STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

EVELYN RAMIREZ-CLAIRE, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 521, Respondent.	Case No. SF-CO-294-M PERB Decision No. 2325-M August 27, 2013

Appearances: Evelyn Ramirez-Claire, on her own behalf; Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 521.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION[1]

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Evelyn Ramirez-Claire (Ramirez-Claire) from the dismissal (attached) by the Office of the General Counsel of her unfair practice charge. The charge alleged that the Service Employees International Union, Local 521 (SEIU) violated the Meyers-Milias-Brown Act (MMBA)[2] by being ineffective in resolving complaints since 2008 and by leading Ramirez-Claire to believe that she would be transferred within a 90-day period. The Office of the General Counsel determined that the charge should be dismissed for failure

[1] PERB Regulation 32320, subdivision (d), provides in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [Board Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB Regs. are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.)

[2] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise noted, all statutory references are to the Government Code.

to state a prima facie case of a breach of the duty of fair representation and for failure to demonstrate that the charge was timely filed.

The Board has reviewed the record in its entirety and has fully considered the appeal and the response thereto. Based on this review, we find the warning and dismissal letters to be 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, supplemented by the discussion below.

DISCUSSION

Compliance with Requirements for Filing Appeal

Pursuant to PERB Regulation 32635, subdivision (a), an appeal from dismissal must:

> (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, subdivision (a), the appeal must sufficiently place the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trade Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H (*State Employees Trades Council*); *City & County of San Francisco* (2009) PERB Decision No. 2075-M.) An appeal that does not reference the substance of the Board agent's dismissal fails to comply with PERB Regulation 32635, subdivision (a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381 (*Pratt*); *Lodi Education Association (Hudock)* (1995) PERB Decision No. 1124; *United Teachers – Los Angeles (Glickberg)* (1990) PERB Decision No. 846.) Likewise, an appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635, subdivision (a). (*Pratt; State*

Employees Trades Council; Contra Costa County Health Services Department (2005) PERB Decision No. 1752-M; *County of Solano (Human Resources Department)* (2004) PERB Decision No. 1598-M.)

The appeal in this case has two sections. The first section contains a verbatim restatement of the allegations as found in the statement of the charge section of the unfair practice charge form. The second section contains new charge allegations under the heading: "Who, What, Where and How."

The appeal does not comply with the requirements of PERB Regulation 32635, subdivision (a). It fails to identify the specific issues of procedure, fact, law or rationale to which the appeal is taken, the page or part of the dismissal to which the appeal is taken, or the grounds for each issue. Thus, Ramirez-Claire's appeal of the dismissal is denied on that basis alone. (*City of Brea* (2009) PERB Decision No. 2083-M.)

New Allegations and Evidence on Appeal

Were we to consider Ramirez-Claire's appeal, we would decline to consider new factual allegations and evidence contained in the appeal, which were not presented in the original charge. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635, subd. (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.)

There are new charge allegations within the body of the appeal as well as new supporting evidence in the form of copies of documents attached to the appeal. As was true with the documents attached to the original charge, the documents attached to the appeal are unorganized and their relevance unexplained. (See *Lindsay Unified School District* (1992)

PERB Decision No. 936.) All of the dates of the events alleged for the first time on appeal and all of the dates of the documents attached to the appeal predate the dismissal of the charge. The appeal provides no reason why they could not have been provided with the original charge or with a timely filed amended charge.

In the warning letter dated April 29, 2013, Ramirez-Claire was advised that the charge allegations were conclusory and lacked the factual specificity that would enable the Board agent to determine whether a prima facie unfair practice had been stated, as required under established Board precedent. Ramirez-Claire was given until May 14, 2013, to amend her charge to address its deficiencies; otherwise, as she was advised, the charge would be dismissed. PERB did not receive an amended charge nor a request for an extension of time by the due date set forth in the warning letter. On May 21, 2013, the Board agent left a voicemail for Ramirez-Claire warning her that the charge would be dismissed if an amended charge was not received that day. After close of business, Ramirez-Claire left a voicemail for the Board agent stating that she did not wish to amend the charge. By letter of May 22, 2013, the Board agent dismissed the charge based on the facts and reasons set forth in the warning letter.

