

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



IVETTE RIVERA,

Charging Party,

v.

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 444,

Respondent.

Case No. SF-CO-349-M

PERB Decision No. 2472-M

February 12, 2016

Appearances: Ivette Rivera, on her own behalf; Weinberg, Roger & Rosenfeld, by Kerianne R. Steele and Robert E. Szykowny, Attorneys, for American Federation of State, County and Municipal Employees, Local 444.

Before Martinez, Chair; Banks and Gregersen, Members.

DECISION¹

GREGERSEN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Ivette Rivera (Rivera) of a dismissal of her unfair practice charge by PERB's Office of the General Counsel (OGC) (attached). The charge, as amended, alleged that American Federation of State, County and Municipal Employees, Local 444 (AFSCME) violated the Meyers-Milias-Brown Act (MMBA)² by: (1) failing to provide fresh

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.)

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

“Hudson” notices³ to Rivera (an agency fee payer) each time the agency fee rate changed, and (2) overcharging her the chargeable⁴ portion of her agency fees for at least seven years.

Rivera alleged that this conduct constituted a breach of AFSCME’s fiduciary duty and duty of fair representation, and a violation of PERB Regulations 32992, 32993, 32995, and 32997, as well as Rivera’s statutory and constitutional right to free association, free speech, and due process.

The OGC dismissed Rivera’s unfair practice charge for failure to state a prima facie case and untimeliness. Rivera timely filed an appeal, and AFSCME timely filed its opposition.

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.

³ As explained by the California Supreme Court in *County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal. 4th 905, 913, fn. 3:

In [*Teachers v. Hudson* (1986) 475 U.S. 292 (*Hudson*)], the United States Supreme Court held that the First Amendment rights of nonunion employees require that, before an agency fee is collected, employees must receive “an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.”

⁴ The U.S. Supreme Court held in *Lehnert v. Ferris Faculty Association* (1991) 500 U.S. 507 that “chargeable activities must (1) be ‘germane’ to collective-bargaining activity; (2) be justified by the government’s vital policy interest in labor peace and avoiding ‘free riders’; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.” (*Id.* at p. 519.)

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 asserts that the OGC abused its discretion and threatened her due process right to a hearing by dismissing her charge, but fails to provide any legal authority for her assertion.

Rivera merely reiterates facts alleged in the unfair practice charge and restates arguments made to the Office of the General Counsel, failing to state "the specific issues of procedure, fact, law or rationale to which the appeal is taken." This failure to comply with PERB Regulation 32635, subdivision (a) subjects the appeal to dismissal on that ground alone. (*State of California (Department of Mental Health, Department of Developmental Services)* (2012) PERB Decision No. 2305-S, p. 4.) Even had Rivera complied with PERB Regulation 32635, subdivision (a), we would reject her appeal for lack of merit, as we now explain.

Rivera claims that the OGC disregarded a chart she submitted with her first amended charge that allegedly includes "overcharge details in prior years" and shows a "pattern and practice." However, she does not explain how the content of the chart would rectify the deficiencies noted in the warning and dismissal letters.

We reject Rivera's argument that she filed her charge on behalf of other similarly situated employees. PERB noted in *California Nurses Association (O'Malley)* (2004) PERB Decision No. 1607-H:

[Charging party] may not assert agency fee objections on behalf of other unit employees. The courts have historically held that the individual agency fee payer has the burden to challenge the use of funds collected from him/her and held by the exclusive representative.

(*Id.* at p. 7, fn. 8; citations omitted)

We also reject Rivera's appeal of the OGC's finding that PERB lacks jurisdiction to adjudicate Rivera's constitutional rights. Although Rivera argues that she filed a "hybrid claim" alleging violations of her constitutional rights as well as PERB's Regulations, "PERB only has jurisdiction to enforce the statutes it is charged with administering and has no jurisdiction to enforce constitutional protections." (*Los Angeles Unified School District* (1990) PERB Decision No. 835, pp. 2-3; footnote omitted.)

We also reject Rivera's objection to the OGC's employment of a standard that Rivera "should have known" of the alleged violations prior to the six-month limitations period. The Board held in *Service Employees International Union Local 1000 (Slotterbeck)* (2010) PERB Decision No. 2135-S:

[Charging Party] knew, *or should have known*, that SEIU was collecting full fair share fees from him, and therefore had not honored his request to pay a reduced fee, when he received his paycheck for the July 2007 and July 2008 pay periods, the first pay period of each respective fiscal year. Each subsequent full fee deduction did not extend the statute of limitations under a continuing violation theory.

