STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MIAO XIAN CHEN, Charging Party, v. CITY & COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-1042-M PERB Decision No. 2344-M December 16, 2013

Appearance: Miao Xian Chen, on their own behalf.

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 Miao Xian Chen (Chen) from the dismissal (attached) by the Office of the General Counsel of Chen's unfair practice charge. The charge alleges that the City and County of San Francisco violated the Meyers-Milias-Brown Act (MMBA)[2] by excluding employees from reapplying for employment via a special closed civil service examination. The examination was open to "as-needed" employees in specified classifications. It was not open to "provisional" employees in those same classifications. Prior to having been

[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 field 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, § 31001 et seq.)

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

laid off, Chen was one such provisional employee. The Office of the General Counsel dismissed the charge for lack of standing and failure to state a prima facie case of discrimination/retaliation.

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 factual allegations and in accordance with applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself.

DISCUSSION

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.)* (20009) PERB Decision No. 2069-H (*State Employees Trade 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 Trade 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 its entirety, states:

> We, Ming Hua Zhao, Jin Chao Liang, Miao Xian Chen are not challenging the exam per se, we are challenging the role of SEIU 1021, who willfully collaborated with the City and County to create criteria, which was 1400 hours worked within a three year time period and also willfully recruited the applicant pool with the City and County by soliciting managers and HR excluding us, though we wrote a letter to the union and city and county prior to the exam. The applicant pool that was accepted was only laid off 3 months prior to the exam and so were we. Both we and the people who were accepted to take the exam were unemployed, but the union refused to accept our protest prior to the examination. The union treated us differently than the people who were accepted to take the exam because we are Asian[3] and we all met the same criteria and were both laid off. This is not only an examination protest, but a protest of the SEIU's role in discriminating against us.

The appeal reiterates facts alleged in the unfair practice charge. It does not take issue with the determination made by the Office of the General Counsel that the charging party lacks standing to pursue an unfair practice charge as a former employee seeking an opportunity for re-employment through the civil service examination procedures. Regarding the Office of the General Counsel's discrimination/retaliation analysis and determination, Chen does not state specific issues to which the appeal is taken, identify the page or part of the dismissal to which the appeal is taken or state the grounds for each issue stated. The appeal raises no issues that were not adequately addressed by the Office of the General Counsel in the warning and dismissal letters. Therefore, Chen's appeal is denied. (*City of Brea* (2009) PERB Decision No. 2083-M [failure to comply with PERB Reg. 32635(a), is grounds for denial of appeal on that basis alone].)

[3] Eligibility for the examination was based not on race or ethnicity, but on the type of status the employee enjoyed. Only those categorized as "as-needed" were eligible. Those categorized as "provisional" were not.

ORDER

The unfair practice charge in Case No. SF-CE-1042-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) 622-1021
Fax: (510) 622-1027

August 16, 2013

Miao Xiao Chen

Re: *Miao Xian Chen v. City & County of San Francisco*
Unfair Practice Charge No. SF-CE-1042-M
DISMISSAL LETTER

Dear Miao Ziao Chen:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 21, 2013. An amended charge was filed on March 6, 2013. Miao Xian Chen (Charging Party) alleges that the City & County of San Francisco (CCSF or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by excluding employees from reapplying for employment via a special closed civil service exam.

Charging Party was informed in the attached Warning Letter dated July 15, 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 prior to July 25, 2013, the charge would be dismissed.

On July 25, 2013, Charging Party filed a second amended charge. As discussed below, the second amended charge does not cure the deficiencies noted in the Warning Letter and does not state a prima facie case. Therefore, the charge is hereby dismissed based on the facts and reasons set forth herein and in the July 15, 2013 Warning Letter.

Allegations of Second Amended Charge

The allegations of the second amended charge appear directed at a position statement filed by exclusive representative Service Employees International Union, Local 1021 (SEIU 1021) on April 5, 2013, regarding related unfair practice charge number SF-CO-310-M (Miao Xian Chen v. SEIU 1021).

