

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ROBERT PELLEGRINI,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA (SAN FRANCISCO),

Respondent.

Case No. SF-CE-1031-H

PERB Decision No. 2416-H

March 18, 2015

Appearances: Robert Pellegrini, on his own behalf.

Before Huguenin, Winslow and Banks, Members.

DECISION¹

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Robert Pellegrini (Pellegrini) from a dismissal (attached) of a seventh amended unfair practice charge by the Office of the General Counsel. In Pellegrini's initial and amended charges, Pellegrini alleged that the Regents of the University of California (San Francisco) (UC) violated section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)² by retaliating against him for protected activity.

The Office of the General Counsel dismissed the charges on October 14, 2014, on the grounds that Pellegrini failed to state a prima facie case for discrimination or retaliation.

Pellegrini filed documents he considered to be an appeal on October 28, 2014.

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 HEERA is codified at Government Code section 3560 et seq.

The Board has reviewed the case file in its entirety. Based on that review, the Board finds that Pellegrini has failed to comply with PERB Regulation 32635 and has therefore not filed a valid appeal of the dismissal of his charge. Accordingly, the Board hereby dismisses the appeal and affirms the dismissal of the charge.

DISCUSSION

The Office of the General Counsel issued a warning letter on September 22, 2014, notifying Pellegrini that none of the amended charges, with the exception of the seventh amended charge, include declarations that the facts alleged are true under penalty of perjury pursuant to PERB Regulation 32615(a). The warning letter also noted that none of Pellegrini's amended charges included a valid proof of service on UC pursuant to PERB Regulations 32135 and 32140. However, since UC's positions statements indicated that it had received all of the amended charges except for the first amended charge, the Office of the General Counsel concluded that there was no prejudice to UC in considering the amended charges it has received. (See *Fontana Unified School District* (2003) PERB Order No. Ad-324.)

Noting that the original charge and the seventh amended charge were the only documents that included declarations under penalty of perjury and that have been received by UC, the Office of the General Counsel indicated in the warning letter that only those documents would be considered for purposes of determining whether Pellegrini had stated a prima facie case.

According to the warning letter, Pellegrini's original charge and seventh amended charge alleged, in relevant part, that Pellegrini, an employee at the University of California San Francisco's Mission Bay Conference Center (MBCC), had engaged in the following activity: presenting a petition to UC that raised a number of concerns related to staff working

conditions, participating in a petition by American Federation of State, County and Municipal Employees (AFSCME) Local 3299 demanding the termination of multiple managers at both UC and a third-party contractor that provided services related to the operation of MBCC, sending whistleblower complaints to the Social Security Administration (SSA) and the State Auditor General, contacting AFSCME Local 3299 for assistance, and filing the instant PERB charge. The warning letter concluded that all of the above activities were protected by HEERA, except for Pellegrini's whistleblower complaints to the SSA and the State Auditor General.

Pellegrini's original charge and seventh amended charge also alleged that UC took various adverse actions against Pellegrini because of his protected activity, including reducing Pellegrini's work hours, removing Pellegrini from the work schedule, only occasionally calling Pellegrini into work, and releasing him from a per diem appointment effective June 19, 2014.

The warning letter indicated that UC's alleged actions of reducing his work hours and removing him from the schedule occurred more than six months before the original charge was filed on June 3, 2013, and were therefore outside of PERB's six-month statute of limitations for filing an unfair practice charge. The warning letter noted that such allegations are untimely, unless an exception applies. The Office of the General Counsel rejected Pellegrini's argument that UC's actions constituted a continuing violation, as there is no indication that UC committed a new wrongful act within the six-month period prior to the filing of the original charge, and even if UC's failure to restore Pellegrini to the work schedule could be considered a new wrongful act, it cannot be determined whether the new wrongful act occurred within the six months preceding the charge. Because there is insufficient information to conclude that the continuing violation doctrine applies, Pellegrini has not met his burden of establishing the

timeliness of the allegations regarding reduction of his work hours and his removal from the work schedule, according to the Office of the General Counsel.

The Office of the General Counsel concluded in the warning letter that UC took the adverse action of terminating Pellegrini's employment, but that the charge failed to establish that the employer knew of Pellegrini's protected activity, and even if the charge had established employer knowledge, it did not allege sufficient evidence that Pellegrini was terminated because of his protected activity. The Office of the General Counsel also concluded that Pellegrini's allegations against AFSCME Local 3299 failed to state a prima facie case against UC. For these reasons, the Office of the General Counsel concluded that the charge did not state a prima facie case.

