STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

IVETTE RIVERA, Charging Party, v. EAST BAY MUNICIPAL UTILITY DISTRICT, Respondent.	Case No. SF-CE-1208-M PERB Decision No. 2469-M January 25, 2016

Appearances: Ivette Rivera, on her own behalf; Liebert Cassidy Whitmore by Zachary W. Shine, Attorney, for East Bay Municipal Utility District.

Before Martinez, Chair; Banks and Gregersen, Members.

DECISION[1]

GREGERSEN, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Ivette Rivera (Rivera) of a dismissal of her unfair practice charge by the Office of the General Counsel (OGC) (attached). The charge, as amended, alleged that the East Bay Municipal Utility District (District) violated the Meyers-Milias-Brown Act (MMBA)[2] by: (1) depriving Rivera and similarly situated employees of their rights under the District's "Employer-Employee Relations Policy" (EERP) because AFSCME Local 444 (Local 444) was recognized by the District as the employees' exclusive

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

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

representative; (2) misrepresenting Rivera's due process right to present her complaints directly to the District's board of directors; (3) entering into a secret agreement with Local 444 to commit the above-referenced misconduct and convincing Rivera to file a grievance; (4) omitting her comments in the minutes of a meeting of the District's board of directors; (5) declining to discuss Rivera's concerns with the above-referenced actions of the board of directors; (6) refusing to hear Rivera's grievance outside of the grievance process under the memorandum of understanding between the District and Local 444; (7) planning and attempting to conceal her unfair practice allegations; (8) losing, misplacing, concealing, censoring, or destroying documents that Rivera provided to the District; (9) mis-attributing statements in the board of directors' minutes; (10) failing to conduct an investigation into Rivera's allegations of District misconduct; (11) refusing to allow Rivera to represent herself in employment disputes with the District without Local 444 involvement; and (12) extracting union dues from Rivera despite the fact that she is a supervisor. Rivera alleged that this conduct constituted violations of MMBA sections 3502 and 3507, PERB Regulation 32603, subdivisions (a), (d), (f), and (g), EERP sections 4, 12(a), 15, and 20, as well as Rivera's federal and state free speech, association and due process rights.

The OGC dismissed Rivera's unfair practice charge for failure to state a prima facie case and lack of standing. Rivera timely filed an appeal, and the District timely filed its opposition. Additionally, Rivera filed a separate "Request To Supplement Case File Record." The District objected to Rivera's request as failing to comply with PERB Regulation 32621.[3]

[3] PERB Regulation 32621 states, in relevant part:

> Before the Board agent issues or refuses to issue a complaint, the charging party may file an amended charge. The amended charge must contain all allegations on which the charging party relies

The Board has reviewed the case file in its entirety and has fully considered the relevant issues and contentions on appeal. Based on this review, the Board finds the warning and dismissal letters accurately describe the allegations included in the unfair practice charge, as amended, and are well-reasoned and in accordance with applicable law. The appeal raises no issues warranting the Board's further consideration. We therefore deny the appeal and adopt the warning and dismissal letters as the decision of the Board itself, as supplemented by the discussion below.

DISCUSSION

Rivera's appeal fails to comply with PERB Regulation 32635, subdivision (a), "Review of Dismissals," which 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.

In her appeal, Rivera alleges that PERB Board agents conspired with the District and Local 444 to deny Rivera her constitutional right to equal protection and due process by denying her right to a hearing. Rivera alleges that the OGC failed to report Rivera's collusion and concealment allegations, and repeats many of the same facts and arguments she made in her second amended charge, without pointing to any error in fact or law by the OGC.

Rivera fails to state "the specific issues of procedure, fact, law or rationale to which the appeal is taken." Her allegations of a conspiracy among PERB, the District and Local 444 are

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and must meet all of the requirements of Section 32615. The amended charge shall be processed pursuant to Section 32620.

wholly unsupported. This failure to comply with PERB Regulation 32635, subdivision (a) subjects the appeal to denial on that ground alone. (*State of California (Department of Mental Health, Department of Developmental Services)* (2012) PERB Decision No. 2305-S, p. 4.)