[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.

Charging Party contends that the "unemployed applicants" were eligible to take a promotional exam, and that SEIU 1021 collaborated with the Respondent CCSF to deny them this right.

Discussion

As stated in the Warning Letter, the MMBA applies only to current employees of a public agency. It appears from the facts alleged in the initial and first amended charges that Charging Party was laid off at an unspecified time in the past, and was not an employee at the time that the exam was noticed and held. Accordingly, he is not an employee of a public agency within the meaning of the MMBA. In the second amended charge, Charging Party states that "this [rule] shouldn't apply." However, no additional facts are provided to establish that Charging Party was an employee at the time of the alleged violation. Accordingly, Charging Party lacks standing. (*Alameda County Management Employees Association (Harper)* (2011) PERB Decision No. 2198-M.) Moreover, even assuming that Charging Party had standing, the facts alleged do not demonstrate that CCSF committed any violation of the MMBA.

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).)

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 _____
Laura Z. Davis
Senior Regional Attorney

Attachment

cc: Janet C. Richardson, Deputy City Attorney
Terence J. Howzell, Deputy City Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

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

July 15, 2013

Miao Xiao Chen

Re: *Miao Xian Chen v. City & County of San Francisco*
Unfair Practice Charge No. SF-CE-1042-M
WARNING LETTER

Dear Miao Xiao Chen:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 21, 2013. An amended charge was filed on March 6, 2013. Miao Xian Chen (Charging Party) alleges that the City & County of San Francisco (CCSF or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by excluding employees from reapplying for employment via a special closed civil service exam.

Facts as Alleged

The statement of charge states, in its entirety, as follows:

> Make these three laid-off provisional employees whole by allowing them the same rights as any laid off as-needed DPH employees in the same class, who all meet the same criteria such as 1400 hrs. within the past 3 years. See attached announcements. Also afford these 3 provisional employees the same rights as previous provisional employees before them, who were made permanent, for the past 15 years by accelerated testing. These issues, the union has failed to represent against the unfair practice & discrimination of the employer.

The reference to "three laid-off" employees is an apparent reference to two other employees who filed charges identical to this one. It is assumed that "DPH" stands for the CCSF Department of Public Health.

The charge attaches a letter addressed to DPH, which states as follows, on behalf of Charging Party and two other employees:

[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.

> City and county department of public health employees have been excluded from a special, closed civil service exam. Please see attached notification from the city and count[y] including emails regarding the same process and notices from the union written in Chinese.
>
> Provisional 2736 employees in the same classification as the as-needed 2736 employees, who were contacted for this special exam meet the same criteria, which is 1400 hours worked within a period of 3 years. The fliers and notices from DHR and the union do not state anything about excluding provisional employees. Not only do they both meet the same criteria, they both are temporary employees. They both have taken and failed the last civil service exam for the same classification, 2736 porter. They both have also been laid off, but in an unfair practice, the city has excluded them in reapplying in this special closed exam. The union has failed to represent the provisional employees, when they are both paying members of the same union, SEIU 1021.
>
> Please accept this claim for unequal, unfair practice and failure to represent the following union members: Miao Chen, Jin Chao Liang, Ming Hua Zhao and Liang Xiang Wu by the city and county health department and SEIU 1021.

Also attached to the charge is a letter dated January 9, 2013, from the CCSF to Ricardo Myers, notifying Mr. Myers that he has been identified as a potential candidate for a civil service exam for the classification of 2736 Porter.[2] This exam resulted from contract bargaining between CCSF and Service Employees International Union Local 1021 (SEIU 1021). The exam is "only open to temporary exempt/as needed employees who have worked 1400+ hours total in 2736 Porter during the three (3) year period ending December 7, 2012." The exam was scheduled for February 4, 2013, and the letter provides further instructions regarding how to apply.

