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-1227-M PERB Decision No. 2501-M September 23, 2016

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

Before Winslow, Banks and Gregersen, Members.

DECISION[1]

GREGERSEN: 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) failing to provide her with the pay and privileges of a supervisor classification; (2) failing to exclude her from the American Federation of State, County and Municipal Employees, Local 444 (AFSCME) bargaining unit; (3) failing to investigate complaints made to the District's board of directors; (4) telling Rivera

[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 [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.

the grievance machinery was owned by the union after she voiced complaints at a District board meeting, (5) failing to accept or process her complaints about her classification; (5) and by retaliating against her for voicing her complaints at District board meetings. The charge further alleged that the District violated its Employer-Employee Relations Policy, as well as Rivera's due process rights and her constitutional rights to free association, free speech, the right to petition her government, and the right to be free from government oppression. Lastly, the charge alleged that the District discriminated against Rivera because of her gender.

The OGC dismissed Rivera's unfair practice charge for failure to state a prima facie case, lack of standing, lack of jurisdiction and timeliness.

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 asserts that the PERB Board agents disregarded relevant facts in Rivera's favor including audio recordings.[3] She further repeats the same factual allegations and arguments she made in her unfair practice charge, without pointing to any error of law by the OGC.[4] 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 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.)

ORDER

The unfair practice charge in Case No. SF-CE-1227-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Winslow and Banks joined in this Decision.

[3] Included in this argument, is an assertion that the PERB Board agent failed to review a DVD submitted by Rivera. Citing PERB Regulation 32615, subdivision (a), the Board agent stated that since a charge must be submitted "in writing," review of the DVD was not warranted. We agree with Rivera that the Board agent erred by failing to review the DVD for the sole reason that it was not "in writing." We do not read PERB Regulation 32615, subdivision (a) to prohibit review of supporting evidence not in written form. That regulation requires only that the unfair practice charge be in writing, not evidence supporting the charge allegations. (See *Antelope Valley Hospital District* (2011) PERB Decision No. 2167-M, p. 3, describing board agent's duties to review the charge and "any accompanying materials.") However, because the Board agent did review the unofficial written transcript of the DVD, and Rivera fails to state how the content of the DVD differed from the unofficial written transcript, the error did not affect the determination that Rivera's charge failed to state a prima facie case.

[4] 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 response to a dismissal is an appeal pursuant to PERB Regulation 32635. We, however, decline to deny Rivera's appeal on this ground.

PUBLIC EMPLOYMENT RELATIONS BOARD

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March 14, 2016

Ivette Rivera

Re: *Ivette Rivera v. East Bay Municipal Utility District*
Unfair Practice Charge No. SF-CE-1227-M
DISMISSAL LETTER

Dear Ms. Rivera:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 26, 2014. Ivette Rivera (Rivera or Charging Party) filed a First Amended Charge on June 29, 2015. Charging Party alleges that the East Bay Municipal Utility District (EBMUD or Respondent) violated sections 3502, 3503, 3504, 3506, 3506.5, 3507, 3507.3, 3507.4, 3507.5, and 3507.9(d)[1] of the Meyers-Milias-Brown Act (MMBA).[2] Rivera also alleges that EBMUD violated EBMUD's Employer-Employee Relations Policy at section 4. In addition, Rivera alleges a violation of her due process rights and her constitutional rights to free association, free speech, the right to petition her government, and the right to be free from government oppression. Finally, Rivera appears to allege gender discrimination.

Charging Party was informed in the attached Warning Letter dated December 8, 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 December 29, 2015, the charge would be dismissed.

On December 29, 2015, Charging Party filed a timely Second Amended Charge. On February 16, 2016, Charging Party filed a Third Amended Charge. The Second Amended Charge and the Third Amended Charge allege for the first time that EBMUD violated EBMUD EERP sections 12 and 15, Government Code section 3509(b), PERB Regulation 32603(a), (f), and

[1] The Dismissal Letter does not address alleged violations of Government Code sections 3507.4 and 3507.9(d), because these sections do not exist.

[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.

(g)[3], and that EBMUD engaged in fraudulent concealment and conspiracy, breached a contract and its fiduciary duty. The Second Amended Charge and the Third Amended Charge do not cure the deficiencies discussed in the Warning Letter and do not state a prima facie case. Therefore, the charge is dismissed based on the facts and reasons set forth herein and in the December 8, 2015 Warning Letter.

Facts Alleged

Rivera is employed as a Gardener Foreman for EBMUD. Rivera was hired on January 24, 2005. Rivera's job duties as Gardener Former include supervising and managing a large portion of the gardening and ground maintenance staff in the West Division of EBMUD. Rivera's bargaining unit is represented by the American Federation of State, County, and Municipal Employees, Local 444 (AFSCME 444).

EBMUD has not acknowledged that Rivera is a supervisor. Thus, Rivera has not received benefits available to employees who are classified as supervisors.

On September 22, 2005, Rivera sent an e-mail message to an AFSCME 444 representative, Reginald Moore. The e-mail message states, in part, that she and several other employees are performing "supervisory" duties, and that she is interested in joining IFPTE, Local 21.

Memorandums of Understanding and Side Letters

Rivera attached to her charge a side letter to AFSCME 444 and EBMUD's MOU that was effective from 1982 to 1985. This side letter indicates that the following supervisory classifications were excluded from AFSCME 444: Auto Mechanic foremen, Electric foremen, General Pipe foremen, Heavy Equipment foremen, Instrument foremen, Mechanical Maintenance foremen, Plant Maintenance foremen, Wastewater Plant foremen, and Pipeline Welding foremen. Rivera alleges that the employees in these classifications were male or males.