The Office of the General Counsel sent Pellegrini the warning letter on September 22, 2014, advising him that unless he filed an eighth amended charge curing the identified defects in the previous charges, the charges would be dismissed. In response, Pellegrini notified the Office of the General Counsel that he did not intend to file any amended charges and that he requested another regional attorney be assigned to his case.

In the dismissal letter issued on October 14, 2014, the Office of the General Counsel rejected Pellegrini's request that the charge be assigned to a different regional attorney. The dismissal letter noted that Pellegrini had not filed an eighth amended charge or a request for withdrawal. On these grounds, the Office of the General Counsel dismissed the charge on the facts and reasons set forth in the warning letter.

On October 28, 2014, Pellegrini filed a package of documents under a cover entitled "Appeal Documentation." Included in the package were copies of Pellegrini's original charge and amended charges, as well as various documents which are not identified or authenticated

by a separate declaration. Pellegrini did not include any explanation for his appeal besides the above-mentioned documents.

PERB Regulation 32635(a) states, in relevant part:

The Appeal shall:

- (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.

Thus, an appeal must sufficiently place the Board and the respondent “on notice of the issues raised on appeal” in order to comply with PERB Regulation 32635(a). (*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). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381; *Contra Costa County Health Services Department* (2005) PERB Decision No. 1752-M.)

Pellegrini’s appeal does not satisfy any of the three requirements listed in PERB Regulation 32635(a), as he included no explanation or grounds for the appeal.

On these grounds, we dismiss the appeal and affirm the Office of the General Counsel’s dismissal of the charge.

ORDER

The unfair practice charge in Case No. SF-CE-1031-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Huguenin and Banks 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 14, 2014

Kevin F. Woodall, Attorney
Woodall Law Offices
580 California Street, 16th floor
San Francisco, CA 94104

Re: *Robert Pellegrini v. Regents of the University of California (San Francisco)*
Unfair Practice Charge No. SF-CE-1031-H
DISMISSAL LETTER

Dear Mr. Woodall:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 3, 2013, and subsequently amended on June 28, 2013; August 30, 2013; January 31, 2014; February 24, 2014; March 28, 2014; June 27, 2014; and July 7, 2014. Robert Pellegrini (Pellegrini or Charging Party) alleges that the Regents of the University of California (San Francisco) (UCSF or Respondent) violated the Higher Education Employer-Employee Relations Act (HEERA or Act)¹ by retaliating against him for engaging in protected activity.

Charging Party was informed in the attached Warning Letter dated September 22, 2014, 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 6, 2014, the charge would be dismissed.

On September 30, 2014, Charging Party sent an e-mail message to PERB Senior Regional Attorney Laura Davis, to whom this charge was previously assigned. In that e-mail message, Charging Party acknowledged receiving the September 22, 2014 Warning Letter and stated that he did not intend to correct the deficiencies identified in that letter.² Charging Party also

¹ HEERA is codified at Government Code section 3560 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the HEERA and PERB Regulations may be found at www.perb.ca.gov.

² Pellegrini's e-mail message states, in its entirety:

Enclosed is a recent letter from PERB Regional Attorney Joseph Eckhart to my attorney. At no time was Eckhart instructed to communicate only with my attorney. I would like to request a change in the attorney who reviews my case

claimed not to have instructed PERB to communicate only with his attorney, and requested that a different PERB attorney review his charge.

Charging Party's claims not to have instructed PERB to communicate only with his attorney are incorrect. On June 24, 2013, PERB received from Charging Party a Notice of Appearance form designating Kevin Woodall (Woodall) as his representative for this matter. Accordingly, all subsequent communications from PERB in this matter have been sent to Woodall.

In addition, Charging Party's request that this charge be assigned to another attorney is not a valid request under PERB Regulations. Such requests are governed by PERB Regulation 32155(c), which requires, among other things, that a request that a Board agent disqualify himself from a case be made under oath. Charging Party's e-mail message was not under oath and, therefore, was not a valid request under PERB Regulation 32155(c). (See *State of California, et al.* (2009) PERB Order No. Ad-377-S.) In any event, Charging Party's e-mail message does not identify any of the circumstances in which a Board agent must recuse himself, and none of those circumstances are present in this case. (See PERB Regulation 32155(a).)