Rivera argues that the OGC erred in failing to issue a complaint on her allegation that the District's Human Resources Manager Delores Turner (Turner) declined Rivera's requests to discuss the concerns Rivera raised to the District board on December 10, 2013, and that such action constituted retaliation because of protected activity. This allegation fails to state a prima facie case of retaliation, in part because Rivera does not allege that Turner's action was adverse to her employment. In determining whether the employer's action is adverse to the employee, the Board applies an objective test. The question is: "whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (*Jurupa Unified School District* (2013) PERB Decision No. 2309 at p. 8, quoting *Newark Unified School District* (1991) PERB Decision No. 864.) We conclude that a reasonable person under the same circumstances would not consider Turner's actions to have an adverse impact on Rivera's employment, and that therefore the OGC did not err in failing to issue a complaint on this allegation.

Furthermore, Rivera's "Request To Supplement Case File Record" does not satisfy PERB Regulation 32635, subdivision (b),[4] because no good cause is shown to present new supporting evidence at the appeal stage.

[4] PERB Regulation 32635, subdivision (b) states, in relevant part:

> (b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

ORDER

The unfair practice charge in Case No. SF-CE-1208-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-0111
Fax: (510) 622-1027

September 14, 2015

Ivette Rivera

Re: *Ivette Rivera v. East Bay Municipal Utility District*
Unfair Practice Charge No. SF-CE-1208-M
DISMISSAL LETTER

Dear Ms. Rivera:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 8, 2014. A First Amended Charge was filed on May 16, 2014. In the First Amended Charge, Ivette Rivera (Rivera or Charging Party) alleged that the East Bay Municipal Utility District (District or Respondent) violated sections 3502, 3503, 3504, 3505, 3506, 3506.5, 3507(a)(4) and (5), and 3507.3 of the Meyers-Milias-Brown Act (MMBA or Act),[1] by creating and maintaining a grievance procedure under which union-represented employees are denied the right to individually invoke certain steps of the grievance process, including arbitration.

Charging Party was informed in the attached Warning Letter dated March 24, 2015, 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, she should amend the charge. Charging Party was further advised that, unless she amended the charge to state a prima facie case or withdrew it on or before April 13, 2015, the charge would be dismissed.

On April 27, 2015, Charging Party filed a Second Amended Charge.

Facts Alleged by Charging Party and the March 24, 2015 Warning Letter

As summarized by the Warning Letter, Charging Party alleges that she is subject to a grievance procedure that prevents her from exercising "the right to individual representation." Charging Party is employed by the District as a gardener foreman, and she is a member of a bargaining unit that is represented by AFSCME Local 444 (Local 444). Charging Party alleges that in or around 2005, the District changed its former complaint and grievance procedures in a way that "effectively stripped employees of their rights of representation." Charging Party reported her

[1] The MMBA is codified at Government Code section 3500 et seq. PERB's 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.

dissatisfaction with the grievance procedures to the District's Board of Directors on December 10, 2013, January 14 and January 28, 2014.

The Warning Letter explained to Charging Party that, pursuant to the grievance procedure in the MOU, individual employees may in fact file grievances without Local 444's involvement. It even appears that individual employees may request arbitration of their grievances without Local 444's involvement.

The Warning Letter observed that only a specified category of grievances, labeled "limited civil service examination grievances," could solely be filed by Local 444. The Warning Letter also noted that it appears that the District may maintain a non-contractual process for the resolution of classification disputes as part of its Civil Service Rules.

The Warning Letter observed that Charging Party was challenging procedures that were in effect since 2005, which is outside of the MMBA's six-month statute of limitations. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.)

The Warning Letter noted that although MMBA sections 3502, 3503 and 3507(a)(4) make reference to the right of an individual employee to represent themselves in their employment relations with a public agency, this right has been defined by PERB and the courts in fairly narrow terms. The Warning Letter summarized case law that discussed the limitations on the right of an individual employee to represent themselves. In addition, the Warning Letter stated that case law indicates that employee due process rights are not violated by collective bargaining agreements under which unions have control over whether to pursue an employee's grievance.