Rivera also attached to her charge a side letter to AFSCME 444 and EBMUD's MOU that was effective from 1985 to 1988. According to that side letter, the following classifications were removed from the bargaining unit: Maintenance Foreman, Material Storage Foreman, Power Plant Foreman, Meter Shop Foreman. The side letter also states that whether any of the following classifications were supervisors would be submitted to binding arbitration: Carpenter Foreman, Painter Foreman, Paving Crew Foreman, and General Grounds Foreman. Rivera alleges that the Carpenter Foreman and the General Grounds Foreman classifications were moved to the supervisory unit after an arbitration procedure. The Paving Crew Foreman and Painter Foreman classifications were not moved to the supervisory unit after arbitration.

[3] PERB Regulation 32603(a) states that it is an unfair practice to interfere with or discriminate against public employees for the exercise of their rights protected by the MMBA. Whether EBMUD unlawfully discriminated against or interfered with Rivera was addressed in the December 8, 2015 Warning Letter.

Rivera alleges that historically, only male supervisors have moved from foremen positions to the supervisors' union. Rivera alleges that her job duties are virtually identical to the foremen positions that have moved to the supervisors' union.

Rivera attaches a letter to her charge dated June 1, 2000, drafted by the chief negotiator of IFPTE Local 21. The letter states that EBMUD had intended to shift certain supervisory classifications from Local 444 to IFPTE Local 21, but Local 444 had not agreed to the shift.

AFSCME 444 and EBMUD agreed to a Memorandum of Understanding that was effective April 25, 2011 to April 21, 2013. During the negotiations period for a successor to this Memorandum of Understanding, both EBMUD and AFSCME 444 were aware that Rivera performed supervisory duties. However, the proposed successor Memorandum of Understanding did not exclude Rivera from AFSCME 444.

On December 10, 2013, EBMUD ratified the proposed successor Memorandum of Understanding. The Memorandum of Understanding became effective February 20, 2014 and allowed for "96 full union paying members of AFSCME 444, all males, in 5 non-supervisory classifications" to have the right of classification review.

Rivera's Speech at Board Meetings and Documents Provided to the Board

In December 2013 and January 2014, Rivera spoke at EBMUD Board meetings several times. Rivera also provided documents to EBMUD Board directors. Rivera's speech, and the documents she provided to the Board, were related to her allegations that: (1) Rivera should receive the benefits and privileges of a supervisor; and (2) EBMUD's complaint policies violated her rights.

On January 28, 2014, during one of the EBMUD Board meetings, EBMUD Director Frank Mellon (Mellon) told Rivera, in part:

> There's a collective bargaining agreement here between the District and the unions. It provides for what is called an exclusive remedy . . .
>
> [Y]ou 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."

In December 2013 and early 2014, Rivera exchanged correspondence with EBMUD representative Michael Rich (Rich) related to her statements at EBMUD Board meetings. Rivera also met with Rich. EBMUD did not create an investigative report based on Rivera's complaints to the EBMUD Board.

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Alleged Retaliation

Charging Party alleges that a letter sent to her on January 9, 2014, by Delores Turner (Turner), the EBMUD Manager of Human Resources, was retaliatory. The letter stated in part, "Ms. Rivera has the ability to request that her position be studied. In the event that the study concludes that Ms. Rivera is performing the duties of a supervisor rather than a foreman, the District would identify the supervisory duties and ensure that she no longer performs them."

Charging Party's Third Amended Charge also alleges that after she made complaints to EBMUD, EBMUD: (1) refused to adequately investigate her complaints; (2) refused to allow her to be properly classified as a supervisor and given the pay and benefits of a supervisor; (3) refused to allow her to move to Local 21; (4) placed her "for the first time in my career, under a quarterly 'sick leave' review program within a month of making MMBA and discrimination complaints"; (5) issued her a "written warning within days of informing [EBMUD] that I would be filing a PERB retaliation complaint"; (6) issued her a counseling memorandum in February 2015; (7) "den[ied] flexible staffing in April 2015"; and (8) "reduc[ed] [Rivera's] supervisory duties in both late-2014 and early-2015[.]"

Complaints Regarding Classification to Manager

Between July 2014 and February 2015, Rivera made several complaints to her immediate manager, Superintendent Ted Lam (Lam). Rivera told Lam that she "was not properly classified as supervisor, my male counter-parts in the position of 'Foreman' had already been appropriately classified as supervisor and allowed representation by Local 21, and that I was not being properly paid as supervisor, along with supervisory benefits." Lam refused to accept or process these complaints. Lam told Rivera that Human Resources told him he was "not allowed" to speak with Rivera about her complaints and "that any dispute [Rivera] had was required to go through [her] union." Lam told Rivera he had no authority to address any of her classification complaints and that she was not allowed to raise any complaints regarding classification because only managers have the authority to request a classification study.

Rivera alleges that EBMUD "has engaged in unfair labor practices by fore-closing on employee's right to obtain remedy for classification complaints by eliminating the right to individual representation."

Grievance

Attached to Rivera's Third Amended Charge is a copy of AFSCME 444 and EBMUD's Memorandum of Understanding effective from April 25, 2011 through April 21, 2013. Under the terms of the 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.)

