

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



IVETTE RIVERA,

Charging Party,

v.

EAST BAY MUNICIPAL UTILITY DISTRICT,

Respondent.

Case No. SF-CE-1292-M

PERB Decision No. 2487-M

June 30, 2016

Appearances: Ivette Rivera, on her own behalf; Liebert Cassidy Whitmore, by Megan M. Lewis, Attorney, for East Bay Municipal Utility District.

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) from the 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 or EBMUD) violated the Meyers-Milias-Brown Act (MMBA)² and PERB regulations by: (1) posting a memorandum that summarized a portion of Government Code section 3502 but did not include the section's full language thereby misrepresenting the individual representation rights of unit members;

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.

(2) informing Rivera that unit members are bound to an “exclusive remedy,” that the unions “own” the grievance process, and that unit members must have their union process their grievance pursuant to the terms of the collective bargaining agreement between the District and the American Federation of State, County and Municipal Employees (AFSCME); (3) telling Rivera at the District’s Board meeting “you need to decide whether or not you’re going to work through your union or not, but this collective bargaining agreement is what the District is party to. The grievance machinery is owned by the ‘union’”; (4) unlawfully extracting dues from her paycheck from 2005 through February 2014 because Rivera was a supervisor and therefore under no contractual obligation to pay union dues; (5) interfering with or intimidating Rivera into forfeiting her right to speak with her employer regarding terms and conditions of her employment by enlisting a law firm to speak to Rivera on the District’s behalf; (6) failing to “promulgate Section 4” of the District’s Employer-Employee Relations Policy (EERP) “by not including the document in the electronic District wide list of Policies and Procedures”; and (7) stating on the District’s website that exclusively represented employees should contact their union representative when they have issues or concerns related to their employment. Rivera alleged that this conduct violated of MMBA sections 3502, 3506, 3506.5, and 3507, PERB Regulation 32603, subdivisions (d), (f), and (g), and EERP section 4, as well as Rivera’s constitutional rights to free association, free speech, and the right to be free from government oppression as well as those rights under applicable California and Federal Law.

The OGC dismissed Rivera’s unfair practice charge for failure to state a prima facie case and lack of standing. In addition, the OGC found the new allegations in the amended unfair practice charge to be untimely.

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 repeats the same factual allegations and arguments she made in her first amended charge, without pointing to any error of fact or law by the OGC.³ Although Rivera identifies particular excerpts of the Dismissal Letter, she fails to state the grounds for appealing those excerpts. As such, the appeal fails to state "the specific issues of procedure, fact, law or rationale to which the appeal is taken." This failure to comply with PERB

³ Rivera's arguments are presented in the form of "exceptions." We note that the filing of exceptions is not the proper method for appealing a dismissal of an unfair practice charge. Exceptions are filed as part of an appeal of a proposed decision pursuant to PERB Regulation 32300. The proper method for appealing a dismissal is an appeal pursuant to PERB Regulation 32635. We, however, decline to deny Rivera's appeal on this ground.

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.)

On appeal, Rivera continues to argue that the OGC erred in failing to issue a complaint on her allegation that the District posted a memorandum that summarizes a part, but not all, of Government Code section 3502, and that by not citing the full section, the District violated the MMBA. This was the only allegation contained in the original charge filed. We agree with the OGC that the MMBA does not prohibit an employer from citing or summarizing a portion of an MMBA code section, and a public agency does not violate the MMBA by doing so. As such, this allegation was properly dismissed.

Rivera also argues that the OGC erred in dismissing the new allegations raised in the amended charge as untimely under the statute of limitations and the relations back doctrine. In her appeal, Rivera acknowledges that the new conduct and events presented in the First Amended Charge occurred before the limitations period, but argues that they were included to “shed light on the true character of matters occurring within the limitations period” relying on *Local Lodge No. 1424 v. National Labor Relations Board* (1960) 362 U.S. 411 (*Local Lodge*). *Local Lodge*, however, does not support Rivera’s contention.