The Warning Letter advised Charging Party that she lacked standing to allege a violation of MMBA section 3505. As the Warning Letter explained, individual employees do not have standing to allege violations of statutes which protect the collective bargaining rights of employee organizations. (*State of California (Department of Corrections)* (1993) PERB Decision No. 972-S.) The Warning Letter also noted that section 3507.3 establishes the right of professional employees to be represented separately from nonprofessional employees. However, Charging Party did not submit evidence to show that the District's professional employees are not represented separately from the District's nonprofessional employees.

The Second Amended Charge

In response to the Warning Letter, Charging Party filed the Second Amended Charge.

The Second Amended Charge is lengthy and contains many paragraphs that consist only of vague accusations and legal conclusions. For example, numbered paragraph 16 states verbatim:

> Charging Party believes and therefore alleges that on December 10, 2013, the District entered into a secret agreement, in part, with the union to:

a) conceal the District and the union's violation of Charging Parties due process rights.
b) deprive Charging Party of her right to remedy that would address her complaints.
c) conceal from public documents the policies and procedures that interfered with represented employee's rights to due process.
d) convince Charging Party to file a grievance.

As Charging Party was advised in the Warning Letter, bare assertions and legal conclusions fail to satisfy Charging Party's burden. (*United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The Second Amended Charge describes, in more detail than the previous charge, Charging Party's appearances at the District's Board of Directors meetings on December 10, 2013, January 14 and January 28, 2014. The Second Amended Charge describes Charging Party's comments during the Board meetings, and the documents that she provided to the Board during the meeting. Charging Party voiced several concerns at the Board Meetings, including her belief that she performed the duties of a supervisor.

After Charging Party appeared at the Board meeting held on December 10, 2013, she was contacted by Mike Rich (Rich), the District's Manager of Employee Relations, who stated that he wanted to schedule a meeting to hear the concerns that Charging Party had raised at the Board meeting. After some e-mail correspondence back and forth, Charging Party met with Rich on January 10, 2014. On or around January 23, 2014, Rich sent Charging Party a letter stating, in part, "If you think that your position is not allocated to the correct job classification you may request a classification study pursuant to Civil Service Rule 4, Section 7."

The Second Amended Charge describes Charging Party's further communications with Rich. The Second Amended Charge also describes Charging Party's correspondence with various other District employees and with individual District Board members.

Charging Party sets forth many allegations related to her interaction with the Board members and other District employees. She alleges, in part, that the Board meeting minutes are inaccurate, the District lost documents that she provided to the Board, Board members failed to address comments that she made at the Board meeting, and Board members disregarded the fact that she was hired to perform supervisory duties.

Charging Party alleges that the District violated MMBA sections 3502 and 3507, and PERB Regulations 32603(a), (d), (f), and (g). Charging Party alleges that "EBMUD Procedure 216" violates the MMBA. She also alleges that the District violated her first amendment and due process rights and California Government Code sections 53296-53297.

Charging Party alleges violations of the EBMUD Employer-Employee Relations Policy sections 4, 12(a), 15, and 20. (Charging Party attached a copy of the Employer-Employee

Relations Policy, dated March 13, 1973.) The Employer-Employee Relations Policy states, in relevant part:

> Section 4. Employee Rights
> Employees of the District . . . shall have the right to represent themselves individually in their employment relations with the District . . .
>
> Section 12. Recognition of Employee Organizations as Majority Representative--Formal Recognition
> (A). . . The employee organization found to represent a majority of the employees in an appropriate unit shall be granted formal recognition and is the only employee organization entitled to meet and confer in good faith on matters within the scope of representation for employees in such unit. This shall not preclude other recognized employee organizations or individual employees from consulting with management representatives on employer-employee relations matters of concern to them.
>
> Section 15. Grievances
> A grievance is any dispute concerning the interpretation or application of this Resolution or of rules or regulations governing personnel practices or working conditions or of the practical consequences of a District rights decision on wages, hours and other terms and condition of employment.
>
> Section 20. Construction
> (A) Nothing contained in this Resolution shall be construed to deny any person or employee the rights granted by Federal and State laws.
> (B) The rights, powers and authority of the District and the General Manager, as set forth in the Municipal Utility District Act, shall not be modified or restricted by this Resolution.
> (C) The provisions of this Resolution are not intended to conflict with, nor shall they be construed in a manner inconsistent with the provisions of Chapter 10, Division 4, Title 1 of the Government Code of the State of California (Sections 3500, et seq.) as amended in 1968, or the Municipal Utility District Act.
> (D) The enactment of this Resolution shall not be construed as making the provisions of Section 923 of the California Labor Code applicable to employees of the District.