(*Id.* at p. 4; emphasis added.)

Rivera's argument that she was not an agency fee payer prior to her employment with the District, and that therefore she had no reason to know what a *Hudson* notice was or looked like, is irrelevant. The Board has ruled that ignorance of the law is no excuse and, therefore, insufficient to warrant a finding of good cause to excuse a party's procedural deficiencies. (*County of Santa Clara* (2014) PERB Order No. Ad-411-M.)

We conclude, as AFSCME urges, that any allegation that AFSCME should have issued Rivera a *Hudson* notice prior to deducting fees in fiscal years 2013-2014 or 2014-2015, was not raised in Rivera's charge, as amended, and is therefore inappropriate for consideration on appeal since no good cause was shown. (PERB Regulation 32635, subd. (b).)⁵

ORDER

The unfair practice charge in Case No. SF-CO-349-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Banks joined in this Decision.

⁵ We interpret the OGC's statement that "PERB itself does not adjudicate [agency fee] objections or challenges" on page 2 of the dismissal letter to convey that PERB plays a limited role in the area of agency fee disputes. (See, e.g. PERB Regulations 32994, subd. (a) and 32997).)

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 17, 2015

Ivette Rivera

Re: *Ivette Rivera v. AFSCME Local 444*
Unfair Practice Charge No. SF-CO-349-M
DISMISSAL LETTER

Dear Ms. Rivera:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 23, 2014. Ivette Rivera (Rivera or Charging Party) alleges that the AFSCME Local 444 (Local 444 or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act).¹

Charging Party was informed in the attached Warning Letter, dated August 12, 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, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn on or before August 20, 2015 the charge would be dismissed.

On August 19, 2015, the undersigned Board agent spoke with Charging Party via telephone, and agreed to extend the deadline for the charge to be amended or withdrawn to September 4, 2015. A First Amended Charge was filed on September 4, 2015.

As in the original charge, Charging Party alleges that on September 26, 2014, she received a *Hudson* notice² from Local 444. Subsequently, Charging Party reviewed AFSCME's financial records and came to two conclusions: 1) she had failed to receive a *Hudson* notice in prior years she was an agency fee payer, and 2) Local 444 had "overcharged" her.

As explained in greater detail in the attached Warning Letter, any allegation concerning Local 444's failure to provide a *Hudson* notice to Charging Party, prior to the one provided on

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.

² *Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292 (*Hudson*).

September 26, 2014, is untimely and must be dismissed. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359.)

As also explained in greater detail in the Warning Letter, PERB itself does not adjudicate agency fee objections or challenges. Such procedures are administered by the exclusive representative in accordance with PERB Regulations 32993 through 32994. (PERB Reg. 32994(a); *Service Employees International Union, Local 99 (Arteaga)* (2008) PERB Decision No. 1991, citing *Teachers Association of Long Beach (Aragon, et al.)* (1999) PERB Decision No. 1311 [employee must exhaust exclusive representatives agency fee appeal procedures].) The First Amended Charge merely reiterates these allegations, albeit with more detail on how Charging Party came to her conclusions. For this reason, and as explained in greater detail in the Warning Letter, this allegation must be dismissed.

Finally, Charging Party alleges that by this conduct, Local 444 has violated her various constitutional rights. PERB lacks jurisdiction to determine the constitutionality of Local 444's actions. (*Kern High Faculty Association, CTA/NEA (Maaskant)* (2007) PERB Decision No. 1885.) Therefore, these allegations are also 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: Robert Szykowny, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
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August 12, 2015

Ivette Rivera

Re: *Ivette Rivera v. AFSCME Local 444*
Unfair Practice Charge No. SF-CO-349-M
WARNING LETTER

Dear Ms. Rivera:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 23, 2014. Ivette Rivera (Rivera or Charging Party) alleges that the AFSCME Local 444 (Local 444 or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act).¹

Rivera is an employee of the East Bay Municipal Utility District (EBMUD) in a bargaining unit exclusively represented by Local 444.

