highway & Transportation District (District), violated the Meyers-Milias-Brown Act (MMBA)¹ by retaliating against him for having filed prior unfair practice charges with PERB² and for having testified on behalf of a co-worker, Willard Park (Park), at Park's PERB hearing³ against the District.⁴ The charge alleges that this conduct violates

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

² PERB Case Nos. SF-CE-620-M; SF-CO-190-M.

³ PERB Case No. SF-CE-598-M.

⁴ The charge also alleges that he was retaliated against by his union, the Inlandboatmen's Union of the Pacific (IBU). These allegations are the subject of a separate unfair practice charge O'Keefe filed against IBU, and therefore are not considered herein. In *O'Keefe v. Inlandboatmen's Union of the Pacific* (2011) PERB Decision No. 2199-M, the

MMBA sections 3502, 3502, 3506 and 3509, and PERB Regulation 32603.⁵ The Board agent dismissed the charge, finding that it failed to state a prima facie case.

We have reviewed O'Keefe's appeal, the warning and dismissal letters and the entire record in light of the relevant law. Based on this review, we find the Board agent's warning and dismissal letters to be well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board adopts the warning and dismissal letters as the decision of the Board itself, supplemented by the brief discussion below.

DISCUSSION

PERB Regulation 32635(a) provides that an appeal from a dismissal "shall" comply with the following requirements:

- (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
- (2) Identify the page or part of the dismissal to which each appeal is taken;
- (3) State the grounds for each issue stated.

To satisfy the requirements of PERB Regulation 32635(a), the appeal must sufficiently place the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H.) An appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635(a). (*Ibid.*) The appeal in this case merely restates facts alleged in the

Board adopted the warning and dismissal letters of the Board agent as the decision of the Board itself, and dismissed O'Keefe's charge against IBU without leave to amend.

⁵ In addition, the charge alleges violations of PERB Regulations 99563.7(A) and 99563, which do not exist. These appear to refer to sections of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act, Government Code section 99560 et seq., a statutory scheme not applicable here. (PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.)

charge and arguments made before the Board agent. It fails to sufficiently place the Board and the District on notice of the issues raised on appeal and is therefore subject to dismissal on that basis alone. (*City of Brea* (2009) PERB Decision No. 2083-M.)

ORDER

The unfair practice charge in Case No. SF-CE-747-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Dowdin Calvillo joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: 322-8227
Fax: (916) 327-6377



September 15, 2010

Derrick O'Keefe

Re: *Derrick C. O'Keefe v. Golden Gate Bridge Highway & Transportation District*

Unfair Practice Charge No. SF-CE-747-M

DISMISSAL LETTER

Dear Mr. O'Keefe:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 25, 2010. Derrick C. O'Keefe (O'Keefe or Charging Party) alleges that the Golden Gate Bridge Highway & Transportation District (District or Respondent) violated sections 3502, 3502.1, 3506 and 3509 of the Meyers-Milias-Brown Act (MMBA or Act)¹ and PERB Regulation 32603 by retaliating against him for filing earlier charges with PERB and for filing a grievance in December 2009.²

Charging Party was informed in the attached Warning Letter dated July 16, 2010, 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 July 27, 2010, the charge would be dismissed.³

Charging Party filed an amended charge dated July 30, 2010. The amended charge fails to cure the deficiencies set forth in the Warning Letter. Specifically, the amended charge fails to allege sufficient facts to establish that the denial of his grievance was an adverse action or that

¹ The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

² In addition the charge alleges violations of Regulations 99563.7(A) and 99563, which are not PERB Regulations and therefore, will not be addressed here. PERB has repeatedly held that it has no jurisdiction to enforce rights contained in other statutes such as the Education Code. (*Barstow Unified School District* (1997) PERB Decision No. 1138b.)

³ On July 30, 2010, Charging Party advised the Board Agent that he would be sending additional information on that date. Based upon that representation, the Board Agent granted an extension of time for Charging Party to submit the additional information.

a nexus existed between that denial and his prior protected activity. The amended charge also fails to establish that the January 12, 2010 meeting had an adverse impact on his employment or that the meeting was motivated by any protected activities by Charging Party. While the amended charge appears to allege that, during that meeting, Charging Party's supervisor denied him leave to seek medical treatment, the charge fails to allege facts to establish that any such denial, if it occurred, was motivated by Charging Party's protected activities. The amended charge also fails to set forth any facts to establish a nexus between Charging Party's protected activities and the denial of his request for vacation leave and the denial of his request to exchange workdays. Accordingly, the amended charge fails to state a *prima facie* violation of the MMBA.

On August 25, 2010, PERB received a letter from Charging Party dated August 19, 2010, with attachments. Even if this letter is considered, it fails to cure the deficiencies set forth in the Warning Letter. Attached to the August 19, 2010 letter are portions of a decision by a PERB administrative law judge in PERB Case No. SF-CE-598-M, December 8, 2009 minutes of the Inlandboatmen's Union of the Pacific (IBU), a letter from the District's general manager to the IBU concerning another employee, an article from the San Francisco Chronicle dated December 25, 2005 concerning a jury verdict against a private employer, and what appears to be one page of a multi-page document pertaining to deckhand work rules. PERB Regulation 32615(a)(5) 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 additional information submitted does not set forth facts sufficient to establish a *prima facie* case of discrimination. Therefore, the charge is hereby dismissed based on the facts and reasons set forth above and in the July 16, 2010 Warning Letter

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

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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).)