Charging Party has Failed to Correct Deficiencies Described in the Warning Letter

The Warning Letter identified four deficiencies in the First Amended Charge: (1) failure to show the charge was filed in a timely manner; (2) failure to state a prima facie case that the District had violated Charging Party's right to represent herself under the MMBA; (3) lack of standing to allege violation of MMBA section 3505; and (4) failure to present evidence of a violation of MMBA section 3507.3. Charging Party has arguably shown that her charge is timely, because the Second Amended Charge alleges that the current MOU was ratified within

the six-month limitations period. However, Charging Party has not cured the other deficiencies outlined in the Warning Letter.

Charging Party has failed to allege facts showing that the MOU's grievance procedures violates her MMBA right to represent herself in her employment relations with the District. As discussed in more detail in the Warning Letter, the right to self-representation is defined in narrow terms. (*See Relyea v. Ventura County Fire Protection District* (1992) 2 Cal.App.4th 875, 833.) The Second Amended Charge does not contain any additional facts to show that the District's grievance procedures violates this right.

In addition, Charging Party has not alleged additional facts to show that she has standing to bring a claim that the District violated MMBA section 3505. Nor has she submitted evidence to show that the District has violated MMBA section 3507.3 by denying professional employees the right to be represented separately from nonprofessional employees.

The Additional Allegations in the Second Amended Charge Do Not State a Prima Facie Case

1. PERB's Jurisdiction

Charging Party's primary concerns in the Second Amended Charge seem to be her belief that the District issued inaccurate Board Meeting minutes, lost documents Charging Party provided to Board members, and did not adequately address the issues that Charging Party raised during several Board meetings. These allegations do not state a prima facie case for a violation of the MMBA. PERB does not have jurisdiction to adjudicate these allegations, because PERB's jurisdiction is limited to the determination of unfair labor practice claims arising under the MMBA and various other public-sector collective bargaining statutes. (*Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S.)

Further, PERB's jurisdiction does not include enforcement of the U.S. Constitution. (*Housing Authority of the City of Los Angeles* (2011) PERB Decision No. 2166-M.) Accordingly, Charging Party's allegations that the District violated her first amendment and due process rights do not state a prima facie case. Similarly, Charging Party's allegation that the District violated California Government Code sections 53296-53297 do not state a prima facie case. (*Ibid.*)

2. Interference

The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the

> exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons.

(*Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807.)

Here, Charging Party's speech at the Board Meetings was arguably protected conduct. However, there are no facts in the Second Amended Charge that indicate that the District interfered with Charging Party's protected conduct. Accordingly, Charging Party has failed to state a prima facie case for interference.

3. Domination

To state a prima facie violation of MMBA sections 3502 and 3503 and PERB Regulation 32603(d), the charging party must allege facts which demonstrate that the employer's conduct tends to interfere with the internal activities of an employee organization or tends to influence the choice between employee organizations. (*Santa Monica Community College District* (1979) PERB Decision No. 103; *Redwoods Community College District* (1987) PERB Decision No. 650.)[2] Proof that an employer intended to unlawfully dominate, assist or influence employees' free choice is not required. Nor is it necessary to prove that employees actually changed membership as a result of the employer's act. (*Ibid.*) The threshold test is "whether the employer's conduct tends to influence [free] choice or provide stimulus in one direction or the other." (*Santa Monica CCD, supra*, at p. 22.)

No facts in the Second Amended Charge indicate that the District interfered with the internal activities of an employee organization, or influenced the choice between employee organizations. Further, only an employee organization, and not an individual employee, may bring a charge of domination or interference with an employee organization. (See *Jurupa Unified School District* (2012) PERB Decision No. 2283; *State of California (Department of Corrections)* (1993) PERB Decision No. 972-S.) Accordingly, Charging Party has failed to state a prima facie case for domination.

