STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ANDREW CHURCH, Charging Party, v. CITY OF OAKLAND, Respondent.	Case No. SF-CE-1069-M PERB Decision No. 2368-M April 9, 2014

Appearances: Andrew Church, on his own behalf; Nossman by Dennis C. Kong, Attorney, for City of Oakland.

Before Huguenin, Winslow and Banks, Members.

DECISION[1]

BANKS, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Andrew Church (Church) of a dismissal (attached) of his unfair practice charge. The charge alleges that the City of Oakland violated the Meyers-Milias Brown Act (MMBA) by retaliating against Church for engaging in activity protected by the MMBA.[2]

The Board has reviewed the dismissal and the record in light of Church's appeal and the relevant law. Based on this review, we find the Board agent's warning and dismissal letters to be well reasoned and adequately support by the record.

[1] PERB Regulation 32320(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, § 31001 et seq.)

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

Church filed his unfair practice charge on May 20, 2013. On September 23, 2013, the Board agent issued a warning letter stating, inter alia, that Church had failed to state a prima facie of retaliation in regards to his exercise of protected rights under the MMBA. Church was given until October 21, 2013, to respond to the warning letter. However, he failed to file an amended charge or request withdrawal by the deadline and, on October 29, 2013, the charge was dismissed.

Church filed a timely appeal on November 20, 2013. However, Church's appeal asserts no reason of procedure, fact or law why the Board should reverse the dismissal. Accordingly, we affirm the dismissal and adopt the warning and dismissal letters as a decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CE-1069-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) 622-1139
Fax: (510) 622-1027

October 29, 2013

Andrew Church

Re: *Andrew Church v. City of Oakland*
Unfair Practice Charge No. SF-CE-1069-M
DISMISSAL LETTER

Dear Mr. Church:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 20, 2013. Andrew Church (Church or Charging Party) alleges that the City of Oakland (City or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by retaliating against Church for engaging in activity protected by the MMBA.

Charging Party was informed in the attached Warning Letter dated September 23, 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, he should amend the charge. Charging Party was further advised that, unless he amended the charge to state a prima facie case or withdrew it on or before October 21, 2013, the charge would be dismissed.

On or about September 26, 2013, Charging Party called the undersigned regarding the Warning Letter. The undersigned explained that Charging Party had until October 21, 2013 to file an amended charge containing any additional factual allegations. However, PERB has not received either an amended charge or a request for withdrawal. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the September 23, 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 Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

[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.

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 _____
Joseph Eckhart
Regional Attorney

Attachment

cc: Veronica M. Gray
Allison Dibley

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1139
Fax: (510) 622-1027

September 23, 2013

Andrew Church

Re: *Andrew Church v. City of Oakland*
Unfair Practice Charge No. SF-CE-1069-M
WARNING LETTER

Dear Mr. Church:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 20, 2013. Andrew Church (Church or Charging Party) alleges that the City of Oakland (City or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by retaliating against Church for engaging in activity protected by the MMBA.

FACTS AS ALLEGED

Church is employed by the City's Public Works Agency (PWA) as a Gardener III, a classification represented by SEIU Local 1021 (Local 1021). Since January 5, 2012, Church has served as a steward for Local 1021.

On the morning of January 5, 2012, Church was at his work site, Joaquin Miller Park, waiting for his supervisor to arrive to take roll. Brian Carthan (Carthan), who supervises Church's supervisor, arrived and announced in front of Church and his co-workers, "Nobody is to listen to Andrew Church." Carthan provided no further explanation. The following day, Church was transferred to another work location, described as "7101 Edge Water."

On January 10, 2012, Church spoke to Jim Ryugo (Ryugo), the park manager at 7101 Edge Water, about the transfer. Ryugo said he would support Carthan's decisions regardless of Church's protests.

On January 24, 2012, Church reported to 7101 Edge Water. His supervisor there was Joe Marsh (Marsh), with whom Church had had previous confrontations. At some point that day, Church drove his truck to Joaquin Miller Park to dump brush. The following day, Marsh told Church that Carthan had observed this. Church was later given a letter advising him not to dump at Joaquin Miller Park. Church later confirmed that the policy regarding dumping had not changed, and that he was being singled out.

[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.

