

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



UNITED PUBLIC EMPLOYEES OF
CALIFORNIA, LOCAL 792,

Charging Party,

v.

CITY OF MILPITAS,

Respondent.

Case No. SF-CE-1289-M

PERB Decision No. 2466-M

December 30, 2015

Appearances: United Public Employees of California, Local 792, by Ocean Mottley, Staff Attorney; Renne, Sloan, Holtzman, Sakai, by Erich W. Shiners, Attorney, for City of Milpitas.

Before Huguenin, Winslow, and Gregersen, Members.

DECISION¹

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by United Public Employees of California, Local 792 (UPE) from the dismissal on October 28, 2015, by PERB's Office of the General Counsel of UPE's first amended charge filed on October 9, 2015 against the City of Milpitas (City). UPE alleged that the City violated section 3506 of the Meyers-Milias-Brown Act (MMBA or Act)² by (1) discriminating against employee Robert DeLong (DeLong) by placing him on administrative

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 regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

² The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

leave on May 21, 2014; and (2) failing to move DeLong into a lead position per a promise by a former supervisor.

We have reviewed the record, including the original and amended charges, the City's responses thereto, the warning and dismissal letters, UPE's appeal, and the City's reply. We conclude that the warning and dismissal letters (attached) accurately summarize the charge allegations, are well reasoned, and consistent with applicable law. PERB's Office of the General Counsel concluded that neither of UPE's allegations was timely filed. We review them.

The administrative leave allegation was first made in UPE's original unfair practice charge filed on February 17, 2015. PERB's Office of the General Counsel concluded in the warning letter that this allegation was untimely. The allegation averred that the City had imposed an administrative leave on DeLong on May 21, 2014, significantly more than six months prior to the February 17, 2015 filing date of the original charge. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359.) In its first amended charge, UPE sought to cure this defect, urging that if the limitations period were deemed to commence on October 9, 2014, the date upon which DeLong's administrative leave concluded, the allegation would be timely. PERB's Office of the General Counsel rejected this contention, noting that the limitations period for a termination or lesser discipline (here an administrative leave) commences upon the date the termination or lesser discipline becomes effective, not on the date it concludes. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381; *Regents of the University of California* (2004) PERB Decision No. 1585-H.)

The other allegation, which stated simply that "Delong has not been given the opportunity to rotate into the position of lead as promised to him by a former supervisor," was raised initially in the first amended charge. PERB's Office of the General Counsel concluded

that this allegation failed to meet UPE's pleading burden under PERB Regulation 32615(a)(5)³ to include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M.) Alternatively, noting that a letter from DeLong mentioned in the original charge contained a reference to rotation into a lead position, PERB's Office of the General Counsel concluded

³ 32615. Contents of Charge.

(a) A charge may be filed alleging that an unfair practice or practices have been committed. The charge shall be in writing, signed under penalty of perjury by the party or its agent with the declaration that the charge is true, and complete to the best of the charging party's knowledge and belief, and contain the following information:

(1) The name and address of the party alleged to have engaged in an unfair practice. If the party is the State of California, the name and address of the "appointing power" as defined in Government Code Section 18524, and of the Governor shall be set forth;

(2) The name, address, and telephone number of the charging party;

(3) The name, address, and telephone number of an authorized agent of the charging party to be contacted;

(4) The sections of the Government Code, the applicable local rules, the applicable rule or regulation adopted by the Statewide Authority pursuant to IHSSEERA or the sections of the Public Utilities Code, alleged to have been violated;

(5) A clear and concise statement of the facts and conduct alleged to constitute an unfair practice; and

(6) A statement of the remedy sought by the charging party;

(b) A charge filed under MMBA, Article 3 of the Trial Court Act, or the Court Interpreter Act alleging a violation of local rules must also contain a copy of the applicable rule(s).

c) Service and proof of service on the respondent pursuant to Section 32140 are required.

that even if sufficiently clear in light of the contents of the letter,⁴ the allegation would nonetheless be untimely since the letter admitted that DeLong had learned in September 2012 that he would not be given a lead assignment. (*Los Angeles Unified School District, supra*, PERB Decision No. 2359.)

In its appeal, UPE asks PERB to defer the charge allegations to arbitration under the parties' MOU. The City responds that as the charge was untimely, PERB never acquired jurisdiction over the matter, and thus there is no basis for deferral. We concur with the City and observe that in any event deferral is an affirmative defense to be raised by a respondent, not a charging party. (*Claremont Unified School District* (2014) PERB Decision No. 2357, p. 2.) Thus, the issue of deferral is moot.

We hereby affirm dismissal of the first amended charge and adopt as the decision of the Board itself the warning and dismissal letters of the Office of the General Counsel, as supplemented by our brief discussion herein.

ORDER

The unfair practice charge in Case No. SF-CE-1289-M is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Winslow and Gregersen joined in this Decision.

⁴ DeLong's letter in the original charge provides, in pertinent part:

August 2012: Meeting with Kathleen to discuss out of class rotation. She was open to putting me in the seat and asked me to tell the Fleet Staff at our upcoming staff meeting later in the day.