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 22, 2014 Warning Letter.

(SF-CE-1031-H). I do not want Joseph Eckhart reviewing my case. My request is based on the following reasons.

1. Eckhart is steeped in affiliations/Alumni with the University of California. I have a hard time believing PERB takes cases like mine so lightly that they don't require an attorney to recuse himself where there is potential for bias/conflict of interest. I want someone with no ties to UC reviewing my case.
2. His conclusions in the letter greatly differ from my attorney's.
3. The required adjustments/amendments to my filings that he requests in the letter were issues under your purview for at least 18 months. Are these [adjustments] necessary? I believe everything was performed to PERB's satisfaction at [t]he time of the last mailings. How can there be that big of a discrepancy that I essentially have to redo my entire case and only be given two weeks to do it in or my case will be dismissed!

I do not intend on performing the actions required by Eckhart. I want a change in the attorney reviewing my case and no adverse action towards my case in the process of any change.

Sincerely, Robert Pellegrini

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,

WENDI L. ROSS
Acting General Counsel

By 
Joseph Eckhart
Regional Attorney

Attachment

cc: Allison Woodall
Kathryn M. Mente

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 22, 2014

Kevin F. Woodall, Attorney
Woodall Law Offices
580 California Street, 16th floor
San Francisco, CA 94104

Re: *Robert Pellegrini v. Regents of the University of California (San Francisco)*
Unfair Practice Charge No. SF-CE-1031-H
WARNING LETTER

Dear Mr. Woodall:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 3, 2013, and subsequently amended on June 28, 2013; August 30, 2013; January 31, 2014; February 24, 2014; March 28, 2014; June 27, 2014; and July 7, 2014.¹ Robert Pellegrini (Pellegrini or Charging Party) alleges that the Regents of the University of California (San Francisco) (UCSF or Respondent) violated the Higher Education Employer-Employee Relations Act (HEERA or Act)² by retaliating against him for protected activity.

As indicated above, the charge consists of an original charge and seven amended charges. Many of these documents were not properly filed and may not be considered for purposes of establishing a prima facie violation of HEERA. First, none of the amended charges, with the exception of the Seventh Amended Charge, include declarations that the facts alleged are true under penalty of perjury. (PERB Regulation 32615(a).) Second, none of the amended charges include a valid proof of service on Respondent. (See PERB Regulations 32135 & 32140.)³

¹ Pellegrini's July 7, 2014 filing includes an unfair practice charge (UPC) form stating that it is an amended charge in this case, UPC No. SF-CE-1031-H. But a cover letter filed with the form describes this as his "second charge." The attachments to the charge are documents relating to Pellegrini's termination, which he originally alleged in his Sixth Amended Charge, filed June 27, 2014. As a result, the July 7, 2014 filing will be considered the Seventh Amended Charge.

² HEERA is codified at Government Code section 3560 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the HEERA and PERB Regulations may be found at www.perb.ca.gov.

³ On July 18, 2014, PERB received a letter from Pellegrini asserting that he had served a copy of all documents on Respondent. This letter, which is not signed under penalty of perjury, includes as attachments copies of certified mail receipts purportedly for each of

Nevertheless, Respondent's position statements indicate that it has received all of the amended charges except for the First Amended Charge, filed on June 28, 2013. There is no prejudice to Respondent in considering the amended charges it has received. (See *Monterey County Office of Education* (1991) PERB Decision No. 913.)

The original charge and the Seventh Amended Charge are the only documents that include declarations under penalty of perjury and that have been received by Respondent. As a result, only these documents are considered below for purposes of determining whether Pellegrini has stated a prima facie case.

FACTS AS ALLEGED

I. Original Charge

From February 2008 through June 2014, Pellegrini was employed at UCSF as a per diem Food Service Worker, a position that is in a bargaining unit represented by AFSCME Local 3299 (AFSCME). Pellegrini worked as a banquet server at UCSF's Mission Bay Conference Center (MBCC).

In December 2010, Mark Wallace (Wallace) became the General Manager for Aramark Corporation (Aramark), a third-party contractor that provides unspecified services related to the operation of MBCC. At this point, the charge alleges, "issues began to arise." Employees attempted to contact AFSCME for assistance with these issues, but AFSCME did not respond.

