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-1310-M PERB Decision No. 2512-M January 26, 2017

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 partial dismissal of her unfair practice charge (attached) by the Office of the General Counsel. The charge, as amended, alleged that the East Bay Municipal District (District or EBMUD) violated the Meyers-Milias-Brown Act (MMBA),[2] and PERB Regulations by retaliating against Rivera by issuing a warning memorandum on May 15, 2015, issuing a counseling memorandum on February 20, 2015, denying her request for a modified work schedule, and not asking for her signature on a hiring authorization form. The amended charge further alleged violations of MMBA sections 3502

[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.

and 3507, and the East Bay Municipal Utility District Employer-Employee Relations Resolution. Lastly, the amended charge alleged that the District violated Rivera's constitutional rights, including her rights to due process and free speech, and retaliated against her for whistle-blowing.

On March 28, 2016, the Office of the General Counsel issued a complaint, based on the allegation that the District retaliated against Rivera by issuing a warning memorandum on May 15, 2015. On the same date, the Office of the General issued a partial dismissal of all other allegations. Rivera filed a timely appeal to which the District filed a timely opposition.

The Board has reviewed the case file in its entirety and has fully considered the relevant issues and contentions on appeal. Based on this review, the Board finds the partial warning and partial dismissal letters accurately describe the factual allegations contained in the unfair practice charge, as amended. The Board also finds the partial warning and partial dismissal letters to be well reasoned and in accordance with applicable law.

Accordingly, the Board hereby adopts the partial warning and partial dismissal letters as the decision of the Board itself.

DISCUSSION

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

An appeal that, in large part, restates facts alleged in the charge, as amended, does not reference any portion of the dismissal or otherwise identify the specific issues of procedure, fact, law or rationale to which the appeal is taken, the page or part of the dismissal to which the appeal is taken, or the grounds for each issue, is subject to dismissal on that basis alone. (*State of California (Department of Mental Health, Department of Developmental Services)* (2012) PERB Decision No. 2305-S, p. 4.) Although Rivera identifies portions of the partial dismissal letter in her appeal, she fails to state the grounds for the appeal and simply repeats the same allegations and conclusory arguments she previously raised in her initial and amended charges. No analysis was provided to show why her appeal warrants reversal of the partial dismissal.

For instance, Rivera's appeal appears to challenge the Office of the General Counsel's determination that some of the allegations included in the amended charge were untimely, arguing that the allegations were in fact timely because she properly relied on the continuing violation theory. However, the appeal cites no authority or rationale for how the continuing violation doctrine should be applied to the facts provided for in Rivera's charge. As such, the appeal fails to state any grounds for reversing the determination that some of the allegations were untimely filed.

In addition, Rivera alleges that the Office of the General Counsel failed to include specific facts related to Rivera having engaged in protected activity by informing a District workers compensation manager that she was filing PERB charges. However, the appeal fails to discuss how the inclusion of these facts would be grounds for reversing any portion of the partial dismissal letter. For example, to demonstrate that an employer discriminated or retaliated against an employee in violation of MMBA section 3506 and PERB Regulation 32603, subdivision (a), one of the elements the charging party must show is that the employer had knowledge of the employee's exercise of protected rights. The discrimination allegation,

however, was not dismissed for lack of employer knowledge. Rather, the Office of the General Counsel found that Rivera had adequately established employer knowledge in its analysis of Rivera's timely discrimination allegation. Even assuming the Office of the General Counsel erred by failing to include the fact that Rivera informed a District workers compensation manager that she was filing PERB charges, the inclusion of this fact would not alter the result reached by the Office of the General Counsel, and Rivera has provided no rationale to find otherwise. (See *Service Employees International Union United Healthcare Workers West* (Lacey) (2016) PERB Decision No. 2486-M.)

Rivera also bases her appeal on an allegation that the Office of the General Counsel wholly ignored her March 15, 2016 verified opposition to the District's position statement. However, Rivera has not included any discussion of pertinent facts or allegations contained in the March 15, 2016 verified opposition that were allegedly omitted in the partial dismissal letter. Moreover, having reviewed the partial dismissal letter, the Office of the General Counsel determined that since Rivera's March 15, 2016 opposition highlighted allegations already set forth in her previous filings and contained no new allegations, the opposition would not be treated as an amended charge. Nevertheless, the Office of the General Counsel stated that it had, in fact, considered the contents of the filing. As such, Rivera failed to provide any rationale for reversing the partial dismissal letter based on the Office of the General Counsel's failure to treat Rivera's March 15, 2016 opposition as an amended charge.