An employee dissatisfied with the response from EBMUD at step one, can escalate the grievance to step two without the union's participation or consent. (MOU section 22.5.2.1.) If a grievant is dissatisfied with the response from EBMUD at step two, they can submit the grievance to binding arbitration. (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 provides that '[t]he District, or its representative, and the employee, or his/her representative, shall jointly select an impartial arbitrator." (MOU section 22.5.3.2.) The MOU has a section discussing suspension of the grievance procedure. This section states in part, "[t]he Grievance Procedure outlined herein shall not be applicable to grievances arising in the period between the termination of this Memorandum and the effective date of its successor." (MOU section 22.9.)

Rivera alleges the following:

> My rights were abridged by Ted Lam, Maintenance Superintendent, Phil Kohne, Facilities Maintenance & Construction Manager, Mike Wallis, Operations Maintenance and Construction Director, Michael Rich Employee Relations Manager and Delores Turner, Human Resources Manager . . . when they refused to accept my grievances related to my classification complaints, unfair labor practices at EBMUD and my request for remedy. The EBMUD Board of Directors ratified the violation of this portion of the contract, when the public elected official, Frank Mellon, EBMUD Director, ratified Jylana Collins, EBMUD General Counsel's statement; that I needed to fill out forms and that I could not bring my complaints directly to the Board . . .
>
> I was NOT allowed to process a grievance by myself AND I was NOT bound to the grievance procedure in the contract because the contract ended in July and the effective date of the new contract was February 20, 2014.

Rivera does not allege that she attempted to file a grievance form with any EBMUD representative.

Exhibits

Both the Second Amended Charge and the Third Amended Charge attached hundreds of pages of exhibits. The exhibits include, but are not limited to:

- a 1985 classification description for a General Grounds Foreman;
- a job description for a Gardener Foreman;
- correspondence between Rivera and various EBMUD representatives;
- Rivera's performance evaluations;
- a tort claim submitted by Rivera to EBMUD on December 19, 2014, and a notice by EBMUD rejecting the tort claim;

- minutes from EBMUD Board meetings in December 2013 and January 2014, public speaker cards from the meetings, documents provided to the Board during the meetings, a DVD of Charging Party playing portions of board meeting audio recordings,[4] and an unofficial transcript of the DVD;
- various EBMUD resolutions, procedures and policies;
- a copy of the First Amended Charge; and
- a copy of a letter dated September 13, 2015, that Charging Party filed with PERB in opposition to EBMUD's position statement.

The Warning Letter

The Warning Letter noted that PERB's jurisdiction does not include enforcement of U.S. or California Constitution, or adjudication of allegations of gender discrimination. 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, 3503, 3504, 3506, 3506.5, 3507, 3507.3, 3507.5, and EBMUD EERP Section 4. Charging Party was also advised that the charge failed to state a prima facie case for interference, discrimination, domination, and bypass, or that EBMUD violated the right to self-representation. Charging Party was provided an opportunity to cure the deficiencies in the charge as identified in the Warning Letter.

Discussion

Rivera's First Amended Charge alleged that: (1) Rivera has performed the duties consistent with a supervisor classification but EBMUD has not provided her with the pay and privileges of a supervisor classification; (2) EBMUD and AFSCME 444's MOU did not exclude Rivera's classification from AFSCME 444 even though other supervisory classifications were excluded; and (3) Rivera voiced complaints and provided documents to EBMUD's Board of Directors but they did not investigate her complaints.

Rivera's Second Amended Charge and her Third Amended Charge additionally allege that EBMUD violated the MMBA by: (1) an EBMUD Board representative telling Rivera the grievance machinery was owned by the union after she voiced complaints at a EBMUD Board meeting; (2) Rivera's manager refusing to accept or process her complaints about classification; and (3) retaliating against Rivera for her protected activity.

For the reasons below, Charging Party has not stated a prima facie case that EBMUD violated the MMBA or PERB regulations.

1. Jurisdiction Over Constitutional Claims, Allegation of Gender Discrimination, Fraud, Conspiracy, Breach of Contract and Fiduciary Duty

[4] PERB Regulation 32615(a) requires that a charge "shall be in writing[.]" Accordingly the DVD was not considered by the Board agent. However, the unofficial written transcript of the DVD was considered.

As the Warning Letter observed, 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.) Accordingly, Charging Party's allegation that EBMUD violated her constitutional rights, and engaged in gender discrimination, fraud, conspiracy, breach of contract, and breach of its fiduciary duty, are hereby dismissed.

2. Rivera's Allegation that She is a Supervisor But She Has Not Received the Pay and Privileges of a Supervisor

Charging Party alleges that since 2005 she has performed the duties of a supervisor but EBMUD has not given her the pay or privileges of a supervisor. However, as stated in the Warning Letter, 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.) Charging Party has believed that she has been performing the duties of a supervisor since 2005, as shown by her e-mail message to Reginald Moore dated September 22, 2005. Charging Party has far exceeded the six month statute of limitations period. Charging Party's allegation that she is performing supervisory duties, but EBMUD is not providing her with the pay or privileges of a supervisor, is therefore untimely. Further, as noted in the Warning Letter, this allegation does not state a prima facie case that EBMUD violated the MMBA. For these reasons, this allegation is hereby dismissed.