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 _____
Dorothy Bácskai Egel
Board Agent

Attachment

cc: Jerrold C. Schaefer

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8387
Fax: (916) 327-6377



July 16, 2010

Derrick O'Keefe

Re: *Derrick C. O'Keefe v. Golden Gate Bridge Highway & Transportation District*
Unfair Practice Charge No. SF-CE-747-M
WARNING LETTER

Dear Mr. O'Keefe:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 25, 2010. Derrick C. O'Keefe (O'Keefe or Charging Party) alleges that the Golden Gate Bridge Highway & Transportation District (District or Respondent) violated sections 3502, 3502.1, 3506 and 3509 of the Meyers-Milias-Brown Act (MMBA or Act)¹ and PERB Regulation 32603 by retaliating against him for filing earlier charges with PERB and for filing a grievance in December 2009.²

Mr. O'Keefe is employed as a deckhand by the District and represented by the exclusive representative, Inland Boatman's Union of the Pacific (IBU). Mr. O'Keefe previously filed PERB charges against both IBU and the District. Mr. O'Keefe also assisted Willard Park, a fellow deckhand, with his PERB charge against the District, which was heard on August 26-27 and November 16, 2009.

The charge against the District alleges four instances of retaliation against Mr. O'Keefe because he engaged in protected activity. The District in its response to this charge acknowledges that Mr. O'Keefe has engaged in conduct protected by the Act. The District, however, denies that it retaliated against Mr. O'Keefe because of his protected activity. The four allegations are as follows:

1. On December 21, 2009, Mr. O'Keefe attempted to file a grievance against the District over the way a maintenance deckhand position had been filled, alleging that the

¹ The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

² In addition the charge alleges violations of Regulations 99563.7(A) and 99563, which are not PERB Regulations and therefore, will not be addressed here. PERB has repeatedly held that it has no jurisdiction to enforce rights contained in other statutes such as the Education Code. (*Barstow Unified School District* (1997) PERB Decision No. 1138b.)

District should have placed a current employee with the lowest seniority into the position rather than hiring a new employee. Mr. O'Keefe was apparently not himself placed in the maintenance deckhand position, nor would he have been placed in it if he had prevailed in his grievance. The District denied the grievance because it was not submitted through IBU and was not signed by IBU's Regional Director, Marina Secchitano.³

2. On January 12, 2010, the District Deputy General Manager, James Swindler, summoned Mr. O'Keefe to his office to address reports that Mr. O'Keefe was posting or disseminating bulletins about another District employee which constituted harassment of that employee.

Mr. O'Keefe contends that he was "screamed at" by Swindler who used profanities and threatened him severe discipline if he had distributed the flyers. Mr. O'Keefe denied distributing any bulletins. He believes that IBU Regional Director Secchitano was responsible for alerting Swindler to the bulletins because, "the layout matched other forwarded Emails (sic) from Marina Secchitano."

The District states that prior to that meeting, Greg Hansard, the Ferry Division Operations Manager, and Susan Spencer, the District's Employee Relations Administrator, had informed Swindler that employees had orally reported that Mr. O'Keefe was posting and/or disseminating bulletins that attacked a deckhand employee in the Ferry Division, in a way that created a hostile work environment. Swindler directly confronted O'Keefe about the impropriety of such action and informed him that this was inappropriate and violated the District's Equal Employment Opportunity and Harassment policies. Swindler determined to immediately stop any harassment against an employee who had previously been subject to sexual harassment by another, now terminated employee.

The District continues by stating that on January 12, 2010, Swindler met with O'Keefe and his IBU representative, Tony Rives, in his office. At the meeting, Swindler told O'Keefe that it was reported to him that O'Keefe was distributing leaflets which attacked another District employee in a manner that constituted harassment. Swindler allegedly showed O'Keefe copies of the bulletins, and O'Keefe denied that he had distributed them. Swindler told O'Keefe that he should not disseminate such bulletins in the future or it could result in his termination. Swindler did not discipline O'Keefe at that time or at any subsequent time because of this alleged conduct.

³ This allegation is also subject of Unfair Practice Charge No. SF-CO-228-M.

The District contends that this alleged conduct was deemed to be very serious because it appeared to be a continuation of conduct by another District employee directed at the same deckhand employee in the Ferry Division.⁴

Following the meeting on January 12, 2010, O'Keefe went to the District's Human Resources Department and filed a complaint of retaliation concerning the January 12, 2010 meeting with Swindler. Pursuant to the District's complaint process set forth in its Equal Employment Opportunity policy, the O'Keefe complaint was investigated by Employee Relations Administrator Susan Spencer. Susan Spencer concluded that even though the January 12, 2010 meeting discussion was at times heated, that Jim Swindler did not threaten O'Keefe with either physical violence or with termination for the alleged misconduct which he denied, nor did Swindler's conduct constitute a violation of the District's policy prohibiting retaliation. In fact, O'Keefe has not at any time been disciplined for the alleged misconduct discussed at the January 12, 2010 meeting.