Pursuant to *Local Lodge, supra*, 362 U.S. 411, actions outside the statute of limitations period may be considered, under certain circumstances, as background evidence of an employer’s motive. (*Ibid.*) However, they may not be considered as separate violations in the absence of an independent violation within the limitations period. (*Trustees of the California State University* (2009) PERB Decision No. 2038-H.) The only allegation contained in the original charge and determined timely filed by the OGC was Rivera’s allegation that the

District posted only a section of Government Code section 3502 and therefore violated the MMBA. As that occurrence failed to constitute an unfair practice, the new allegations raised in the amended charge were properly dismissed as untimely.

ORDER

The unfair practice charge in Case No. SF-CE-1292-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



February 16, 2016

Ivette Rivera

Re: *Ivette Rivera v. East Bay Municipal Utility District*
Unfair Practice Charge No. SF-CE-1292-M
DISMISSAL LETTER

Dear Ms. Rivera:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 23, 2015. Ivette Rivera (Rivera or Charging Party) alleges that the East Bay Municipal Utility District (EBMUD or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)¹ and PERB Regulations by posting a notice that did not summarize Government Code section 3502 in its entirety.

Charging Party was informed in the attached Warning Letter dated December 14, 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 January 4, 2016, the charge would be dismissed.

On January 4, 2016, Charging Party filed a timely First Amended Charge. The First Amended Charge does not cure the deficiencies discussed in the Warning Letter, and does not state a prima facie case. Therefore, the charge is dismissed based on the facts and reasons set forth herein, and in the December 14, 2015 Warning Letter.

Facts Alleged in the Initial Charge

Rivera is employed by EBMUD as a gardener foreman.

On October 9, 2014, an informal conference was held at PERB to discuss an unfair practice charge filed by the American Federation of State, County and Municipal Employees, Local 2019 (AFSCME) against EBMUD. The unfair practice charge alleged that EBMUD violated the MMBA by taking adverse action against an EBMUD employee who distributed a flyer to

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.

her co-workers. Rivera was not involved in the unfair practice charge or the settlement discussions. AFSCME and EBMUD reached a settlement agreement during the informal settlement conference. One part of the settlement was to post a memorandum for a period of thirty work days. The parties agreed to the language in the memorandum.²

On October 16, 2014, EBMUD posted the memorandum, which stated:

Government Code Section 3502 grants the District's employees the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. These rights include, under appropriate circumstances, and subject to the District's policies, procedures, and MOUs, the non-disruptive informational distribution of flyers addressing working conditions.

The District acknowledges that Government Code Section 3506 prohibits the District from interfering with, intimidating, restraining, coercing, or discriminating against public employees because of their exercise of their rights under section 3502.

Pursuant to a settlement agreement between the District and AFSCME Local 2019, the parties have agreed to remove a June 4, 2014 counseling memo issued to an employee.

On October 28, 2014, Rivera sent an e-mail message to Michael Rich, Delores Turner, Alexander Coate, Katy Foulkes, and Andy Katz. The charge does not include the title of these individuals, but it appears that they are EBMUD management employees. Rivera's e-mail message stated, in part:

The October 16, 2014, Memorandum . . . that I just noticed in the break room only states half of Government Code Section 3502 . . . [t]he statutory right to individual representation is missing. Will the posting be corrected?

On October 29, 2014, Michael Rich wrote back to Rivera stating, "The item that was posted was approved by PERB."

² The facts in this paragraph were taken from the verified declaration of Michael Rich which was attached to EBMUD's position statement in response to the initial charge. A Board agent may rely on facts in a position statement if they do not materially conflict with any facts alleged by the Charging Party. (*Chula Vista Elementary School District* (2003) PERB Decision No. 1557.)

Charging Party alleges that the October 16, 2014 memorandum “affirmatively misrepresented MMBA 3502. The right to individual representation was deleted.”