3. Rivera's Allegation that She Should Have Been Placed in a Supervisory Unit

Charging Party alleges that EBMUD and AFSCME 444 should have excluded her from a bargaining unit represented by AFSCME 444, because Charging Party is a supervisor. As the Warning Letter noted, this allegation does not state a prima facie case that EBMUD violated the MMBA. Further, the Board has held that individual employees lack standing to challenge unit configuration or to file a unit modification petition. (*State Employees Trades Council-United (Chemello)* (2006) PERB Decision No. 1867-H.) Accordingly, Charging Party lacks standing to challenge her placement in a non-supervisory unit. For these reasons, this allegation is hereby dismissed.

4. Right to Self-Representation under the MMBA; Government Code sections 3502 and 3503

Charging Party submits several allegations that indicate that she was unsatisfied with how EBMUD representatives responded to her various complaints. Charging Party alleges:

- Rivera voiced complaints at EBMUD Board meetings in December 2013 and January 2014. During a January 28, 2014, EBMUD Board meeting, Board Director Mellon told her that the collective bargaining agreement provides an exclusive remedy, and that the grievance machinery is "owned by the 'union.'"

- Rivera exchanged correspondence and met with EBMUD representative Rich related to her statements at EBMUD Board meetings. However, EBMUD did not issue an investigative report regarding Rivera's complaints.
- Rivera voiced complaints regarding her classification to her manager Ted Lam and other EBMUD representatives, but he refused to accept them. Jylana Collins, EBMUD General Counsel, stated that Rivera "needed to fill out forms" and that she could not bring her complaints directly to the Board.
- Rivera "was NOT allowed to process a grievance by myself AND [she] was NOT bound to the grievance procedure in the contract because the contract ended in July and the effective date of the new contract was February 20, 2014."

As summarized in the Warning Letter, the Courts and PERB have narrowly defined the MMBA's right to self-representation. The right to self-representation 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.)

In *Antelope Valley Hospital District* (2011) PERB Decision No. 2167-M, the Board noted that "individual employees at best have the right to a grievance procedure (in which the employer is bound to respond) only to the extent it is created by the contract negotiated and administered by the union." (*Antelope Valley Hospital District, supra,* PERB Decision No. 2167-M (citing *Lillebo v. Davis* (1990) 222 Cal.App.3d 1421, 1445-1446.)) The Board observed that PERB does not have jurisdiction to remedy a violation of a collective bargaining agreement. (*Antelope Valley Hospital District*, supra, PERB Decision No. 2167-M.) Accordingly, the Board concluded that although the MMBA may provide individual employees the right to file grievances (if a grievance procedure has been negotiated by a union), an employer's refusal to process a grievance does not establish a prima facie violation of the MMBA. (*Ibid.*)

Here, Charging Party voiced her complaints to Ted Lam and other EBMUD representatives including the EBMUD Board. EBMUD and AFSCME 444's MOU permits an employee to file a written grievance through use of a specified form. (MOU section 22.5.1.1.) Rivera alleges that Ted Lam and other EBMUD representatives "refused to accept my grievances" but she does not allege that she tried to file a grievance form with any of these representatives in accordance with the MOU. Rivera rejects the proposition that she "needed to fill out forms" and instead appears to assert that Ted Lam and other EBMUD representatives were required to respond to her verbal and written complaints made outside the grievance procedures set forth in the MOU. However, Charging Party's dissatisfaction with EBMUD representatives' responses to her verbal and written complaints is not sufficient to show that EBMUD violated her right to self-representation. (*Relyea v. Ventura County Fire Protection District*, supra, 2 Cal.App.4th 875, 883.)

Rivera alleges that there was a period of time, between July 2013 and February 20, 2014, that EBMUD's grievance procedure was suspended because there was no effective MOU between AFSCME and EBMUD. However, Rivera's allegation that the grievance procedure was suspended does not state a prima facie violation of the MMBA. This is because individual employees only have a right to a grievance procedure to the extent that it is created by a

contract negotiated by a union. (*Antelope Valley Hospital District*, supra, PERB Decision No. 2167-M; *Lillebo v. Davis*, supra, 222 Cal.App.3d 1421, 1445-1446.)

Rivera also alleges that she was not allowed to "process a grievance by myself[.]" However, an employer's refusal to process a grievance does not establish a prima facie violation of the MMBA. (*Antelope Valley Hospital District*, supra, PERB Decision No. 2167-M.)

Finally, although it is not clear, Rivera appears to be alleging that some of her complaints, such as her complaint that she should be classified as a supervisor, were not the type of complaint that could be grieved under the grievance procedure set forth in AFSCME 444 and EBMUD's MOU. However, this allegation does not establish a prima facie violation of the MMBA because individual employees are not entitled to a grievance procedure beyond that established by a contract negotiated by a union. (*Antelope Valley Hospital District*, supra, PERB Decision No. 2167-M; *Lillebo v. Davis*, supra, 222 Cal.App.3d 1421, 1445-1446.)

Accordingly, Charging Party's allegation that EBMUD violated her right to self-representation under the MMBA is hereby dismissed.

5. EBMUD EERP sections 4, 12, and 15

EBMUD EERP section 4 states that employees "shall have the right to represent themselves individually in their employment relations with the District." Section 12 states that employees are not precluded from consulting with management representatives on employer-employee relations matters of concern to them. Charging Party has not stated a prima facie case that EBMUD violated these EERP sections 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 EBMUD EERP sections 4 and 12 is hereby dismissed.

The EBMUD EERP section 15 defines a grievance. Charging Party has not set forth allegations to show that EBMUD violated this section of their EERP. Accordingly, Charging Party's allegation that EBMUD violated EBMUD EERP section 15 is hereby dismissed.