3. On February 11, 2010, Mr. O'Keefe submitted a request to take off the days of February 24 and 25, 2010, the first as a vacation day and the second as one of his "seven (7) individual days off without pay." O'Keefe believed he had enough time on the books to accommodate his request.

He was told by Operations Supervisor Cindy Amadeo that he had no accrued vacation time available. He was further informed that, if he took off February 24, it would be charged as his 7th individual day off, and that if he took off February 25, his absence would be charged as an occurrence under the District's Ferry Division Attendance Policy. The District contends when Mr. O'Keefe was absent on February 24 and February 25, he was charged with an occurrence as the result of the application of the Ferry Division Attendance Policy.

Mr. O'Keefe's appeal of the denial of use of vacation time was also denied.

4. In April 2010, O'Keefe requested permission to do a mutual exchange of workdays so that he could work a baseball shift on Giants Opening Day. His request was denied. Mr. O'Keefe alleges this was the first and only time a switch in shifts for a Baseball Mutual has been denied by the District.

The District states the reason for the denial as the exchange of single days when Baseball Shifts are scheduled for a 40-hour shift has resulted in extra payroll cost to the District. The District subsequently agreed with IBU that mutual exchanges will be approved if the exchange covers the entire 40-hour baseball work shift. The District argues that Mr. O'Keefe has recently requested another mutual exchange for a Baseball Shift which was a single day assignment rather than a 40-hour Baseball Work Shift.

⁴ The alleged conduct of the other employee was the subject matter of Unfair Practice Case No. SF-CE-598-M.

This request was approved because the mutual exchange covered the entire assignment. The District argues that there was no evidence of retaliation with respect to the earlier denial of a mutual exchange — the denial was based upon the facts that the District did not believe it was obligated to make the exchange and such exchanges had resulted in extra payroll costs.

Mr. O' Keefe states “[b]ecause IBU is working in concert with [the District] I fear for my employment and any legal Protection under the MOU or union bylaws. I am seeking help from the Public Employment Relations Board to put an end to this constant harassment and the threat of termination.”

Discussion

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 because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *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 (*Newark*); emphasis added; footnote omitted.)

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; (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 (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (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 applying the test for establishing a discrimination violation, the current charge fails to estate violations with regard to any of the four allegations, even though the charge does establish that O'Keefe engaged in protected activity and that the District had knowledge of his protected activity. The deficiencies in the charge allegations are as follows:

1. Denial of grievance over filling maintenance dockhand (deckhand?) position

This allegation does not establish the requisite "nexus" of a violation, as discussed above, even though the timing of the denial following several weeks after Mr. O'Keefe's participation in SF-CE-598-M. As noted above, timing alone is not sufficient to establish unlawful motivation. (*Moreland Elementary School District, supra*, PERB Decision No. 227.) Further, the charge does not establish evidence of an adverse action against O'Keefe in this regard, as. O'Keefe acknowledges that the grievance did not impact his position. (*Newark, supra*, PERB Decision No. 864.)

2. January 12, 2010 Meeting with Swindler

Again, there is no evidence of any adverse action under an objective standard. (*Newark, supra*, PERB Decision No. 864.) Without evidence that the January 12, 2010 meeting has had an impact on O'Keefe's employment, the charge fails to state a prima facie violation under a retaliation theory. (*Novato, supra*, PERB Decision No. 210.) Nor does the charge establish that the meeting was motivated by any protected activities of O'Keefe.

3. Denial of vacation request

None of the factors necessary to establish "nexus" are present here. There is no evidence of disparate treatment (*State of California (Department of Transportation), supra*, PERB Decision No. 459-S); or the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District, supra*, PERB Decision No. 104; *San Leandro, supra*, 55 Cal.App.3d 553); or the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation), supra*, PERB Decision No. 328-S); or the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District, supra*, PERB Decision No. 1529), or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District supra*, PERB Decision No. 786); or employer animosity

towards union activists (*Jurupa Community Services District, supra*, PERB Decision No. 1920-M; *Cupertino Union Elementary School District supra*, PERB Decision No. 572.) Without evidence establishing the necessary "nexus," this allegation fails to state a violation.

4. Exchange of workdays

The charge fails to demonstrate that the District took adverse action against the employee, or that the employer took the action because of the exercise of protected rights. (*Novato, supra*, PERB Decision No. 210.) The fact that this was the only time a shift change was not permitted does not by itself establish a violation. Further, there is no evidence of how this denial adversely impacted O'Keefe. Without evidence of an adverse action, using an objective standard, a violation cannot be found. (*Newark, supra*, PERB Decision No. 864.)

For these reasons the charge, as presently written, does not state a prima facie case.⁵ 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 July 27, 2010,⁶ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Roger Smith
Labor Relations Specialist

RCS

⁵ 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.*)

⁶ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)