

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



JOSEPH SIMS,

Charging Party,

v.

CITY & COUNTY OF SAN FRANCISCO
(PUBLIC WORKS),

Respondent.

Case No. SF-CE-1375-M

PERB Decision No. 2510-M

January 20, 2017

Appearances: Joseph Sims, on his own behalf; Rafal Ofierski, Deputy City Attorney, for City & County of San Francisco (Public Works).

Before Winslow, Banks and Gregersen, Members.

DECISION¹

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Joseph Sims (Sims) from the dismissal (attached) by PERB's Office of the General Counsel of Sims' unfair practice charge. The charge, as amended, alleged that the City & County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA)² and PERB Regulations by terminating Sims' employment with the City as a 7355 Truck Driver on March 31, 2015. On September 29, 2016, the Office of the General Counsel dismissed the

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

² The MMBA is codified at Government Code section 3500 et seq.

charge for lack of jurisdiction and/or failure to state a prima facie case of any violation of the MMBA.

The Board has reviewed the case file and has fully considered the relevant issues and contentions raised by Sims' appeal, the City's opposition to the appeal, and applicable law. The warning and dismissal letters accurately describe the factual allegations included in the unfair practice charge, as amended, and the Office of the General Counsel's legal conclusions are well-reasoned and in accordance with applicable law. Sims' charge and supporting materials indicate that Sims was terminated for allegations of threatening workplace conduct. Although the charge alleges that the City failed to properly investigate these allegations before terminating Sims, as discussed in the warning and dismissal letters, the charge and supporting materials include no facts to indicate that Sims was terminated in retaliation for any protected conduct, that his termination was the result of a unilateral change (or that Sims has standing to bring such an allegation on behalf of the bargaining agent), or that Sims' factual allegations, even when accepted as true and read in the light most favorable to Sims, would constitute any other unfair practice within PERB's jurisdiction. Sims' appeal provides no basis to conclude that this determination by the Office of the General Counsel was incorrect. Accordingly, we adopt the warning and dismissal letters as a decision of the Board itself.

ORDER

The unfair practice charge in Case No SF-CE-1375-M is hereby **DISMISSED**
WITHOUT LEAVE TO AMEND.

Members Winslow and Gregersen joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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



September 29, 2016

Joseph Sims

Re: *Joseph Sims v. City & County of San Francisco (Public Works)*
Unfair Practice Charge No. SF-CE-1375-M
DISMISSAL LETTER

Dear Mr. Sims:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 8, 2016. Joseph Sims (Sims or Charging Party) alleges that the City & County of San Francisco (City or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)¹ when it terminated his employment.

Charging Party was informed in the attached Warning Letter dated June 6, 2016 that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn on or before June 20, 2016, the charge would be dismissed.

Charging Party filed a First Amended Charge on June 20, 2016.

The Charge Is Untimely

As noted in the Warning Letter, Charging Party alleges that his employment was terminated on March 31, 2015. Any unfair practice charge alleging that this termination was unlawful must have been filed within six months in order to be timely. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929.) The instant charge was filed more than six months later, on February 8, 2016.

In the First Amended Charge, Sims alleges that he filed a grievance over his termination on April 2, 2015. The charge's description of the timeline of the grievance's progress is somewhat unclear, but Sims argues that the limitations period to file a charge should be tolled

¹ The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

to February 28, 2016. Sims' assertion is that the last day to convene a grievance meeting under the contractual grievance procedure would have been August 30, 2015. Because none was convened, the grievance process ended that day.

The limitations period under the MMBA is equitably tolled while parties utilize a binding or non-binding dispute resolution procedure if: (1) the procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent. (*Solano County Fair Association* (2009) PERB Decision No. 2035-M.)

Here, it is not at all clear that the subject of the grievance was the "same dispute" as this charge.² The grievance form, filed by Charging Party with the City on April 2, 2015 states:

- I wish to ~~grieve~~ appeal termination
- 1) Notice of Dismissal dated March 31, 2015
 - 2) Skelly Hearing
 - 3) Weingarten Hearing

On or about April 6, 2015, a Teamsters Local 853 Business Representative sent a letter to Larry Stringer, Deputy Director of Operations for the City's Public Works Department. This letter states:

Teamsters Local 853 is protesting the termination of our member, your employee, Joseph Sims.

Please contact the undersigned so we can meet and try and resolve this issue as soon as possible.