6. Government Code section 3509(b)

Charging Party alleges EBMUD violated Government Code section 3509(b). Government Code section 3509(b) relates to the processing of unfair practice charges. Charging Party has not set forth any facts to show that EBMUD violated Government Code section 3509(b). Accordingly, this allegation is hereby dismissed.

7. Government Code Sections 3506.5(b), (c), and (e); Domination; Bypass

Charging Party has not submitted any additional facts to show that she has standing to allege that EBMUD violated Government Code sections 3506.5(b), (c), and (e). Nor has she submitted any additional facts to show that she has standing to allege that EBMUD engaged in

unlawful domination or bypass. Accordingly, these allegations are hereby dismissed. (*Jurupa Unified School District*, *supra*, PERB Decision No. 2283.)

8. Government Codes Sections 3507 and 3507.5, PERB Regulation 32603(f), and Adoption of Local Rules

The Warning Letter noted that Government Code sections 3507 and 3507.5 permit public agencies to adopt reasonable rules and regulations. PERB Regulation 32603(f) makes it an unfair practice to adopt or enforce a local rule not in conformance with the MMBA. The Warning Letter noted that Charging Party had not identified which local rule she was contesting. Charging Party has still failed to identify a local rule she is contesting. In fact, Charging Party's Second Amended Charge asserts "I NEVER alleged that I found any section of the EERP unreasonable. The EBMUD directors have violated the local rules I list." Accordingly, Charging Party's allegation that EBMUD violated Government Code sections 3507, 3507.5, and PERB Regulation 32603(f) are hereby dismissed.

9. Government Code Section 3504

Charging Party has not alleged additional facts to show that EBMUD violated Government code section 3504, which defines the term "scope of representation." Accordingly, this allegation is hereby dismissed.

10. Government Code Section 3507.3

Charging Party has not alleged additional facts to show that she is professional employee or that professional employees at EBMUD are not represented separately from nonprofessional employees. Accordingly, Charging Party's allegation that EBMUD violated Government Code section 3507.3 is hereby dismissed.

11. Discrimination

As the Warning Letter noted, to demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action <u>because of</u> the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following

additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210).

a. Protected Activity and Employer Knowledge

The Warning Letter acknowledged that Charging Party's speech at Board meetings in December 2013 and January 2014 was arguably protected.

Between July 2014 and February 2015, Charging Party voiced complaints to her manager Lam that she should be classified as a supervisor like her male counterparts. In order to be protected, an individual's activity must be the "logical continuation of group activity." (*Regents of the University of California* (2010) PERB Decision No. 2153-H (*Regents*).) Internal complaints, "undertaken alone and for [the employee's] sole benefit" are not protected. (*Los Angeles Unified School District* (2003) PERB Decision No. 1552.) Here, Rivera's complaints appear mostly for her sole benefit. However, because it is at least arguable that Rivera's complaints were made, in part, as a continuation of group activity, she has sufficiently stated that her complaints to Lam were protected.

On an unspecified date, Charging Party informed EBMUD that she would be filing a PERB retaliation complaint. This was a protected activity.

b. Adverse Action

Charging Party appears to allege that a letter to Rivera dated January 9, 2014, from Delores Turner, the EBMUD Manager of Human Resources, constituted an adverse action. The letter states in part, "Ms. Rivera has the ability to request that her position be studied. In the event that the study concludes that Ms. Rivera is performing the duties of a supervisor rather than a foreman, the District would identify the supervisory duties and ensure that she no longer performs them." The letter does not indicate that EBMUD has taken any duties away from Rivera. The letter states that EBMUD may take supervisory duties away if Rivera requests a study of her position and the study finds that she is performing the duties of a supervisor. The charge does not indicate that Rivera requested a position study. Requesting a position study is

not a protected activity. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 1552.) Accordingly, Rivera's loss of duties as a result of Turner's letter is at best speculative, and is therefore insufficient to constitute an adverse action. (See *County of Tehama* (2010) PERB Decision No. 2122-M [speculative loss of promotional activity insufficient to support a finding of adverse action].)

Rivera alleges that EBMUD refused to allow her to move to Local 21 and refused to adequately investigate her complaints to EBMUD's Board and her manager. These allegations are not sufficient to state an adverse action. Rivera has not shown that a reasonable person under the same circumstances would consider these acts to have an adverse action on their employment. (*Jurupa Unified School District* (2013) PERB Decision No. 2309.) Rivera's allegation that EBMUD "den[ied] flexible staffing" is vague. Rivera has not provided specific facts showing that a reasonable person under the same circumstances would consider this denial an adverse action on their employment. *(Ibid.)*

Charging Party alleges that EBMUD "reduc[ed] [Rivera's] supervisory duties[.]" The addition or change of similar job duties typically does not constitute adverse action. (*Alvord Unified School District* (2009) PERB Decision No. 2021.) However, PERB has found that an adverse action exists when a reasonable person would consider the duties of the new position to be a step down from those of the previous position. (*Trustees of the California State University* (2006) PERB Decision No. 1853-H [warehouse worker reassigned to "count discarded supplies"]; *Pleasant Valley School District* (1988) PERB Decision No. 708 [groundskeeper reassigned from mowing duties to raking, pruning and watering]; *Trustees of State of California* (2009) PERB Decision No. 2038-H [position requiring exercise of independent judgment to clerical position requiring routine tasks].) Here, Charging Party has not provided specific information supporting a conclusion that the reduction of her "supervisory duties" constituted an adverse action.