The December 14, 2015 Warning Letter

The Warning Letter noted that the October 16, 2014 memorandum posted by EBMUD summarized a part, but not all of Government Code section 3502. The part of Government Code section 3502 not cited by the memorandum grants public employees the right to represent themselves individually in their employment relations with a public agency. The Warning Letter observed that a public agency does not violate the MMBA by citing a part, but not all, of a MMBA section. Charging Party was further advised that the charge failed to allege facts to state a prima facie case that EBMUD violated Government Code section 3502, and PERB Regulation 32603 (a), (d), (f), and (g) by failing to include the entire text of Government Code section 3502 in a memorandum. Charging Party was provided an opportunity to cure the deficiencies in the charge as identified in the Warning Letter.

Allegations in the First Amended Charge

Rivera is a supervisor at EBMUD.

Rivera alleges that the memorandum posted by EBMUD on October 16, 2014, was part of a “pattern and practice of promulgating the custom of falsely representing that AFSCME unit members only have associational rights listed under 3502.”

Rivera spoke at EBMUD Board meetings on December 10, 2013, January 14, 2014, and January 28, 2014. Rivera’s statement concerned primarily her allegations that she is a supervisor and that EBMUD’s grievance process violates the MMBA. In response to one of Rivera’s statements at the January 28, 2014 Board meeting, EBMUD Board member Frank Mellon told Rivera, “you need to decide whether or not you’re going to work through your union or not, but this collective bargaining agreement is what the District is party to. The grievance machinery is owned by the ‘union.’”

Rivera alleges the following:

- I soon discovered after that January 28, 2014 [EBMUD Board] meeting that;
1. No union member is bound to an exclusive remedy [citation omitted]
 2. In spite of MOU’s stating that union members can file grievances, union officials investigate and screen all contractual and non-contractual complaints and grievances and approve or negate the filing of grievances.
 3. There is no complaint policy at the District to file unfair labor practice complaints, even though a Complaint Procedure is mentioned in the MOU.

On December 9, 2014, Rivera spoke at another EBMUD Board meeting and stated that EBMUD had failed to include its Employer-Employee Relations Policy (EERP) in an electronic form in the “electronic District wide list of Policies and Procedures.” In January 2015, EBMUD Human Resource manager Delores Turner (Turner) told Rivera that EBMUD was not required to post the EERP electronically. The EERP is still not listed with the electronic list of policies and procedures.

Rivera alleges that the EBMUD Employee Relations website states, in part:

If you are an employee who is represented by one of the four labor organizations (unions) at the District, you should contact your union representative when you have issues or concerns related to employment at EBMUD.

Charging Party attached multiple exhibits to her First Amended Charge. The exhibits include, but are not limited to:

- e-mail correspondence between Rivera and various EBMUD representatives;
- e-mail correspondence between Rivera and a PERB Senior Regional Attorney;
- minutes from an October 30, 2014, PERB Public Meeting;
- a copy of EBMUD’s EERP;
- a DVD of Charging Party playing portions of board meeting audio recordings,³ and an unofficial transcript of the DVD;
- a copy of Charging Party’s initial Unfair Practice Charge filed on February 23, 2015; and;
- a copy of a letter dated April 8, 2015, that Charging Party filed with PERB in opposition to EBMUD’s position statement.⁴

Charging Party’s First Amended Charge quotes a part of the April 8, 2015 letter, which states:

From 2005 through February 2014, I was under no contractual obligation to pay any dues to AFSCME because I am [a] supervisor. EBMUD extracted dues from my paycheck, even though they possessed material evidence that I am a supervisor.

³ PERB Regulation 32615(a) requires that a charge “be in writing.” Accordingly the DVD was not considered by the Board agent. However, the unofficial written transcript of the DVD was considered.

⁴ As explained in the Warning Letter, Charging Party’s April 8, 2015 letter was not considered an amended charge for several reasons. In the first paragraph of the letter, Rivera states, in part, “Please allow this letter to serve as my objection and opposition to East Bay Municipal District’s motion to dismiss PERB ULP SF-CE-1292-M[.]” Further, PERB Regulation 32615(a) requires that a charge be signed under penalty of perjury with a declaration that the charge is true and complete. Rivera’s April 8, 2015 letter was not signed under penalty of perjury.