There is no other information provided about the subject of the grievance. This is not sufficient to show that the matter is the "same dispute" as that raised in this unfair practice charge. It is Charging Party's burden to establish that the charge was timely filed, and thus that the limitations period was equitably tolled. (*City of Berkeley* (2012) PERB Decision No. 2281-M.) Having failed to provide any information about the subject of the grievance, Charging Party has not met this burden and the charge must be dismissed as untimely. (*Ibid.*)

But, even assuming that the grievance concerned the "same dispute" as the allegations contained in the instant unfair practice charge, Charging Party has not shown that that dispute is one implicating PERB's jurisdiction. As explained below, an unfair practice charge at PERB must describe a violation of the relevant Act under PERB's jurisdiction, in this case the

² Part of this is owing to the lack of clarity in the charge itself, which does not appear to relate to a matter within PERB's jurisdiction. This issue is discussed more below.

MMBA. It does not appear from the information Charging Party provides about the grievance that he or Teamsters Local 853 attempted to challenge his termination as violating the MMBA.

The Charge Does Not Appear to Relate to PERB's Jurisdiction

As Charging Party was informed in the Warning Letter, PERB Regulation 32615(a)(5) requires Charging Party to provide a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." An unfair practice concerns a violation of Charging Party's rights under the MMBA. Specifically, Charging Party may allege that Respondent violated MMBA section 3506.5(a), which provides that an employer may not:

Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

Taken as a whole, the charge does not appear to be alleging that Sims was terminated because he exercised his rights under the MMBA. Rather, the charge appears to allege that the City incorrectly determined that Sims engaged in misconduct, when it failed to "properly" investigate the multiple complaints of workplace violence against him.

PERB's jurisdiction is limited to the enforcement of the collective bargaining statutes it administers, including the MMBA. The MMBA "does not purport to regulate every aspect of [Respondent's] conduct." (See *Los Angeles Community College District* (1979) PERB Order No. Ad-64.) PERB does not stand as a general appellate body to the City's personnel processes. Because Charging Party does not allege any facts showing that that he ever exercised his rights under the MMBA before his termination, or that his termination in any way violated his rights under the MMBA, the charge must be 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.)

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Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

J. FELIX DE LA TORRE
General Counsel

By

Daniel Trump
Regional Attorney

Attachment

cc: Rafal Ofierski, Deputy City Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

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



June 6, 2016

Joseph Sims

Re: *Joseph Sims v. City & County of San Francisco (Public Works)*
Unfair Practice Charge No. SF-CE-1375-M
WARNING LETTER

Dear Mr. Sims:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 8, 2016. Joseph Sims (Sims or Charging Party) alleges that the City & County of San Francisco (City or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)¹ when it terminated his employment.

As an initial matter, following the filing of the charge on February 8, 2016, Charging Party attempted to file additional documents with PERB. These were received on February 22, 2016 and March 9, 2016. There is no indication that these documents were ever served on Respondent. PERB Regulation 32615(c) requires service and proof of service on the Respondent for any documents to be properly filed. Therefore, these documents are being returned to Charging Party along with this letter.

FACTS ALLEGED

Sims alleges that, until March 31, 2015, he was employed as a class 7355 Truck Driver with the City Public Works Department.

Sims had filed a lawsuit against the City for "retaliation" and "harassment," but the City prevailed in summary judgment in February 2015. Shortly thereafter, the City informed Sims that he was being investigated for workplace violence. Following a *Skelly*² officer's recommendation that Sims's employment be terminated, Department of Public Works Director Mohammed Nuru issued a notice of dismissal on March 31, 2015.

¹ The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

² See *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.

DISCUSSION

Charging Party's burden

PERB Regulation 32615(a)(5) requires that an unfair practice charge include a “clear and concise statement of the facts and conduct alleged to constitute an unfair practice.” In doing so, a charging party should allege with specificity the particular facts giving rise to a violation. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M.) The charging party may do this by alleging sufficient facts describing the “who, what, when, where and how” of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S (*Dept. of Food and Agriculture*), citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Such allegations should focus on the elements of the prima facie case. Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

Charging Party has not met his burden

Charging Party's employment with the City was terminated on March 31, 2015. As noted above, an unfair practice charge alleging that the termination was unlawful had to be filed within six months of the date of termination. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board, supra*, 35 Cal.4th 1072.) Therefore, the charge had to be filed no later than October 1, 2015. The instant charge was filed later, on February 8, 2016. Therefore, Charging Party has not met his burden to show that the charge was timely filed. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359.)

If Charging Party is able to provide timely allegations in any amendment to the charge, they must contain a “clear and concise statement of the facts and conduct alleged to constitute an unfair practice.” (PERB Regulation 32615(a)(5).) The allegations contained in the charge so far do not satisfy this requirement.

For these reasons the charge, as presently written, does not state a prima facie case.³ If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies

³ In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make “a

explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before **June 20, 2016**,⁴ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Daniel Trump
Regional Attorney

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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.*)

⁴ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile or electronic mail. (PERB Regulation 32135.)