EBMUD's alleged refusal to classify Rivera as a supervisor and provide her with the pay of a supervisor was arguably an adverse action. EBMUD's placement of Rivera under quarterly sick leave review, and issuance of a written warning and counseling memorandum were also arguably adverse actions.

c. Nexus

EBMUD has allegedly refused to classify Rivera as a supervisor and provide her with the pay of a supervisor since 2005. Charging Party's protected activities occurred between December 2013 and February 2015. Accordingly there is no temporal proximity between the refusal to classify Rivera as a supervisor and any of Rivera's protected activities.

Rivera was placed under quarterly sick leave within a month of making MMBA and discrimination complaints. Rivera was issued a written warning days after she informed EBMUD she would be filing a PERB retaliation complaint. Rivera was issued the counseling memorandum in February 2015, the same month she made a classification complaint to her manager. Accordingly, Charging Party has sufficiently established temporal proximity for

these adverse actions. (*Escondido Union Elementary School District* (2009) PERB Decision No. 2019 [3.5 month gap sufficiently close to indicate temporal proximity].)

However, Charging Party has not alleged any other facts to show that EBMUD engaged in these adverse actions because of Charging Party's protected activity. Accordingly, Charging Party has not submitted sufficient facts to establish a nexus between her protected activity and any adverse action.

d. Timeliness

Further, Charging Party's allegation that EBMUD refused to classify her as a supervisor and provide her with the pay of a supervisor is untimely. Charging Party alleges that she has been not been classified as a supervisor or given the pay and privileges of a supervisor since 2005. Accordingly, this allegation far exceeds the six month statute of limitations. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board, supra*, 35 Cal.4th 1072.)

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 original charge. (*Sacramento City Teachers Association (Marsh)* (2001) PERB Decision No. 1458.) Here, Charging Party did not include allegations about Turner's letter, quarterly sick leave review, the written warning, the counseling memorandum, the denial of flexible staffing, or her reduction of duties, in either her original charge or her First Amended Charge. Rivera filed her Second Amended Charge on December 29, 2015, and her Third Amended Charge filed on February 16, 2016. The counseling memorandum was issued in February 2015, flexible staffing was denied in April 2015, and Rivera's duties were reduced between late 2014 and early 2015. Accordingly, Charging Party exceeded the six month statute of limitations to file a charge regarding these allegations. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board, supra*, 35 Cal.4th 1072.) Further, Charging Party did not include the date that she was issued the written warning or placed under quarterly sick leave review. Thus, Charging Party has not met her burden of showing that she timely filed these allegations. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

For these reasons, Charging Party has failed to state a prima facie case for discrimination and this allegation is hereby dismissed.

12. Interference

Charging Party has not submitted any additional facts to show that EBMUD engaged in unlawful interference. Accordingly, Charging Party's interference allegation is hereby dismissed.

13. PERB Regulation 32603(g)

PERB Regulation 32603 lists various conduct of a public agency that amounts to an unfair practice. PERB Regulation 32603(g) states that it shall be an unfair practice to "In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507." For the reasons stated above, Charging Party has not shown a prima facie case that EBMUD violated the MMBA or a local rule. Accordingly, Charging Party's allegation that EBMUD violated PERB Regulation 32603(g) is hereby dismissed.

Conclusion

For these reasons and incorporating the discussion 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 8, 2015

Ivette Rivera

Re: *Ivette Rivera v. East Bay Municipal Utility District*
Unfair Practice Charge No. SF-CE-1227-M
WARNING LETTER

Dear Ms. Rivera:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 26, 2014. Ivette Rivera (Rivera or Charging Party) filed a First Amended Charge on June 29, 2015.[1] Charging Party alleges that the East Bay Municipal Utility District (EBMUD or Respondent) violated sections 3502, 3503, 3504, 3506, 3506.5, 3507, 3507.3, 3507.4, 3507.5, and 3507.9(d)[2] of the Meyers-Milias-Brown Act (MMBA).[3] Rivera also alleges that EBMUD violated EBMUD's Employer-Employee Relations Policy at Section 4. In addition, Rivera alleges a violation of her due process rights and her constitutional rights to free association, free speech, the right to petition her government, and the right to be free from government oppression. Finally, Rivera appears to allege gender discrimination.

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[1] On September 14, 2015, Rivera filed a letter that she characterized as her "opposition to East Bay Municipal Utility Districts' (EBMUD) Response and Position Statement[.]" The letter was accompanied by a declaration from Rivera. The letter stated, in part, that if PERB found the First Amended Charge deficient, Rivera planned to ask PERB leave to file a Second Amended Charge. Thus, it is appears that the letter and the declaration were not intended to serve as a Second Amended Charge. For these reasons, the undersigned Board Agent did not treat the letter or declaration as an amended charge. Nonetheless, the Board Agent considered the content of the letter and declaration.

[2] This warning letter does not address alleged violations of Government Code Sections 3507.4 and 3507.9(d), because these sections do not exist.

[3] 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.

FACTS AS ALLEGED

Rivera is employed as a Gardener Foreman for EBMUD. Since she was hired in January 2005, Rivera has performed the duties associated with "supervisory and assistant superintendent" job classifications. However, EBMUD has not acknowledged that Rivera is a supervisor. Thus, Rivera has not received benefits available to employees who are classified at the "supervisory and assistant superintendent" classification level.