The union financially gained by taking dues against my will. Supervisors were EXEMPT from paying all dues, per the contract. I had no right to remedy. I had no right to grieve or complain because the District has removed, with the union's approval, the right of represented employee's to file complaints or grievances without union intervention.

The First Amended Charge alleges for the first time that EBMUD violated EBMUD EERP section 4, Government Code sections 3506, 3506.5, 3507, and Charging Party's constitutional rights.

Discussion

Jurisdiction over Constitutional Claims

Charging Party alleges that EBMUD violated her constitutional rights to free association, free speech, and the right to be free from government oppression. 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.) PERB's jurisdiction does not include enforcement of the U.S. or California Constitutions. (*Housing Authority of the City of Los Angeles* (2011) PERB Decision No. 2166-M.) Accordingly, PERB does not have jurisdiction to adjudicate Charging Party's allegation that EBMUD violated her constitutional rights, and this allegation is hereby dismissed.

Statute of Limitations, Relation Back

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 (*Coachella*)). 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.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

Where a charging party alleges a new legal theory in an amended charge, based upon the same set of facts as alleged in the initial charge, the new legal theory is said to "relate back" to the initial charge. (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959.) New factual allegations, however, do not relate back if they are not mentioned in the initial charge. (*Ibid.*) An amended charge relates back to the initial charge only when it clarifies facts alleged in the initial charge or adds a new legal theory based on facts alleged in the initial charge. (*Ibid.*) The statute of limitations for a new allegation contained in an amended charge begins to run based on the filing date of the amended charge, not the initial charge. (*Sacramento City Teachers Association (Marsh)* (2001) PERB Decision No. 1458.)

Charging Party's First Amended Charge includes several new factual allegations including:

- During an EBMUD Board meeting on January 28, 2014, EBMUD Board member Frank Mellon told Rivera, "you need to decide whether or not you're going to work through your union or not, but this collective bargaining agreement is what the District is party to. The grievance machinery is owned by the 'union.'"
- Soon after the January 28, 2014 Board meeting, Rivera discovered that: (1) "union officials investigate and screen all contractual and non-contractual complaints and grievances and approve or negate the filing of grievances" and (2) "[t]here is no complaint policy at the District to file unfair labor practice complaints[.]"
- On December 9, 2014, Rivera told EBMUD Board members that EBMUD did not include the EERP in its electronic list of policies and procedures, and in January 2015, Turner told Rivera that EBMUD was not required to post the EERP electronically.

All of these allegations refer to events that occurred more than six months prior to Charging Party's filing of her First Amended Charge on January 4, 2016. Further all of these allegations do not relate back to Charging Party's initial charge. (*Sacramento City Teachers Association (Franz)*, *supra*, PERB Decision No. 1959.) Thus Charging Party has failed to show that these allegations are timely. (*Coachella*, *supra*, 35 Cal.4th 1072.)

Charging Party alleges that the EBMUD Employee Relations website states that an employee represented by a union should contact their union representative when they have issues or concerns related to employment at EBMUD. Charging Party does not state when she became aware that this statement was on the website. Accordingly, Charging Party has not established this allegation is timely. (*Coachella*, *supra*, 35 Cal.4th 1072.)

Charging Party also alleges in her First Amended Charge that from 2005 to 2014, she was not required to pay dues to AFSCME because she was a supervisor but EBMUD nonetheless extracted dues from her pay check. Charging Party refers to alleged conduct that has occurred for ten years. Thus Charging Party has failed to show that this allegation is timely. (*Coachella*, *supra*, 35 Cal.4th 1072.) Accordingly, Charging Party's allegation that EBMUD extracted dues from her paycheck, and all of her other allegations that exceed the six month statute of limitations period, are hereby dismissed as untimely.

MMBA and the EBMUD Memorandum

Charging Party has failed to submit any additional facts to show that by posting a memorandum on October 16, 2014, which summarized only a part of Government Code section 3502, EBMUD violated the MMBA. Accordingly, Charging Party's allegations that EBMUD's memorandum violated the MMBA, PERB Regulations, and interfered with employee rights are hereby dismissed.