In March 2011, Pellegrini contacted a friend who was a member of the AFSCME Executive Board. It was suggested that Pellegrini write a list of grievances and obtain signatures of support from his co-workers.

In April 2011, Pellegrini met with Miguel Tamayo (Tamayo), an AFSCME representative.

On July 28, 2011, a meeting was held with representatives of UCSF's Retail Services, Human Resources, and Labor Relations Departments. Pellegrini and another employee, on behalf of the MBCC staff, presented a petition and raised a number of concerns related to staff working conditions. The staff also demanded the termination of Wallace; Liz Stone (Stone), Aramark's assistant manager; and Jay Bergers, the MBCC Banquet Captain.

On October 18, 2011, a follow-up meeting was held for UCSF to discuss the results of its investigation into the staff concerns. UCSF "made mockery" of those concerns, and failed to address them. At the meeting, additional concerns were raised on behalf of the MBCC staff, but these were never addressed.

Pellegrini's filings. This letter does not meet the requirements for a valid proof of service. (See PERB Regulation 32140(a).)

From August through December 2011, Pellegrini communicated by e-mail with AFSCME representatives, but no action was taken. At Tamayo's suggestion, Pellegrini drafted a petition to the UCSF Chancellor regarding working conditions at MBCC. Ultimately, the petition was never submitted.

In January 2012, Tamayo circulated a petition seeking Wallace's termination for "racism." Pellegrini disagreed with the assessment that Wallace was racist, but Tamayo insisted he had "concrete examples." Pellegrini signed the petition, along with 17 other employees.

In February 2012, Michael Adams (Adams), a representative of the UCSF Equal Employment Opportunity (EEO) Office, held a meeting regarding the allegations against Wallace. Pellegrini participated in the meeting and described what he viewed as racist actions by Stone.

In April 2012, Adams determined that an investigation should be conducted into the allegations against Wallace. He discussed his findings with UCSF and Aramark managers. The investigation was conducted by Cheryl Addleman (Addleman). Addleman requested to speak with Pellegrini several times, but Pellegrini declined to participate, "having realized that the investigation was just a sham to try and make the union look like they were responsive to the staff."

From January 2012 through May 2012, Pellegrini began to notice his work hours being reduced. Pellegrini's supervisor attributed this to a two-week "customer service observation" by Wallace. Pellegrini later learned that the worst of these observations was that Pellegrini had walked into a room without smiling and without engaging the guests. Banquet servers do not receive official performance evaluations from UCSF.

From May 2012 through October 9, 2012, Pellegrini was removed from the schedule and only "occasionally" called into work. By September, it was clear that other employees were receiving much more work than Pellegrini. According to Pellegrini, the reduction in his hours and his removal from the work schedule were not "approved" by UCSF. In addition, under the labor contract between AFSCME and UCSF, third-party contractors do not have the authority to remove an employee from the work schedule.

On October 9, 2012, Pellegrini contacted Addleman and agreed to talk to her. Pellegrini told Addleman that he believed the claims that Wallace was racist were unfounded. Pellegrini and Addleman spoke for 90 minutes, and "went into great details covering the previous actions and retaliation." Pellegrini stayed in contact with Addleman for the next four months to inform her that he was still being left off the work schedule. Addleman recommended that Pellegrini be placed on the schedule, but this recommendation was ignored by UCSF administrators.

In February 28, 2013, Addleman concluded her investigation. She wrote a letter stating her conclusion that Wallace had retaliated against Pellegrini by keeping him off the work schedule. Addleman found that Wallace's justification for removing Pellegrini from the work schedule was "insufficient or unprofessional," and was based on only three brief observations of Pellegrini's performance.

Nevertheless, it was not until March 16, 2013, that Pellegrini was restored to the work schedule, following continued telephone calls by Addleman to unspecified individuals.

On March 22, 2013, Pellegrini met with Addleman's supervisor, Sandra Avila (Avila). Pellegrini sought to have Avila clarify that Wallace's retaliation had been for protected whistleblowing and union activities. Wallace also raised a number of other issues of employee working conditions with Avila. Avila gave Pellegrini contact information for six UCSF offices that handle whistleblower cases and advised Pellegrini to obtain "whistleblower status."

Between March 22, 2013 and April 30, 2013, Pellegrini contacted two of these offices, but neither would talk to him "directly." One of the offices referred him to Human Resources.