[2] It is noted that this letter to Mr. Myers was provided with the initial charge but not included in the amended charge. However, it appears that the amended charge was intended to include the allegations of the original charge, and therefore all documents will be considered as one pleading. (*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332.)

Discussion

From the facts provided, it appears that Charging Party and two or three other employees were provisional employees with the CCSF DPH. It further appears that these employees were laid off, on an unspecified date, and afterwards were interested in reemployment. The charge appears to allege that Charging Party and other employees were not offered the opportunity to apply for or take the special civil service exam given on February 4, 2013.[3]

The MMBA[4] does not extend a remedy against all acts of perceived unfairness or discrimination against public employees. Rather, PERB's jurisdiction is limited to resolving claims of unfair practices, as defined, which violate the Acts enforced by PERB. (See, e.g., *Los Angeles Unified School District* (1984) PERB Decision No. 448.) Violations of city or county civil service requirements, alone, are not a violation of the MMBA. (See, e.g., *City of Santa Barbara* (2004) PERB Decision No. 1628-M.)

The MMBA only applies to current employees of a public agency, as defined. (Gov. Code, § 3501.) For example, retirees are not employees. (*County of Sacramento* (2009) PERB Decision No. 2045-M.) A person seeking reemployment, who is an employee at the time he or she applies for reemployment, may be considered an employee under this definition. (*Hacienda La Puente Unified School District* (1989) PERB Decision No. 741; *Chula Vista Elementary School District* (2011) PERB Decision No. 2221.)[5] Here, it appears that Charging Party was laid off from his employment on an unspecified date in the past. Insufficient facts are alleged to show that Charging Party sought reemployment while still employed, or otherwise was an employee, within the meaning of MMBA, at the time of the alleged violation. Therefore, Charging Party lacks legal standing to pursue this charge.

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[3] While information concerning other employees can be considered for background purposes, only signatories to the unfair practice charge will be considered to be charging parties. (*United Teachers of Los Angeles (DePace)* (2008) PERB Decision No. 1964; *Regents of the University of California* (2004) PERB Decision No. 1592-H.)

[4] The charge form alleges violations of the Educational Employment Relations Act (EERA, codified at Gov. Code, §3540 et seq.), the Higher Education Employer-Employee Relations Act (HEERA, codified at Gov. Code, §3560 et seq.), and the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA, codified at Pub. Util. Code, §99560 et seq.). The Board agent may, upon review of the charge, determine the grounds under which the charge should be analyzed. (*Los Banos Unified School District* (2007) PERB Decision No. 1935.)

[5] 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.)

Retaliation/Discrimination Standard

The following information is provided to assist Charging Party in filing an amended charge. (PERB Regulation 32620, subd. (b).)

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*).) 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.)

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); (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); (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).

To establish retaliation under this standard, Charging Party would have to allege facts showing that he: (1) engaged in protected activity; (2) that the employer knew about his protected activity; and (3) that the employer took adverse action against him because of the protected activity. There are no facts alleged to show that Charging Party engaged in protected activity or that the employer knew about such protected activity. Charging Party appears to allege that he was not offered the opportunity to take a particular civil service exam. Insufficient facts are alleged to show that this is an adverse action under the *Novato* standard, in that Charging Party does not allege facts to show he was a bona fide applicant for employment or that the employer's conduct had an objectively adverse impact upon his employment. (See, e.g., *Trustees of the California State University* (2008) PERB Decision No. 1970-H; *City of Huntington Park* (2002) PERB Decision No. 1485-M; *State of California* (2002) PERB Decision No. 1484-S.) There are no facts alleged to show that any adverse action was taken because of Charging Party's protected activity.

For these reasons the charge, as presently written, does not state a prima facie case.[6] 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 Second 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

[6] 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.*)

PERB. If an amended charge or withdrawal is not filed on or before **July 25, 2013**,[7] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Laura Z. Davis
Senior Regional Attorney

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