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Government Code section 3502 & The Right to Self-Representation under the MMBA

Government Code section 3502 includes a public employee's right to represent themselves individually in their employment relations with a public agency. As summarized in the Warning Letter, the Courts and PERB have narrowly defined the MMBA's right to self-representation. An employer satisfies its obligation under the MMBA if it is "willing to talk to [an employee] about employment matters unrelated to [the union] negotiated employment contract." (*Relyea v. Ventura County Fire Protection District, supra*, 2 Cal.App.4th, at p. 883.)

Here, Rivera was afforded multiple opportunities to speak at EBMUD Board meetings, and correspond with EBMUD representatives.

Rivera alleges that EBMUD Board member Frank Mellon told her that "[t]he grievance machinery is owned by the union." Rivera alleges that soon afterward she discovered that "union officials investigate and screen all . . . grievances and approve or negate the filing of grievances" and that there was "no complaint policy at the District to file unfair labor practice complaints[.]" Rivera also alleges that EBMUD did not include the EERP in its electronic list of policies and procedures, and that EBMUD's website includes a statement that represented employees should contact their union representative with concerns related to their employment. As discussed above, all these allegations are untimely. Even if these allegations were timely, they are not sufficient to show that EBMUD violated Charging Party's right to self-representation under the MMBA. (*Relyea v. Ventura County Fire Protection District, supra*, 2 Cal.App.4th, at p.883.) Charging Party alleges that union officials screen all grievances. But she does not allege that she ever attempted to file a grievance or that EBMUD refused to process her grievance. As the Warning Letter noted, the right to self-representation under the MMBA "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." (*Ibid.*) Charging Party has not alleged facts to show that EBMUD violated her right to self-representation under the MMBA. Accordingly, this allegation is hereby dismissed.

EBMUD EERP section 4

EERP section 4 states, in part, that employees "shall have the right to represent themselves individually in their employment relations with the District." This language mirrors the language in Government Code section 3502. Charging Party has not stated a prima facie case that EBMUD violated EERP section 4 for the same reasons she has not stated a prima facie case that EBMUD violated her right to self-representation under the MMBA. Accordingly, Charging Party's allegation that EBMUD violated EERP section 4 is hereby dismissed.

PERB Regulation 32603(d) & Domination

Charging Party has failed to submit additional facts to show that she has standing to allege that EBMUD engaged in unlawful domination. Further, Charging Party has not alleged facts

showing that EBMUD engaged in unlawful domination. Accordingly, this allegation is hereby dismissed. (*Jurupa Unified School District, supra*, PERB Decision No. 2283.)

PERB Regulation 32603(f) & Government Code section 3507

PERB Regulation 32603(f) states that it shall be an unfair practice for a public agency to adopt or enforce a local rule that is not in conformance with the MMBA. Government Code section 3507 permits public agencies to adopt reasonable rules and regulations. Charging Party has failed to cure the deficiency in the Warning Letter that Charging Party had not identified which local rule she was contesting. Although Charging Party refers to EERP section 4, Charging Party does not allege any facts detailing in what manner this section was not adopted in conformance with the MMBA. Accordingly, Charging Party's allegation that EBMUD violated PERB Regulation 32603(f) and Government Code section 3507 is hereby dismissed.

PERB Regulation 32603(g)

Charging Party has not stated any additional facts to show that EBMUD violated PERB Regulation 32603(g). Accordingly, this allegation is hereby dismissed.

Conclusion

For these reasons and those set forth in the attached 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 _____
Jessica Kim
Regional Attorney

Attachment
cc: Richard C. Bolanos, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

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



December 14, 2015

Ivette Rivera

Re: *Ivette Rivera v. East Bay Municipal Utility District*
Unfair Practice Charge No. SF-CE-1292-M
WARNING LETTER

Dear Ms. Rivera:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 23, 2015.¹ Ivette Rivera (Rivera or Charging Party) alleges that the East Bay Municipal Utility District (EBMUD or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)² and PERB Regulations by posting a notice that summarized a portion of Government Code section 3502 but did not include the section's full language.

FACTS AS ALLEGED

Rivera is employed by EBMUD as a gardener foreman.