In March and April 2013, Pellegrini sent whistleblower complaints to the Social Security Administration, regarding the lack of Social Security deductions from employee paychecks, and to the State Auditor General, regarding Wallace's expenditures for holiday parties, which were approved by UCSF.

In April 2013, Pellegrini sent a letter to AFSCME President Kathryn Lybarger (Lybarger) requesting to speak to an AFSCME representative. He received no response. Pellegrini then sent a letter requesting to speak to the AFSCME Executive Board. He again received no response.

On May 15, 2013, Pellegrini's attorney sent a letter to AFSCME threatening legal action if AFSCME failed to take action on Pellegrini's behalf by June 1, 2013.

II. Seventh Amended Charge

The Seventh Amended Charge contains no factual allegations, but attaches the following documents: (1) a June 19, 2014 memorandum to Pellegrini from Tamara Villarina (Villarina), the MBCC Liaison and Retail Services Assistant Manager; (2) two documents that appear to relate to Pellegrini's final paycheck; and (3) an e-mail message from Pellegrini to the Board agent previously assigned to this charge, explaining that he had incorrectly described his June 27, 2014 charge as his Seventh Amended Charge, when it was, in fact, the Sixth Amended Charge.

The June 19, 2014 memorandum from Villarina states: "This is to notify you of your release from your Campus Per Diem appointment as a Food Service Worker in the Mission Bay Conference Services Department of the University of California, San Francisco effective Thursday, June 19, 2014."

In a cover letter to the Seventh Amended Charge, Pellegrini states: "My employment was terminated by UC on June 18, 2014. It was the direct result, in continuation, of me using my right to concerted union activity."

DISCUSSION

I. The 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 allege sufficient facts describing 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

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929 (*Los Angeles*); *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) The charging party's belated discovery of the legal significance of the conduct underlying the charge does not revive the statute of limitations. (*State of California* (2001) PERB Decision No. 1459-S.)

Pellegrini alleges that from January 2012 through May 2012, his work hours were reduced, and that, in May 2012, he was removed from the work schedule. These actions occurred more than six months before the original charge was filed, on June 3, 2013. Addleman's February 28, 2013 conclusion that Wallace and other Aramark managers gave insufficient or false justifications for these scheduling actions relates only to the legal significance of these actions, and therefore does not establish the timeliness of these allegations. (*State of California, supra*, PERB Decision No. 1459-S.) As a result, these allegations are untimely, unless an exception applies. (*Los Angeles, supra*, PERB Decision No. 1929.)

In his Second Amended Charge, Pellegrini argues that there was a "continuing violation."⁴ Under the continuing violation doctrine, conduct that is otherwise untimely may be "revived" by a later, timely alleged, violation of the same type. (*Rio Teachers Association (Lucas)* (2011) PERB Decision No. 2157.) The timely conduct must stand on its own as a violation without reference to the prior conduct. (*County of Orange* (2011) PERB Decision No. 2155-

⁴ This statement is considered as a legal argument, not as a factual allegation, because the Second Amended Charge is not signed under penalty of perjury.

M.) In other words, there must be a new, independently wrongful act that is not barred by the statute of limitations. (*County of Orange* (2006) PERB Decision No. 1868-M.)

Here, there is no indication that after Pellegrini's removal from the schedule in May 2012, UCSF committed a new wrongful act. (*County of Orange, supra*, PERB Decision No. 1868-M.) The failure to restore Pellegrini to the schedule according to Addleman's recommendation was not a new wrongful act. Merely maintaining a position taken outside the statute of limitations period does not establish a continuing violation. (*County of Riverside* (2011) PERB Decision No. 2176-M.)

Even if the failure to restore Pellegrini to the schedule could be considered a new wrongful act, it cannot be determined whether the new wrongful act occurred within the six months preceding the charge. The charge alleges that, following Pellegrini's October 9, 2012 meeting with Addleman, he stayed in contact with Addleman for the next four months, informing her that he was not being restored to the schedule, despite Addleman's recommendations. As a result, even if a new wrongful act is established, it is not clear that it occurred within the statute of limitations period. (*County of Orange, supra*, PERB Decision No. 1868-M.)

Because there is insufficient information to conclude that the continuing violation doctrine applies, Pellegrini has not met his burden of establishing the timeliness of the allegations regarding the reduction of his work hours and his removal from the work schedule. (*Los Angeles, supra*, PERB Decision No. 1929.)⁵

III. Retaliation

To demonstrate that an employer retaliated against an employee in violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (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*)).