On appeal, Ramirez-Claire attempts to address the deficiencies of the charge as requested of her by the Board agent in his warning letter. Although the right to file an appeal is guaranteed by PERB Regulation 32635, it bears mention that it is the role of the Office of the General Counsel to investigate and process unfair practice charges. By failing to amend the charge where, as here, the charging party apparently had additional facts she believed warranted PERB's attention, Ramirez-Claire deprived the Office of the General Counsel the opportunity to reassess its initial determination. An appeal is no substitute for full engagement in that process. (*Regents of the University of California* (2006) PERB Decision No. 1851-H [purpose of rule requiring charging party to present its allegations and supporting evidence to

the Board agent in the first instance is to ensure that the Board agent can fully investigate the charge before deciding whether to issue a complaint or dismiss the charge, citing *South San Francisco Unified School District* (1990) PERB Decision No. 830].)

As the Board stated in *Oakland Education Association (Freeman)* (1994) PERB Decision No. 1057:

> [W]hen a party has the opportunity to cure defects in his prima facie case at earlier stages and does not do so, the Board is reluctant to allow him to raise such facts or evidence later. The warning letter to Freeman stated that if there were any factual inaccuracies in the warning letter or any additional facts which would correct the deficiencies explained therein, he should amend the charge accordingly. . . . Freeman did not cure those deficiencies in his amended charge, and he has not offered any reason why the Board should consider new allegations on appeal now.

(Fn. omitted.)

Here, Ramirez-Claire has not demonstrated good cause for the Board to consider the new allegations and evidence contained in the appeal. For all of the above reasons, we decline to consider them.[3]

[3] SEIU argues that Ramirez-Claire's appeal was untimely filed and improperly served. The appeal was required to be filed by June 17, 2013. It was filed on June 14, 2013, and thus was timely filed. It appears that on June 13, 2013, Ramirez-Claire served the appeal on "SEIU Local 521/Contract Enforcement, Attn: Kristy Sermersheim, President, 2302 Zanker Road, San Jose, CA 95131." On June 4, 2013, however, the law firm of Weinberg, Roger & Rosenfeld had entered an appearance on behalf of SEIU and, therefore, should have been served with the appeal on SEIU's behalf. The service problem was brought to Ramirez-Claire's attention by the Board's Appeals Assistant and the service issue was corrected on June 18, 2013. PERB has excused a party's failure to comply with the service requirements under 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; *City of Long Beach* (2008) PERB Decision No. 1977-M.) The appeal is denied and the service issue is moot. We note, however, that under PERB precedent failure to comply with service requirements would be excusable under these circumstances given actual notice and lack of any demonstrated prejudice to respondent.

ORDER

The unfair practice charge in Case No. SF-CO-294-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Huguenin and Winslow joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1025
Fax: (510) 622-1027

May 22, 2013

Evelyn Ramirez-Claire

Re: *Evelyn Ramirez-Claire v. Service Employees International Union Local 521*
Unfair Practice Charge No. SF-CO-294-M
DISMISSAL LETTER

Dear Ms. Claire:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 30, 2012. Evelyn Ramirez-Claire (Charging Party) alleges that the Service Employees International Union Local 521 (SEIU or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act).[1]

Charging Party was informed in the attached Warning Letter dated April 29, 2013 that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn on or before May 14, 2013, the charge would be dismissed.

PERB has not received an amended charge. On May 21, 2013, the undersigned Board Agent left a voicemail message for Charging Party stating that if an amended charge was not received that same day, the charge would be dismissed. After the close of business on May 21, 2013, Charging Party left a voicemail message for the undersigned Board Agent stating that she did not wish to amend the charge. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the April 29, 2013 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

[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.

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).)

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,

M. SUZANNE MURPHY
General Counsel

By _____
Daniel Trump
Regional Attorney

Attachment

cc: Kerianne R. Steele, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1025
Fax: (510) 622-1027

April 29, 2013

Evelyn Ramirez-Claire

Re: *Evelyn Ramirez-Claire v. Service Employees International Union Local 521*
Unfair Practice Charge No. SF-CO-294-M
WARNING LETTER

Dear Ms. Ramirez-Claire:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 30, 2012. Evelyn Ramirez-Claire (Charging Party) alleges that the Service Employees International Union Local 521 (SEIU or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act).[1]

Charging Party states that her employer is the "San Mateo County Health System Department of Family Health Services." She is in a bargaining unit exclusively represented by SEIU.