September 2012[:] Kathleen told me later that Tom Williams restrained her from rotating the out of class assignment and that she knows that I'm being underutilized. She's also stated that she "is just the acting Public Works Director and her hands are tied and has no real authority". (*Sic.*)

PUBLIC EMPLOYMENT RELATIONS BOARD

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



September 10, 2015

Eric Miller, Labor Representative
United Public Employees of California, Local 792
1800 Park Marina Drive
Redding, CA 96001

Re: *United Public Employees of California, Local 792 v. City of Milpitas*
Unfair Practice Charge No. SF-CE-1289-M
WARNING LETTER

Dear Mr. Miller:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 17, 2015. The United Public Employees of California, Local 792 (Local 792 or Charging Party) alleges that the City of Milpitas (City or Respondent) violated section 3506 of the Meyers-Milias-Brown Act (MMBA or Act)¹ by discriminating against employee Robert DeLong (DeLong).

DeLong is an employee of the City and a Local 792 executive board member. The charge attaches a letter DeLong sent to Local 792's attorney, dated October 18, 2014. Section 6.d of the charge form appears to incorporate the factual assertions made by DeLong in this letter.

The letter is a timeline of events going back to June 2009. More recently, in September 2014, DeLong was asked to return to work following several months of administrative leave. DeLong did return to work on October 5, 2014, and asserts that he has never been provided a "written reason" why he was placed on administrative leave.

DISCUSSION

Charging Party's Burden

PERB Regulation 32615(a)(5) requires that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." In doing so, a charging party should allege with specificity the particular facts giving rise to a violation. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M.) The charging party may do this by alleging sufficient facts describing the "who, what, when, where and

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.

how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S (*Dept. of Food and Agriculture*), citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Such allegations should focus on the elements of the *prima facie* case. Mere legal conclusions are not sufficient to state a *prima facie* case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

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; *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 Charge is Untimely

The limitations period in a case involving termination or lesser discipline commences on the date the termination or lesser discipline becomes effective. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381; *Regents of the University of California* (2004) PERB Decision No. 1585-H.)

Here, the charge alleges that DeLong was placed on administrative leave pending investigation on May 21, 2014. This allegation well outside the six-month limitations period prior to the filing of the charge. Charging Party has therefore not met its burden to demonstrate that the charge is timely. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359).²

For these reasons the charge, as presently written, does not state a *prima facie* case.³ 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

² Similarly, prior events described in the "timeline" attached to the charge are untimely.

³ 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.*)

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 **September 24, 2015**,⁴ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Daniel Trump
Regional Attorney

DT

⁴ 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.)

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
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October 28, 2015

Ellis Miller, Labor Representative
United Public Employees of California, Local 792
1800 Park Marina Drive
Redding, CA 96001

Re: *United Public Employees of California, Local 792 v. City of Milpitas*

Unfair Practice Charge No. SF-CE-1289-M

DISMISSAL LETTER

Dear Mr. Miller:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 17, 2015. The United Public Employees of California, Local 792 (Local 792 or Charging Party) alleges that the City of Milpitas (City or Respondent) violated section 3506 of the Meyers-Milias-Brown Act (MMBA or Act)¹ by discriminating against employee Robert DeLong (DeLong).

Charging Party was informed in the attached Warning Letter dated September 10, 2015, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it on or before September 24, 2015, the charge would be dismissed.

Charging Party was granted an extension of time to October 9, 2015 to file a First Amended Charge. Charging Party filed a First Amended Charge on October 9, 2015.

The original charge incorporated statements made in a letter from DeLong to Local 792's attorney containing a timeline of events going back to June 2009. According to the letter, DeLong was placed on administrative leave on May 21, 2014.

The Warning Letter noted that because the charge was filed more than six months after DeLong was placed on administrative leave, any allegations related to that action are untimely. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359.)

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.

The First Amended Charge argues that because DeLong's return date, October 5, 2014, was less than six months prior to the filing of the charge, the allegation is timely. However, as noted in the Warning Letter, the limitations period in a case involving termination or lesser discipline commences on the date the termination or lesser discipline becomes effective. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381; *Regents of the University of California* (2004) PERB Decision No. 1585-H.) DeLong's administrative leave became effective on May 21, 2014. This allegation is therefore untimely.

The First Amended Charge also states:

This discrimination continues to this date. Mr. DeLong has not been given the opportunity to rotate into the position of lead as promised to him by a former supervisor.

It is unclear what allegations in the original charge, if any, this new assertion relates to. At a minimum, Charging Party must allege with specificity the particular facts giving rise to a violation. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M.)

It is possible that Charging Party is referring to this allegation from DeLong's letter in the original charge:

August 2012: Meeting with Kathleen to discuss out of class rotation. She was open to putting me in the seat and asked me to tell the Fleet Staff at our upcoming staff meeting later in the day.

September 2012: Kathleen told me later that Tom Williams restrained her from rotating the out of class assignment and that she knows that I'm being underutilized. She also stated that she "is just the acting Public Works Director and her hands are tied and has no real authority."

No additional information or context is provided for this allegation. Charging Party has not met its burden under PERB Regulation 32615(a)(5) to include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (*National Union of Healthcare Workers, supra*, PERB Decision No. 2249a-M.) Furthermore if, as it appears, Respondent determined in September 2012 that DeLong could not rotate into a lead position, any charge related to that conduct must have been filed within six months. As with the administrative leave allegation, this allegation is untimely. (*Los Angeles Unified School District, supra*, PERB Decision No. 2359.)

For the above reasons and those contained in the Warning Letter, the charge is hereby dismissed.

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,

J. FELIX DE LA TORRE
General Counsel

By _____
Daniel Trump
Regional Attorney

Attachment

cc: Erich W. Shiners, Attorney