The complete statement of the charge reads, verbatim:

I have been an Agency Fee Payer from 2005 until present. Under a CPRA, on Sept. 10, 2014, I asked EBMUD for AFSCME financial reports from 1999 through 2013. On Sept. 26, 2014, I received MY FIRST EVER (EVER) Hudson Notice, postmarked Sept. 23, 2014 from AFSCME 444. On Sept. 26, 2014, asked AFSCME 444 to show me "itemized financial records" [1999-present]. On 10/20/14, after reviewing AFSCME documents, I discovered I was overcharged the agency fee-payer rate for 7 years. (Remedy: Injunction/restitution/ULP Charge & Posting.)

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.

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 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.)

Hudson Notice

PERB Regulation 32992 represents the Board's codification of the rules governing the collection of agency shop fees set forth by the United States Supreme Court in *Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292 (*Hudson*).

Regulation 32992 provides:

- (a) The exclusive representative shall provide annual written notice to each nonmember who will be required to pay an agency fee. The notice shall include:
 - (1) The amount of the exclusive representative's dues and the agency fee;
 - (2) The percentage of the agency fee amount that is attributable to chargeable expenditures and the basis for this calculation;
 - (3) The amount of the agency fee to be paid by a nonmember who objects to the payment of an agency fee amount that includes

nonchargeable expenditures (hereinafter referred to as an “agency fee objector”); and

(4) Procedures for (A) objecting to the payment of an agency fee amount that includes nonchargeable expenditures and (B) challenging the calculation of the nonchargeable expenditures.

(b) (1) The calculation of the chargeable and nonchargeable expenditures will be based on an audited financial report, and the notice will include either a copy of the audited financial report used to calculate the chargeable and nonchargeable expenditures or a certification from the independent auditor that the summarized chargeable and nonchargeable expenditures contained in the notice have been audited and correctly reproduced from the audited report, or

(2) the calculation of the chargeable and nonchargeable expenditures may be based on an unaudited financial report if the exclusive representative’s annual revenues are less than \$50,000 and a nonmember is afforded a procedure sufficiently reliable to ensure that a nonmember can independently verify that the employee organization spent its money as stated in the notice.

(c) Such written notice shall be sent/distributed to the nonmember either:

(1) At least 30 days prior to collection of the agency fee; or

(2) Concurrent with the initial agency fee collection provided escrow requirements in Section 32995 are met; or

(3) In the case of public school employees, where the agency fee year covers the traditional school year, on or before October 15 of the school year, provided escrow requirements in Section 32995 are met.

The Charge is Untimely and Otherwise Fails to State a Prima Facie Case

The charge may be construed to contain two separate allegations. First, that Local 444 failed to provide Rivera with a *Hudson* notice for any year she was an agency fee payer prior to 2014. Second, that during seven of those years, Local 444 “overcharged” Rivera in assessing her the agency fee.

The first allegation is plainly untimely. Charging Party knew or should have known that she had not received a *Hudson* notice in any year she did not receive one prior to 2014. Charging Party alleges that she did receive one in September 2014. Therefore, any failure by

Respondent to provide a *Hudson* notice to Charging Party would have occurred—and was or should have been known to Charging Party to have occurred—well prior to the six-month period preceding the filing of the charge on October 23, 2014. Charging Party has failed to meet her burden to show the charge is timely. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359.)

The second allegation is vague and conclusory, only stating that Charging Party's personal assessment of some document she received from EBMUD demonstrate that Respondent has "overcharged the agency fee-payer rate for 7 years." The basis for this conclusion is not provided, nor is a specification of which seven of the nine years between 2005 and 2014 are at issue.

More importantly, however, PERB Regulations describe the process by which an agency fee payer may object to the payment of agency fees that includes nonchargeable expenditures, or challenge the calculation of chargeable and nonchargeable expenditures. Specifically, agency fee payers must utilize the process described in the *Hudson* notice itself. (PERB Regulation 32992(a)(4).) The exclusive representative administers these procedures, not PERB. (PERB Regulations 32993-32994.) The procedures must provide agency fee payers a 30-day opportunity, following distribution of the *Hudson* notice, an opportunity to file objections or challenges in writing with the representative or official designated in the *Hudson* notice. (*Ibid.*) PERB itself does not adjudicate objections or challenges.

For these reasons the charge, as presently written, does not state a prima facie case.² If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before **August 20, 2015**,³ PERB will dismiss your charge.

² 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.*)

³ 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,

Daniel Trump
Regional Attorney

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