MOUs and Side Letters

Rivera is represented by the American Federation of State, County, and Municipal Employees, Local 444 (AFSCME 444). AFSCME 444 and EBMUD agreed to a Memorandum of Understanding that was effective April 25, 2011 to April 21, 2013. AFSCME 444 and EBMUD agreed to a successor Memorandum of Understanding that was effective starting on February 20, 2015.[4]

Charging Party alleges that EBMUD "has the authority to move or not move supervisory employees from AFSCME units during contract negotiations." Rivera alleges that EBMUD has "deliberately, with malicious intent, denied her the negotiated right to be excluded from AFSCME 444."

Rivera attached to her charge a side letter to AFSCME and EBMUD's MOU that was effective from 1982 to 1985. This side letter indicates that the following supervisory classifications were excluded from AFSCME 444: Auto Mechanic foremen, Electric foremen, General Pipe foremen, Heavy Equipment foremen, Instrument foremen, Mechanical Maintenance foremen, Plant Maintenance foremen, Wastewater Plant foremen, and Pipeline Welding foremen. Rivera alleges that the employees in these classifications were male or males.

Rivera also attached to her charge a side letter to AFSCME and EBMUD's MOU that was effective from 1985 to 1988. According to that side letter, the following classifications were removed from the bargaining unit: Maintenance Foreman, Material Storage Foreman, Power Plant Foreman, Meter Shop Foreman. The side letter also states that whether any of the following classifications were supervisors would be submitted to binding arbitration: Carpenter Foreman, Painter Foreman, Paving Crew Foreman, and General Grounds Foreman. Rivera alleges that the Carpenter Foreman and the General Grounds Foreman classifications were moved to the supervisory unit after an arbitration procedure. The Paving Crew Foreman and Painter Foreman classifications were not moved to the supervisory unit after arbitration.

Rivera attaches a letter to her charge dated June 1, 2000, drafted by the chief negotiator of IFPTE Local 21. The letter states that EBMUD had intended to shift certain supervisory classifications from Local 444 to IFPTE Local 21, but Local 444 had not agreed to the shift.

[4] The year the successor MOU became effective is unclear from the charge. Rivera states that the successor agreement was enacted on February 20, 2015, but she also states that the successor agreement was entered into on February 20, 2014.

Rivera's Speech at Board Meetings and Documents Provided to the Board

In December 2013, and January 2014, Rivera spoke at EBMUD's Board meetings several times. Rivera also provided documents to EBMUD Board directors. Rivera's speech, and the documents she provided, were related to her allegations that "she was deprived of due process rights" and that she should receive the benefits and privileges of a supervisor. The EBMUD directors did not investigate Rivera's allegations.

On January 28, 2014, Frank Mellon (Mellon), an EBMUD director, and Jylana Collins (Collins), EBMUD's general counsel, told Rivera to "go back to the union."

Rivera alleges that EBMUD "has engaged in unfair labor practices by fore-closing on employee's right to obtain remedy for classification complaints by eliminating the right to individual representation."

Rivera alleges that by not investigating her allegations, and telling her to go back the union, EBMUD's management violated her constitutional rights to free association, free speech, the right to petition her government, and the right to be free from government oppression.

DISCUSSION

The First Amended Charge appears to center around three main allegations: (1) Rivera has performed the duties consistent with a supervisor classification but has not received the pay and privileges of a supervisor classification; (2) EBMUD and AFSCME 444's MOU did not exclude Rivera's classification from AFSCME 444 even though other supervisory classifications were excluded; and (3) Rivera voiced complaints and provided documents to EBMUD's Board of Directors but they did not investigate her complaints.

Accepting these allegations as true, they do not show that EBMUD violated the MMBA. Charging Party alleges that EBMUD violated sections 3502, 3503, 3504, 3506, 3506.5, 3507, 3507.3, and 3507.5. The reasons why Charging Party has not shown a violation of these sections are discussed below.

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.)

2. Jurisdiction Over Constitutional Claims and Allegation of Gender Discrimination

Charging Party alleges that EBMUD violated her due process rights and her constitutional rights to free association, free speech, the right to petition her government, 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 the District violated her first amendment and due process rights.

Charging Party alleges that the supervisory classifications that were excluded from AFSCME 444 were filled by males. It appears that Charging Party is attempting to allege gender discrimination. PERB does not have the jurisdiction to adjudicate allegations of gender discrimination. (*Baldwin Park Education Association (Hayek, et al.)* (2011) PERB Decision No. 2223.) Thus PERB does not have jurisdiction to adjudicate Charging Party's apparent allegation of gender discrimination.

3. Statute of Limitations

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.) 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.)

Charging Party alleges that since 2005 she has performed the duties consistent with a supervisor classification but has not received the pay and privileges of a supervisor classification. This allegation is not timely because it was not submitted within the six month statute of limitations.

4. Right to Self-Representation

Charging Party alleges that EBMUD violated Government Code Section 3502 and 3503. Government Code Section 3502 states in part:

> 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.

Government Code Section 3503 states in part:

> Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies . . . Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the 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 First Amended Charge do not explain exactly how EBMUD violated Rivera's right to self-representation. In fact, it appears that Charging Party was afforded multiple opportunities to speak at EBMUD's Board of Directors meetings and provide documents to EBMUD representatives.