4. Local Rules

Charging Party alleges a violation of PERB Regulation 32603(f), which states that it is an unfair practice for a local agency to adopt or enforce a local rule that is not in conformance with the MMBA. Charging Party alleges that EBMUD Procedure 216 violates the MMBA. Charging Party did not properly file a copy of this policy with her Second Amended Charge.[3]

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[2] 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.)

[3] On June 15, 2015, Charging Party sent by e-mail message a copy of EBMUD Procedure 216 to former Senior Regional Attorney Miles Locker's e-mail address. She also copied Respondent on this e-mail message. Respondent objected to this correspondence as

Accordingly, Charging Party has not stated a prima facie case that the District violated PERB Regulation 32603(f).

Charging Party also alleges a violation of PERB Regulation 32603(g) which states, in part, that it is an unfair practice to violate any local rule adopted pursuant to Government Code section 3507. Charging Party alleges violations of EBMUD Employer-Employee Relations Policy sections 4, 12(a),15, and 20.

EBMUD Employer-Employee Relations Policy section 4 states that employees "shall have the right to represent themselves individually in their employment relations with the District." Section 12(a) states that employees are not precluded from consulting with management representatives on employer-employee relations matters of concern to them. The allegations in the Second Amended Charge do not explain exactly how the District violated these sections. In fact, it appears that Charging Party was afforded multiple opportunities to speak at the District's Board of Directors meetings and correspond with District management employees. Further, Charging Party has not shown that the MOU grievance procedures conflict with EBMUD Employer-Employee Relations Policy sections 4 and 12(a).

Charging Party alleges that the District violated EBMUD Employer-Employee Relations Policy section 15. Section 15 merely defines a grievance. Thus, Charging Party has not established a violation of section 15.

Finally, Charging Party alleges that the District violated EBMUD Employer-Employee Relations Policy section 20. Section 20 sets forth how the policy should be construed. Thus, Charging Party has not established a violation of section 20.

For these reasons and incorporating the discussion in the attached Warning Letter, the charge is hereby dismissed.

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improperly filed on June 24, 2015. Electronic filings must be directed to PERBe-file.SFRO@perb.ca.gov, not sent directly to board agents. (Cal. Code Regs., tit. 8, § 32091.) Further, amended charges must contain all allegations on which a charging party relies. (Cal. Code Regs., tit. 8, § 32621.) Accordingly, Charging Party's e-mail message was not properly filed, and it cannot be used as evidence to support Charging Party's charge.

However, even if Charging Party had properly filed her June 15, 2015 e-mail message, she would not have established a prima facie case that EBMUD Procedure 216 violates the MMBA. EBMUD Procedure 216 sets forth an appeal procedure for employees not represented by a union. EBMUD Procedure 216 states that "Employees working in union-represented positions must use the grievance procedure contained in the governing MOU." As discussed herein, Charging Party has not established a prima facie case that the MOU grievance procedures violate 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,

J. FELIX DE LA TORRE
General Counsel

By _____
Jessica Kim
Regional Attorney

Attachment

cc: Richard C. Bolanos, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
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March 24, 2015

Ivette Rivera

Re: *Ivette Rivera v. East Bay Municipal Utility District*
Unfair Practice Charge No. SF-CE-1208-M
WARNING LETTER

Dear Ms. Rivera:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 8, 2014. An amended unfair practice charge was filed on May 16, 2014. In this amended charge, Ivette Rivera (Rivera or Charging Party) alleges that the East Bay Municipal Utility District (District or Respondent) violated sections 3502, 3503, 3504, 3505, 3506, 3506.5, 3507(a)(4) and (5), and 3507.3 of the Meyers-Milias-Brown Act (MMBA or Act),[1] by creating and maintaining a grievance procedure under which union-represented employees are denied the right to individually file complaints or invoke certain steps of the grievance process, including arbitration

Facts Alleged By Charging Party

Charging Party states that she is employed by the District as a gardener foreman, that she is within a bargaining unit that is represented by AFSCME Local 444 (Local 444), and that, along with all other represented employees, she is subject to a grievance procedure that prevents her from exercising "the right to individual representation." She alleges that "[s]ince 2005, unions were bestowed, by the [District's] Board of Directors and [Department of] Human Resources, [with] exclusive authority and responsibility to address all complaints and grievances on behalf of all represented employees." Additionally, Charging Party alleges that by replacing its former complaint and grievance policies and procedures with the current policies and procedures, in or around 2005, the District "effectively stripped employees of their rights of individual representation." Moreover, she asserts that Local 444 and the District have "intimidated, interfered, discriminated, restrained and attempted to coerce me from exercising my rights to due process for 9 years."