On October 9, 2014, an informal conference was held at the Public Employment Relations Board to discuss an unfair practice charge filed by the American Federation of State, County and Municipal Employees, Local 2019 (AFSCME) against EBMUD. The unfair practice charge alleged that EBMUD violated the MMBA by taking adverse action against an EBMUD employee who distributed a flyer to her co-workers. Rivera was not involved in the unfair

¹ On March 30, 2015, EBMUD filed a position statement. On or around April 8, 2015, Rivera filed a letter. In the first paragraph of the letter, Rivera states, in part, "Please allow this letter to serve as my objection and opposition to East Bay Municipal District's motion to dismiss PERB ULP SF-CE-1292-M[.]" It does not appear that Rivera's April 8, 2015 letter was intended to serve as an amended charge. Further, PERB Regulation 32615(a) requires that a charge be signed under penalty of perjury with the declaration that the charge is true and complete. Rivera's April 8, 2015 letter was not signed under penalty of perjury. For these reasons, the letter was not an amended charge. Accordingly, the undersigned Board Agent has considered the arguments, but not the allegations, in the April 8, 2015 letter.

² 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.

practice charge or the settlement discussions. AFSCME and EBMUD reached a settlement agreement during the informal settlement conference. One part of the settlement was to post a memorandum for a period of thirty work days. The parties agreed to the language in the memorandum.³

On October 16, 2014, EBMUD posted the memorandum, which stated:

Government Code Section 3502 grants the District's employees the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. These rights include, under appropriate circumstances, and subject to the District's policies, procedures, and MOUs, the non-disruptive informational distribution of flyers addressing working conditions.

The District acknowledges that Government Code Section 3506 prohibits the District from interfering with, intimidating, restraining, coercing, or discriminating against public employees because of their exercise of their rights under section 3502.

Pursuant to a settlement agreement between the District and AFSCME Local 2019, the parties have agreed to remove a June 4, 2014 counseling memo issued to an employee.

On October 28, 2014, Rivera sent an e-mail message to Michael Rich, Delores Turner, Alexander Coate, Katy Foulkes, and Andy Katz. The charge does not include the title of these individuals, but it appears that they are EBMUD management employees. Rivera's e-mail message stated, in part:

The October 16, 2014, Memorandum . . . that I just noticed in the break room only states half of Government Code Section 3502 . . . [t]he statutory right to individual representation is missing. Will the posting be corrected?

On October 29, 2014, Michael Rich wrote back to Rivera stating, "The item that was posted was approved by PERB."

Charging Party alleges that the October 16, 2014 memorandum "affirmatively misrepresented MMBA 3502. The right to individual representation was deleted."

³ The facts in this paragraph were taken from the verified declaration of Michael Rich which was attached to EBMUD's position statement. A Board agent may rely on facts in a position statement if they do not materially conflict with any facts alleged by the Charging Party. (*Chula Vista Elementary School District* (2003) PERB Decision No. 1557.)

DISCUSSION

Charging Party alleges that EBMUD violated the MMBA, Government Code section 3502, and PERB Regulation 32603 (a), (d), (f) and (g) by failing to include the entire text of Government Code section 3502 in a memorandum.

The memorandum posted by EBMUD on October 16, 2014, accurately stated that:

Government Code Section 3502 grants the District's employees the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

The memorandum did not summarize or cite another part of Government Code section 3502, particularly the following language:

Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency.

However, the October 16, 2014 memorandum did not indicate that it was citing the full language of Government Code section 3502. Nor did the memorandum indicate that it was summarizing all the rights contained in Government Code section 3502.

1. 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.)

2. MMBA

EBMUD posted a memorandum that summarizes a part, but not all, of Government Code section 3502. Rivera alleges that by not citing the full section, EBMUD violated the MMBA. However, the MMBA does not prohibit an employer from citing or summarizing a portion of a MMBA code section. A public agency does not violate the MMBA by citing a part, but not all, of a MMBA section. Accordingly, Charging Party has not shown that EBMUD violated the MMBA.