Rivera alleges that after she spoke at EBMUD Board meetings, EBMUD did not investigate her claims. Rivera also alleges Mellon and Collins told her "go back to the union" instead of seeking remedy through the Board. These allegations are not sufficient to state a prima facie case that EBMUD violated Rivera's right to self-representation. (*Relyea v. Ventura County Fire Protection District, supra,* 2 Cal.App.4th at p. 883.) Further, none of the other allegations in the First Amended Charge demonstrate that EBMUD violated Rivera's right to self-representation.

5. Local Rule, EBMUD's Employer-Employee Relations Policy, Section 4

PERB Regulation 32603(g) states that it is an unfair practice to violate any local rule adopted pursuant to Government Code section 3507. Charging Party alleges EBMUD violated its Employer-Employee Relations Policy (EERP), Section 4, which states, in part:

> Employees of the District 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 District.

The language regarding self-representation in EERP, Section 4, mirrors the language in Government Code Section 3502. For the same reasons that Rivera has not stated a prima facie case that EBMUD violated Government Code Section 3502, Rivera has also not shown a prima facie case that EBMUD violated EERP, Section 4.

6. Government Code Sections 3507 and 3507.5, Adoption of Local Rules

Rivera alleges that EBMUD violated Government Code Sections 3507 and 3507.5. Government Code Section 3507 states in part:

> A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization . . .

Government Code Section 3507.5 states in part:

> [A] public agency may adopt . . . reasonable rules and regulations providing for designation of the management and confidential employees of the public agency and restricting such employees from representing any employee organization . . .

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 which local rule that she is contesting. Charging Party attached to her First Amended Charge EBMUD's Employer-Employee Relations Policy. However, she does not specify a section of the EERP she finds unreasonable, nor does she provide any facts demonstrating that any EERP section is unreasonable. The only section of the EERP Charging Party specifically discusses in her First Amended Charge is EERP, Section 4. However, she appears to rely on EERP, Section 4, and does not assert that she is challenging Section 4's reasonableness. Accordingly, Charging Party has not stated a prima facie case that EBMUD adopted an unreasonable local rule.

7. Government Code Section 3504

Charging Party alleges that EBMUD violated Government Code Section 3504. Government Code Section 3504 defines the term "scope of representation." Charging Party has not shown that EBMUD violated Government Code Section 3504.

///

8. Government Code Section 3506.5(b), (c), and (e)

Charging Party alleges that EBMUD violated Government Code Section 3506.5(b), (c), and (e). 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 a violation of Government Code Section 3506.5(b), which states that a public agency shall not "[d]eny to employee organizations the rights guaranteed to them by this chapter." It also alleges a violation of Government Code Section 3506.5(c) which requires employers to meet in good faith with employee organizations, and Government Code Section 3506.5(e) which requires employers to participate in good faith in applicable impasse procedures. As Charging Party is an individual and not an employee organization, Charging Party lacks standing to bring a claim that 3506.5(b), (c), and (e) were violated.

9. Government Code Section 3507.3

Charging Party alleges a violation of Government Code Section 3507.3. Government Code Section 3507.3 states in part:

> Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of those professional employees . . .
>
> "Professional employees," for the purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists.

Charging Party has not alleged facts demonstrating that she is a professional employee as defined by Government Code Section 3507.3. Charging Party has also not alleged facts to show that professional employees at EBMUD are not represented separately from nonprofessional employees. Accordingly, Charging Party has failed to state a prima facie case that EBMUD violated Government Section 3507.3.

10. Discrimination

To demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the

subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210).

Here, Charging Party's speech at the Board Meetings was arguably protected conduct. EBMUD's refusal to provide Charging Party with the pay and privileges of a supervisory classification was arguably an adverse action. However, Charging Party has not shown a nexus between the denial of pay and privileges and her protected conduct. Charging Party has not demonstrated a temporal proximity because she alleges that she has been denied pay and privileges since she was hired in 2005—before she had engaged in any protected conduct. Charging Party has not submitted any other allegations that show that EBMUD adversely acted against her because of her protected conduct. Accordingly, Charging Party has not stated a prima facie case of discrimination.

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11. 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.)

As stated above, Charging Party's speech at the Board Meetings was arguably protected conduct. However, there are no facts in the First 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.

12. 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.) 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 First 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.

13. Bypass

An employer may not communicate directly with employees to undermine or derogate the representative's exclusive authority to represent unit members. (*Muroc Unified School District*

(1978) PERB Decision No. 80.) Similarly, the employer violates the duty to bargain in good faith when it bypasses the exclusive representative to negotiate directly with employees over matters within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160.) However, once a policy has been established by lawful means, an employer has the right to take necessary actions, including consulting with employees, to implement the policy. (*Ibid.*) To establish that an employer has unlawfully bypassed the union, the charging party must demonstrate that the employer dealt directly with its employees (1) to create a new policy of general application, or (2) to obtain a waiver or modification of existing policies applicable to those employees. (*Ibid.*)

As noted above, an individual employee does not have standing to pursue violations of the rights of an employee organization. (*State of California (Department of Corrections)*, *supra*, PERB Decision No. 972-S.) In addition, individual employees lack standing to allege that an employer has failed to bargain in good faith. (*Oxnard School District* (1988) PERB Decision No. 667.) Therefore, Charging Party is without standing to allege bypass.

CONCLUSION

For these reasons the charge, as presently written, does not state a prima facie case.[5] 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 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 December 29, 2015,[6] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Jessica Kim
Regional Attorney

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[5] 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.*)

[6] 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.)