Charging Party asserts that she engaged in recent "whistleblowing" efforts, on December 10, 2013, January 14 and January 28, 2014, by "report[ing] to the [District's Board of Directors]

[1] The MMBA is codified at Government Code section 3500 et seq. PERB's 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.

that the District's complaint and grievance process for represented employees is unfair." After concluding that the Board of Directors would not make the changes she sought, Rivera filed this charge with PERB.

It is somewhat difficult to understand exactly how the District changed its grievance and complaint procedures in 2005, as Charging Party did not provide copies of all of the former policies and procedures which are referenced in her charge. As alleged in the charge, until 2005 there were "[three] procedures for filing grievances and one non-grievance procedure to handle complaints regarding ... performance appraisals and established wages or salaries," but under the new procedures, "represented employees no longer were afforded the complaint resolution procedure" for non-grievance complaints. Charging Party further alleges that because the MOUs between the District and Local 444 have "never contained a resolution process for filing non-grievable complaints without union intervention," these MOUs denied due process to represented employees. Finally, Charging Party asserts that under the District's current procedures, "[represented employees are denied access to Steps 2 or 3 if the complaint is not MOU related or covered under Civil Service Rules," and as such, these procedures violate MMBA section 3502.

Respondent's Position

Respondent filed a verified position statement on June 20, 21014, and a verified amended position statement on August 4, 2014. Respondent contends that the charge is time-barred And therefore, the charge must be dismissed. Respondent further contends that even if the charge was not time-barred, it would have to be dismissed because of its failure to state a prima facie case, in that the charge is not supported by specific factual allegations but rather, is solely based upon conclusory statements of law. Finally, Respondent asserts that the Charging Party lacks standing to bring a charge alleging a violation of MMBA sections 3505 and 3507, and that the filing of an unfair practice charge with PERB is not the appropriate mechanism to adjudicate a dispute under MMBA section 3507.3.

Relevant Provisions of the MOU Between Local 444 and the District

As a member of the bargaining unit represented by Local 444, Charging Party is covered by the MOU between Local 444 and the District. Under the terms of that MOU, a grievance is defined as "any dispute between the District and an employee or group of employees concerning the interpretation or application of this [MOU], or the interpretation or application of rules or regulations governing personnel practices or working conditions." (MOU section 22.2.1.1.) There is a three step grievance procedure, commencing with the filing of a written grievance through use of a specified form, which may be filed by an employee without the union's participation or consent. (MOU section 22.5.1.1.) The first step results in a written decision by the employee's immediate supervisor. (MOU section 22.5.1.1.2.) An employee who is not satisfied with the Step 1 written response from his or her immediate supervisor can escalate the grievance to Step 2, without the union's participation or consent, by timely filing the specified form with the Manager of Employee Relations. (MOU section 22.5.2.1.) Step 2 proceedings are held before a Board of Adjustment, consisting of two representatives of

management and two labor representatives. (MOU section 22.5.2.2.) If the grievance remains unresolved after the conclusion of Step 2 proceedings, the grievant may submit the grievance to binding arbitration before a neutral arbitrator, by filing a timely written request, stating the issue to be arbitrated, with the Manager of Employee Relations. (MOU section 22.5.3.2.) The MOU appears to contemplate that an individual employee can request arbitration without the consent of the union, as the MOU expressly provides that "[t]he expenses of the arbitrator shall be shared equally by the District and the Union or employee, as appropriate." (MOU section 22.5.3.3.4.)