3. Government Code section 3502 & The Right to Self-Representation

Charging Party alleges that EBMUD violated Government Code section 3502. As noted above, Government Code section 3502 includes a public employee's right to represent themselves individually in their employment relations with a public agency.

The Courts and PERB have narrowly defined the MMBA's right to self-representation. The right to self-representation is limited and does not encompass a right to negotiate with an employer over the terms and conditions of employment. (*Relyea v. Ventura County Fire Protection District* (1992) 2 Cal.App.4th 875, 883.) Instead, "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." (*Ibid.*) An employer satisfies its obligations under the MMBA if it is "willing to talk to [an employee] about employment matters unrelated to [the union] negotiated contract." (*Ibid.*) Under the MMBA's right of self-representation, individual employee complaints to the employer are protected only when they are a logical continuation of group activity and are not undertaken solely for the employee's benefit. (*City of Alhambra* (2011) PERB Decision No. 2161-M.)

The allegations in the charge do not explain how EBMUD violated Rivera's right to self-representation. Accordingly, Charging Party has not sufficiently alleged a prima facie case that EBMUD violated Government Code section 3502.

4. Interference & PERB Regulation 32603(a)

PERB Regulation 32603(a) states, in part, that it shall be an unfair practice for a public agency to interfere with public employees because of their exercise of protected rights. 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 has not made any allegations to show that she engaged in protected conduct. Accordingly, she has not stated a prima facie case for interference.

Even assuming for the sake of argument that Charging Party had engaged in protected conduct, Charging Party did not show that the employer acted in a way to interfere with protected conduct. The October 16, 2014 memorandum summarizes one of the rights set forth in Government Code section 3502. The Charging Party appears to assert that by not summarizing or citing Government Code section 3502's right to individual representation, the October 16, 2014 memorandum somehow harmed that right. However, Charging Party has not shown that the right to individual represented was harmed simply because EBMUD posted a document summarizing a part, but not all, of Government Code section 3502.

5. PERB Regulation 32603(d) & Domination

To state a prima facie violation of 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.*) 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 charge indicate that EBMUD 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.

6. PERB Regulation 32603(f)

Rivera alleges that EBMUD violated PERB Regulation 32603(f). PERB Regulation 32603(f) states that it shall be an unfair practice for a public agency to "Adopt or enforce a local rule that is not in conformance with the MMBA."

Rules adopted by the local agency must be reasonable, and consistent with the purposes and provisions of the MMBA. (*County of Imperial* (2007) PERB Decision No. 1916-M.) When considering the reasonableness of a local rule, PERB considers whether the local rule is consistent with and effectuates the purposes of the MMBA, not whether PERB would find a different rule more reasonable or an existing rule unreasonable, measured against an arbitrary standard. (*City of San Rafael* (2004) PERB Decision No. 1698-M.) The burden of proof is on the party contesting the rule as unreasonable and PERB will presume it is reasonable absent proof to the contrary. (*City & County of San Francisco* (2007) PERB Decision No. 1890-M.)

Here, Charging Party has not identified the local rule that she is contesting. Accordingly, Charging Party has not stated a prima facie case that EBMUD adopted an unreasonable local rule.

7. PERB Regulation 32603(g)

Rivera alleges that EBMUD violated PERB Regulation 32603(g). PERB Regulation 32603 lists conduct by a public agency that constitutes an unfair practice. PERB Regulation 32603(g) states that it shall be an unfair practice for a public agency to "In any other way violate MMBA or any local rule adopted pursuant to Government Code Section 3507." As discussed above, EBMUD's posting of a memorandum that summarized a portion of a MMBA section, does not violate the MMBA. In addition, Charging Party has not identified a local rule that was allegedly violated by the posting of the memorandum. Accordingly, Charging Party has not stated a prima facie case that EBMUD violated PERB Regulation 32603(g).

CONCLUSION

For these reasons the charge, as presently written, does not state a prima facie case.⁴ If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with

⁴ In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

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PERB. If an amended charge or withdrawal is not filed on or before January 4, 2016,⁵ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Jessica Kim
Regional Attorney

JSK:jk

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.)