A. Protected Activity

The charge adequately alleges that Pellegrini engaged in protected activity by presenting the workplace concerns of his co-workers in meetings with UCSF management (*Regents of the University of California (Davis)* (2004) PERB Decision No. 1590-H), participating in AFSCME's petition seeking the removal of Wallace (*Jurupa Unified School District* (2012) PERB Decision No. 2283 (*Jurupa*)), contacting AFSCME for assistance (*Los Angeles Unified School District* (1992) PERB Decision No. 957), and filing the instant PERB charge (*Trustees of the California State University (San Marcos)* (2010) PERB Decision No. 2140-H). However, Pellegrini's whistleblower complaints to the Social Security Administration and the

⁵ Because these allegations are subject to dismissal as untimely, this letter does not further address whether they state a prima facie case.

State Auditor General are not considered protected activity. (*Coachella Valley Unified School District* (2013) PERB Decision No. 2342.)

B. Adverse Action

In determining whether evidence of adverse action is established, the Board uses an objective test to determine “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.) The harm alleged must be actual, not merely speculative. (*County of Tehama* (2010) PERB Decision No. 2122-M (*Tehama*)). The charge sufficiently alleges that UCSF took adverse action against Pellegrini by terminating his employment (*City of Santa Monica* (2011) PERB Decision No. 2211-M).

C. Employer Knowledge

The question of employer knowledge is whether the relevant decision maker had knowledge of the protected activity. (*County of San Diego* (2012) PERB Decision No. 2258-M (*San Diego*)). Knowledge may be inferred from circumstantial evidence. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337.)

Because Villarina issued the memorandum regarding Pellegrini’s termination, it appears that she was the relevant decision maker. There is no information in the charge establishing that Villarina had knowledge of any of Pellegrini’s protected activities, all of which, with the exception of the PERB charge, occurred in 2011 and 2012. Notably, the charge does not identify the individuals present on behalf of UCSF management at the July 28, 2011 or October 18, 2011 meetings. As a result, the charge fails to establish employer knowledge of Pellegrini’s protected activity. (*San Diego, supra*, PERB Decision No. 2258-M.)

D. Employer Motive

Even if the charge includes sufficient facts to establish employer knowledge, it does not allege sufficient evidence that Pellegrini was terminated because of his protected activity. To establish that the employer took the adverse action because of the employee’s protected activity, the charge must allege either direct or circumstantial evidence of employer motive. Because direct evidence is rare, a prima facie case may be established by circumstantial evidence including: close temporal proximity between the adverse action and the employee’s protected conduct, and additional facts suggestive of an unlawful motive. (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*)). Additional facts that may indicate unlawful motive include disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); a departure from established procedures (*Compton Unified School District* (1979) PERB Decision No. 109 (*Compton*)); a failure to offer justification for its actions (*Oakland Unified School District* (2003) PERB Decision No. 1529); or animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572).

Pellegrini states that his termination was the “direct result” of his participation in concerted union activity. This legal conclusion is not sufficient to establish direct evidence of unlawful motive. (*State of California (Department of Food and Agriculture)*, *supra*, PERB Decision No. 1071-S.)

Pellegrini’s circumstantial evidence of motive consists solely of the proximity in time between his protected activity, specifically, his PERB charge, and his termination. There are no other facts alleged regarding the termination that suggest that UCSF was motivated to take this action because of his protected activity. Because timing alone is not sufficient, the charge fails to include sufficient information to establish circumstantial evidence of motive. (*North Sacramento, supra*, PERB Decision No. 264.)

IV. Conduct by AFSCME

The charge alleges that AFSCME, on a number of occasions, failed to respond to Pellegrini’s individual requests for assistance and to MBCC staff’s requests for assistance. UCSF is not responsible for any alleged failure by AFSCME to discharge its duty of fair representation to the employees it represents. (*Jurupa, supra*, PERB Decision No. 2283.) As a result, these allegations fail to state a prima facie case against UCSF.

CONCLUSION

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 Eighth 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 6, 2014,⁷ PERB will dismiss your charge.

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.*)

⁷ A document is “filed” on the date the document is **actually received** by PERB, including if transmitted via facsimile or electronic mail. (PERB Regulation 32135.)

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

Sincerely,

Joseph Eckhart
Regional Attorney

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