The MOU also provides for "limited civil service examination grievances," which may be filed by Local 444 on behalf of a current employee or group of current employees, with respect to the following disputes: (1) disqualification from taking an examination, (2) examination results, (3) other grievances pertaining to recruitment, examination or selection as stated in the civil service rules.[2] (MOU sections 22.6.1-22.6.1.3.) Under the procedures set out in the MOU, it does not appear that any an individual employee or job applicant can file this sort of limited civil service examination grievance.[3] This type of grievance is processed under a compressed, two-step procedure, with Step 1 culminating in a written decision from the Manager of Human Resources. This decision may be appealed by Local 444 by filing a timely request for an expedited arbitration. (MOU sections 22.6.1.3.1-2.6.2.)

Discussion

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." 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 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.) Mere legal conclusions are not sufficient to state a prima facie case. (*Id.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

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[2] The MOU does not specify what civil service rules apply to this type of grievance. Neither party has provided PERB with a copy of these rules.

[3] There may be other procedures available for individual employees and job applicants to challenge a civil service examination and/or the results of such an examination. In a section of the MOU dealing with the election of remedies, there is a reference to "the District Complaint Procedure," and "the District Civil Service Procedure." (MOU section 22.67.2.)

A prima facie case is established if the factual allegations set out in the charge are sufficient to satisfy the legal elements of the alleged violation. In the initial processing of an unfair practice charge, PERB will assume that the facts set out in the charge are true. If these alleged facts establish the legal elements of a violation, so as to set out a prima facie case, PERB will issue a complaint, thereby allowing the charge to proceed to an evidentiary hearing. (PERB Regulations § 32640; *Eastside Union School District* (1984) PERB Decision No. 466.) However, if the alleged facts are not sufficient to establish a prima facie case, PERB will notify the Charging Party of any deficiencies in the allegations, so as to give the Charging Party an opportunity to cure the deficiency by filing an amended charge. If the Charging Party still fails to establish a prima facie case, the charge will be dismissed by PERB without the issuance of a complaint. (PERB Regulations §§ 32620, 32621, 32630.)

Timeliness

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.)[4] Belated awareness of the legal significance or potential illegality of another party's conduct does not excuse an otherwise untimely filing. (*SEIU-United Healthcare Workers West* (2011) PERB Decision No. 2172-M; *Orange County Fire Authority* (2008) PERB Decision No. 1968-M.) A charging party bears the burden of demonstrating that the charge is timely filed, as timeliness is an essential element of a prima facie case. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359; *City of Escondidio* (2013) PERB Decision No. 2311-M.)

Once the limitations period begins to run, a charging party "cannot cause it to begin anew by making the same request over and over again" because "such a result would eviscerate the purpose of the statute of limitations." (*California State Employees Association, Local 1000* (2003) PERB Decision No. 1553-S.) To be sure, under the "continuing violation doctrine," a violation within the six-month limitations period may revive an earlier violation of the same type that occurred outside the limitations period. But for the doctrine to apply, the violation within the limitations period must constitute an independent unfair practice without reference to the prior violation. A continuing violation is not found when the employer's action during the limitations period merely confirms or reiterates the position it took and communicated outside the limitations period. (*County of Riverside* (2011) PERB Decision No. 2176-M; *Fresno County Office of Education* (1993) PERB Decision No. 978; *UCLA Labor Relations Division* (1989) PERB Decision No. 735-H.)

[4] 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.)

As alleged in the charge, the challenged procedures have been in effect since 2005, far outside the six-month statute of limitations. No facts were alleged to show the commission of an independent unfair practice within this limitations period. Charging Party's complaints regarding these procedures, communicated to the District's Board of Directors, in December 2013 and January 2014, though within the limitations period, do not appear to be related to any new, independent violation, and thus, are not sufficient to revive the violation alleged to have taken place when these procedures were adopted.