On March 21, 2012, Carthan approached Church with a paper in his hand, questioning Church about his whereabouts on a certain date. Carthan's manner was "intimidating." Church was confused because Carthan refused to explain his questions. Carthan then separated Church from one of his co-workers "as though [they] had done something very wrong."

On March 23, 2012, Carthan sent Church a letter informing him that he was under investigation by the PWA. The letter did not say why.

Five days later, Church met with Carthan, Marsh, and Susan Lawson (Lawson), a human resources employee. During the meeting, Church was questioned regarding certain locations that he had driven to in his work truck. PWA had used the GPS tracking system in Church's truck to determine those locations. Church alleges that he was the only employee against whom the GPS tracking system was used.

On March 29, 2012, Church requested leave time from Marsh, providing more than a week's notice. However, Carthan had instructed Marsh to deny Church's leave requests, even with two weeks' notice. The following day, Church requested half an hour of leave time. Marsh granted that request, but rescinded it after meeting with Carthan. Church was out on sick leave the following day. When he returned, he was placed on attendance management.

Church was injured at work on June 5, 2012, and was on leave until October 1, 2012. When he returned that day, he had no truck and "no section to work out of." Church was denied the opportunity to gain experience as an acting supervisor, and was transferred to Lake Merritt.

Church's transfer to Lake Merritt took effect on October 22, 2012. He was isolated "in a section" and was not given either a truck or a crew.

In November 2012, Church was informed that he would be serving as an acting supervisor for the month of December.

On December 1, 2012, Carthan addressed a morning meeting of employees, including Church. Carthan started by explaining that Local 1021 had questioned whether a new employee had been hired from a hiring list. Carthan appeared to assume that it was Church who had reported the matter to Local 1021. Church stood up in the meeting and denied that it was him. Carthan also discussed the matter of union representatives. Carthan stated that he knew who was on the list of union stewards. Church believed that Carthan "was really trying to say" that Church was not, in fact, a union steward. However, Church checked with Local 1021 and confirmed that he was on the list of stewards.

On December 6, 2012, all PWA crews were ordered to report to City Hall for a morning project. Isaac Papillion (Papillion) was in charge of the project. Church's supervisor, Victoria Rocha (Rocha) arrived and assumed that Church was giving direction. Rocha began talking to Church in a disrespectful manner, using hand gestures. Church told Rocha that he would not be "disrespected in that manner." Rocha stated that Church was yelling at her. Rocha instructed Church's co-worker to take Church back to Rocha's office. They talked later and

agreed they both had been at fault for the situation, and Rocha sent Church back to work. However, Carthan and Ryugo continued "pushing" this issue despite Rocha's agreement that it had been settled.

On December 7, 2012, Carthan again addressed a morning meeting of employees, including Church. Carthan discussed an e-mail message he received from Local 1021 regarding an employee who was not hired from a hiring list. Carthan said Local 1021 did not know what it was talking about, but stopped short of naming who he believed had reported the issue to Local 1021. Church again denied that he had done so. Carthan then brought up the issue regarding the identity of the union stewards, naming all of them except for Church. Church later confirmed, again, that he was on the list of stewards.

On January 18, 2013, Carthan gave Church a letter regarding a three-day suspension. The subject of the suspension dated back two years.

On March 13, 2013, Church received a notice that he was being suspended for three days beginning March 26, 2013.

On March 14, 2013, Church discussed his workplace issues with his Local 1021 representative, including the three-day suspension and the department's refusal to allow Church the opportunity to become a supervisor.

On March 25, 2013, Church requested two days off for the days following his three-day suspension. His acting supervisor granted that request. Two days later, on March 27, 2013, Church was in the middle of serving his three-day suspension. Rocha called Church at home to inform him that he would not be permitted to take those two days off, due to his failure to provide five days' notice. Rocha told Church that he would need a doctor's note if he took those days off. According to Church, supervisors typically grant leave requests without the officially-required notice.

On April 2, 2013, Church received a call from Carthan at work. Carthan asked if Church had a doctor's note for the days he was out. Church said that he did not need one because he was not on attendance management.

On April 6, 2013, Church received his paycheck and noticed that two days' pay had been deducted. He believes Carthan is responsible for this deduction. A similar incident took place "four years ago," when Carthan "took time" off Church's timesheet. Church filed a grievance over the earlier incident, and Carthan's action was rescinded.