The unfair practice charge form, section 6.d, states, verbatim:

> SEIU Has been ineffective since 2008 to date in resolving my complaints and allegations of continuous exposure to hostile working environment conditions, subsequent to providing an enormous volume of information and meetings in good faith of resolution as I was advised in 2008/2009 to file with DFEH/EEOC, this was not the resolution I was looking for I have to continue to work. Seeking SEIU assistance again in April 2011, I was led to believe I would be transferred in a 90 day period. (Please see all attached in support of my potential for a case and resolved.)

Attached to the unfair practice charge form are 237 pages of e-mail messages and other correspondence dating back to 2008.

[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.

Discussion

Charing Party's Burden

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." Charging Party should allege facts showing 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.)

A charging party also bears the burden of demonstrating 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.) 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.)

The Exclusive Representative's Duty of Fair Representation

Although no theory of a violation appears in the charge, it is herein assumed that Charging Party has alleged that SEIU denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). (*Los Angeles County Education Association, CTA/NEA (Burton)* (1999) PERB Decision No. 1358 [where a charging party fails to allege that any section of the Act has been violated, the Board Agent may determine under what section the charge should be analyzed].)

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213.) In *Hussey*, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union's power."

In *International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M, the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions in such cases, including *Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332 and *American Federation of State, County and Municipal Employees,*

Local 2620 (Moore) (1988) PERB Decision No. 683-S, are consistent with the approach of both *Hussey* and federal precedent (*Vaca v. Sipes* (1967) 386 U.S. 171).

The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Unified District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory, or in bad faith. In *United Teachers of Los Angeles (Collins)*, the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal. [Citations omitted.]

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also, *Robesky v. Quantas Empire Airways Limited* (9th Cir. 1978) 573 F.2d 1082.)

Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (*International Association of Machinists*

(Attard), *supra*, PERB Decision No. 1474-M.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (*United Teachers – Los Angeles (Wyler)* (1993) PERB Decision No. 970.)

Charging Party has not Alleged Sufficient Facts to State a Prima Facie Case

As an initial matter, Charging Party has not provided PERB with a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice," as required by PERB Regulation 32615(a)(5). The charge alleges only that SEIU has been "ineffective" with regard to "complaints and allegations of continuous exposure to hostile working environment conditions." This allegation lacks the specificity required for PERB to determine whether an unfair practice has been committed. (*United Teachers-Los Angeles (Ragsdale)*, *supra*, PERB Decision No. 944.) Although Charging Party attaches numerous unorganized exhibits to the charge, their relevance to the allegations is unclear. (*Lindsay Unified School District* (1992) PERB Decision No. 936

Charging Party has also not met her burden to show that the charge is timely filed. (*Tehachapi Unified School District*, *supra*, PERB Decision No. 1024.) As noted above, 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*, *supra*, 35 Cal.4th 1072.) In cases alleging a breach of the duty of fair representation, the six-month statutory limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (*Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889.) Because Charging Party does not state with specificity when she sought assistance from SEIU—except for instances more than one year prior to the filing of the charge—or whether or how SEIU responded to Charging Party's request, it is impossible to determine whether the charge is timely filed.

Similarly, because Charging Party does not state with specificity what assistance she sought from SEIU, it cannot be determined that SEIU had a duty to assist her under the MMBA. A union does not owe a duty of fair representation to unit members in a forum over which the union does not exclusively control the means to a particular remedy. (*SEIU Local 1000 (George)* (2008) PERB Decision No. 1984-S.) This means that a union does not have a duty to represent members in a forum such as the Department of Fair Employment and Housing. (*Ibid.*) It is unclear from the charge whether SEIU's allegedly ineffective assistance related to a contractual grievance or another forum, and therefore whether the MMBA's duty of fair representation applies in this case.

Assuming the duty of fair representation applies to the facts in this case, Charging Party has not alleged sufficient facts to show that SEIU's allegedly ineffective assistance violated that duty. Because the charge lacks specificity about any of SEIU's conduct, it is impossible to determine whether that conduct was without a rational basis or devoid of honest judgment.

(*Reed District Teachers Association, CTA/NEA (Reyes)*, *supra*, PERB Decision No. 332.) Charging Party has thus not met her burden to show how SEIU abused its discretion. (*Service Employees International Union, Local 1021 (Schmidt)* (2009) PERB Decision No. 2080-M.)

For these reasons the charge, as presently written, does not state a prima facie case.[2] 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 May 14, 2013,[3] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Daniel Trump
Regional Attorney

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[2] 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.*)

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