The Right of Individual Employees to Represent Themselves Under the MMBA

MMBA sections 3352, 3503 and 3507(a)(4) all make reference to the right of an individual employee to represent himself or herself in his or her employment relations with the public agency. This right has been defined both by PERB and the courts in fairly narrow terms. It does not encompass a right to negotiate with the employer over terms and conditions of employment; rather, "it is essentially the right to be heard, under [which] employees retain the ability to raise their personal concerns through whatever grievance or other administrative appeal and internal communications procedures exist." (*Relyea v. Ventura County Fire Protection District* (1992) 2 Cal.App.4th 875, 883.) "The scope of the right of self-representation ... must necessarily be limited where, as here, the public employer" is required to "bargain exclusively with an employee organization." (*Ibid.*) Under such circumstances, an employer satisfies its obligations under the MMBA if it is "willing to talk to [the employee] about employment matters unrelated to [the union] negotiated contract." (*Ibid.*)

Likewise, in *Alameda County Medical Center* (2004) PERB Decision No. 1620-M, the Board held that the right to self-representation set out in the MMBA "merely refers to the employee's ability to meet with the employer without the employee organization."

Other cases have addressed the issue of whether employee due process rights are violated by a collective bargaining agreement that vests the employees' exclusive bargaining representative with discretion to determine which grievances to pursue. Due process is "flexible and calls for such procedural protections as the particular situation demands." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334.) In *Mathews*, the United States Supreme Court held that three factors are to be considered in determining whether a particular procedure satisfies due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

(*Id.*, at p. 335.) Here, the information provided with the charge is insufficient for the purpose of fully analyzing these three factors. For example, because the charge provided no information as to the nature of the Charging Party's underlying dispute with the District, it is impossible to analyze the "private interest" at issue, or the "official action" taken by the

District that caused harm to that private interest. And as discussed above, without copies of any applicable non-MOU complaint procedures, it is not possible to analyze the second *Mathews* factor. These deficiencies notwithstanding, a review of the relevant caselaw leaves little doubt that employees' due process rights are not violated by collective bargaining agreements under which unions have control over whether to pursue an employee's grievance.

"Union discretion in determining which grievances to arbitrate is essential to the functioning of the collective bargaining system." (*Jones v. Omnitrans* (2004) 125 Cal.App.4th 273, 281.) It is "essential that labor organizations have some freedom and discretion in handling employee disputes with employers.... In order to prevent the settlement mechanism from being clogged by meritless complaints, the union must be permitted to sort out the substantial grievances from the unjustified ones." (*Lane v. I.U.O.E. Stationary Engineers, Local 39* (1989) 212 Cal.App.4th 164.) Any due process concerns are ameliorated by the union's duty of fair representation owed to bargaining unit members, under which a member may bring a claim against a union that controls access to any step of the grievance procedure if the union's decision not to proceed with the grievance was arbitrary, discriminatory, or in bad faith. (*Jones v. Omnitrans*, *supra*, 125 Cal.App.4th at pp. 283-284; see *Anderson v. California Faculty Association* (1994) 25 Cal.App.4th 207, 219-220 [discussing factors considered by PERB in deciding whether union's failure to pursue grievance violates its duty of fair representation].)

Charging Party's Standing to Bring Claims Alleged

Individual employees do not have standing to allege violations of statutes which protect the collective bargaining rights of employee organizations. (*State of California* (*Department of Corrections*) (1993) PERB Decision No. 972-S.) The charge alleges, among other violations, a violation of MMBA section 3505. This statute makes no reference to individual employee rights, but rather, expressly protects the collective rights of "recognized employee organizations." As such, Charging Party lacks standing to bring a claim as to this alleged violation.

The charge also alleges a violation of MMBA section 3507.3, which establishes the right of "professional employees" to be represented separately from "nonprofessional employees." Charging Party has presented no evidence as that "professional employees" working for the District are not represented separately from the District's "nonprofessional employees," nor has any evidence been presented as to whether Charging Party is a "professional employee" within the meaning of the statute, so as to be aggrieved by the alleged lack of separate representation. Moreover, the statute does not indicate that the lack of separate representation for "professional employees" is a proper subject of an unfair practice charge; rather, the express procedure for resolving such a claim consists of submission of the dispute, by "any of the parties" to the California State Mediation and Conciliation Service.

Conclusion

For the reasons set out above, the charge, as presently written, does not state a prima facie case. 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 Charging Party wishes 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. Alternatively, you may file a notice of withdrawal of the charge.

If an amended charge or withdrawal is not filed on or before April 13, 2015,[5] PERB will dismiss your charge. Feel free to contact me by telephone if you have any questions.

Sincerely,

Miles E. Locker
Senior Regional Attorney

[5] 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.)