Leave Request Policies

The District alleges the following policies governing leave requests:[2]

The memorandum of understanding (MOU) between the City and Local 1021 provides:

> A unit member may take accrued vacation, with the prior scheduling approval of the department head or designee. The department head or designee shall respond to vacation requests in a timely manner and no later than seven (7) working days from the date the request is submitted and shall not be unreasonably denied.

The PWA policy on vacation and compensatory leave provides:

> Pre-approval of vacation and compensatory leave is required. Employees may take accrued vacation and compensatory leave with prior scheduling approval from their supervisor. Requests must be in writing one week in advance for vacations of less than 3 weeks.

DISCUSSION

I. Charging 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." The charging party should include sufficient facts 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.)

II. Statute of Limitations

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*

[2] A Board agent may rely on facts asserted by the respondent that do not conflict with the facts alleged in the charge. (*Chula Vista Elementary School District* (2003) PERB Decision No. 1557.)

(1996) PERB Decision No. 1177.)[3] A charging party 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.) The charge alleges numerous actions occurring between January 5, 2012 and April 6, 2013. The charge was filed on May 20, 2013. As a result, only conduct that occurred within six months of the date the charge was filed may be considered. This means that all allegations prior to December 20, 2012 are untimely.

III. Retaliation

The charge alleges the following actions by the City that occurred within the six months preceding the charge: (1) the January 18, 2013 notice regarding the three-day suspension; (2) Church's three-day suspension, which he served on or around March 27, 2013; (3) the denial of Church's request for leave on March 27, 2013; and (4) the deduction of two days' pay from Church's April 6, 2013 paycheck.

To demonstrate that an employer 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 the 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

[3] 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.)

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).

A. Exercise of Rights under the MMBA and Employer Knowledge

The charge alleges that Church was a Local 1021 union steward. However, an employee's status as a union steward, without evidence of specific conduct, is insufficient to establish the exercise of protected rights. (*Trustees of the California State University* (2009) PERB Decision No. 2038-H.)

The charge also alleges that Church discussed his "workplace issues" with his Local 1021 representative on March 14, 2013. While this may establish that Church exercised rights under the MMBA, there are no facts showing that the City had knowledge of this activity. (*Novato*, *supra*, PERB Decision No. 210.)

The charge further alleges that Carthan implied that Church was the employee who had reported PWA's hiring activities to Local 1021, although Carthan never mentioned Church by name. Where an employer perceives that an employee has engaged in protected activity, proof of actual protected activity is not required. (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 310-311.) In this case, however, Church expressly denied that he had reported PWA's hiring activities to Local 1021. It is, therefore, unclear whether Carthan perceived Church as having exercised rights under the MMBA.

B. Employer Motive

Assuming that the charge establishes protected activity, or perceived protected activity, it fails to include sufficient evidence, other than timing, to establish that the City took action against Church because of that activity.

With respect to the allegations that the City gave Church a notice of three-day suspension, and then carried out that suspension, the only allegation in the charge is that the suspension was

based on conduct dating back two years. However, the charge does not allege, for instance, that the suspension departed from established procedures, that the City engaged in a cursory investigation of Church's alleged misconduct, or that the City failed to offer a justification for the suspension.

With respect to the denial of Church's request for leave, the charge does not allege a departure from established procedures. Both the MOU and PWA policies required that leave requests be made seven days in advance. The charge appears to acknowledge that Church's request did not comply with the MOU and PWA policies, stating only that such notice was not typically required. Although the charge alleges that the official policies differed from the routine practice, the charge does not allege that the routine practice would apply in a situation such as this one, where the employee requests to take leave following a suspension. As a result, the charge does not allege a departure from established procedures or practices.

With respect to the deduction from Church's paycheck, the charge does not allege that the City had an established procedure of paying employees for days on which they took leave without approval. Thus, there are no allegations demonstrating a departure from established procedures.

For these reasons the charge, as presently written, does not state a prima facie case.[4] 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 October 21, 2013,[5] PERB will dismiss your charge.

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[4] 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.*)

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

If you have any questions, please call me at the above telephone number.

Sincerely,

Joseph Eckhart
Regional Attorney

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