ORDER

The allegations that the District: (1) retaliated against Rivera by issuing a counseling memorandum on February 20, 2015; (2) retaliated against Rivera by denying her request for a modified work schedule; (3) retaliated against Rivera by and not asking for her signature on a hiring authorization form; (4) violated MMBA sections 3502 and 3507, and the East Bay

Municipal Utility District Employer-Employee Relations Resolution; (5) violated Rivera's constitutional rights, including her rights to due process and free speech; and (6) retaliated against Rivera for whistle-blowing as stated in the partial dismissal letter of March 28, 2016, of the unfair practice charge in Case No. SF-CE-1310-M are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Winslow and Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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April 6, 2016

Ivette Rivera

Re: *Ivette Rivera v. East Bay Municipal Utility District*
Unfair Practice Charge No. SF-CE-1310-M
PARTIAL DISMISSAL

Dear Ms. Rivera:

The above-referenced unfair practice charge was filed on June 2, 2015. Ivette Rivera (Rivera or Charging Party) alleges that the East Bay Municipal Utility District (EBMUD or Respondent) violated the Meyers-Milias-Brown Act (MMBA). Rivera alleges that EBMUD: (1) discriminated against her for her protected activity by issuing her a warning memorandum; (2) violated Government Code Sections 3502 and 3507; (3) violated the East Bay Municipal Utility District Employer-Employee Relations Resolution (EBMUD EERP) at Section 4; (4) violated her constitutional rights including her rights to due process and free speech; and (5) retaliated against her for whistle-blowing. This partial dismissal letter addresses the second through fifth allegations. The first allegation will be addressed in a separate document.

Charging Party was informed in the attached Partial Warning Letter dated January 19, 2016, that certain allegations contained in the 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 these allegations to state a prima facie case or withdrew them prior to February 9, 2016, the allegations would be dismissed.

On February 9, 2016, Charging Party filed a timely First Amended Charge.[1] The First Amended Charge does not cure the deficiencies discussed in the Partial Warning Letter. Further, the First Amended Charge does not state a prima facie case except for the allegation that EBMUD discriminated against Charging Party for her protected activity by issuing her a

[1] On February 22, 2016, EBMUD filed a position statement in response to the First Amended Charge. On March 15, 2016, Charging Party filed an opposition to this position statement. Charging Party's opposition highlights allegations that Charging Party set forth in her previous filings. The opposition contains little to no new allegations. Charging Party verified the opposition under penalty of perjury. Because Charging Party submitted this filing as an opposition, and because it contains little to no new facts, this filing has not been treated as an amended charge. Nonetheless, the Board agent has considered the contents of this filing.

warning memorandum.[2] Therefore, all of the other allegations are dismissed based on the facts and reasons set forth herein and in the January 19, 2016 Partial Warning Letter.

Facts Alleged in the Initial Charge

Rivera is employed by EBMUD as a Gardener Foreman.

On February 19, 2015, Charging Party sent an e-mail message to EBMUD Board Members. The message stated in part:

> There is no administrative remedy at the District available to represented employees to circumvent the union to report an abuse of authority at EBMUD.
>
> I believe this practice, policy and custom at EBMUD violates the East Bay Municipal Utility district Employer-Employee Relations Policy/Resolution, the Meyers-Milias-Brown-Act under 3502 and the State of California Local Government Disclosure of Information Act: Government Code 53297[.]"

Charging Party sent a letter to the same Board Members with a similar message on the same day.

EBMUD received a copy of Charging Party's "PERB complaint" on March 19, 2015.

On May 15, 2015, Ted Lam (Lam), a Maintenance Superintendent for EBMUD, issued Rivera a letter. The subject of the letter was: "Warning for Unsatisfactory Job Performance." The letter stated it was issued because of Rivera's "excessive use of personal sick leave." The letter stated that Rivera's sick leave between August 2014 and May 2015 was 158.9 hours and that usage "exceeds acceptable levels of absences." The letter stated that if Ms. Rivera's behavior did not change Lam would "consider further disciplinary action."

On May 19, 2015, Phillip C. Kohne (Kohne), Manager of Facilities Maintenance and Construction, issued a letter with the subject "Retraction of May 15, 2015 Warning Memo." The letter stated in part:

> Based on further review, your attendance record does not warrant the subject warning memo. Although the total sick leave of 158.9 hours as of May 3, 2015 is unsatisfactory, during the period following a counseling memo issued to you in February 2015, your sick leave has averaged 3 hours per month . . .

[2] As noted above, this allegation is addressed in a separate document.

> The May 15, 2015 warning memo will be removed from your file and from files of recipients of the memo. Thank you for your improvement in attendance.

Rivera alleges that even when she is away from work she is "on call." Rivera alleges that there was not an ongoing expectation for her to be present at her work place until after she engaged in whistleblowing.

Rivera alleges that in previous years she used "approved leave time" in the following manner:

- 2006-2007: 523.0 hours
- 2007-2008: 198.7 hours
- 2008-2009: 274.1 hours
- 2009-2010: 467.9 hours
- 2010-2011: 614.9 hours
- 2011-2012: 295.7 hours
- 2012-2013: 241.7 hours
- 2013-2014: 353.0 hours

Charging Party alleges that despite exceeding leave balances in several previous years, she never received an adverse action.

EBMUD EERP

The EBMUD EERP at Section 4 is titled "Employee Rights" and 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 January 19, 2016 Partial Warning Letter

The Partial Warning Letter noted that PERB's jurisdiction does not include enforcement of U.S. or California Constitution, or the Whistleblower Protection Act (Gov. Code, § 8547 et seq.). Charging Party was further advised that the charge failed to allege facts to state a prima facie case that EBMUD violated Government Code section 3502 and 3507, and EBMUD EERP Section 4. Charging Party was provided an opportunity to cure the deficiencies in the charge as identified in the Partial Warning Letter.

New Allegations in the First Amended Charge

In 2014, Rivera discovered that employees at EBMUD cannot grieve performance appraisals, established wages or salaries, or memorandums of understanding.

On January 27, 2015, Rivera filed a federal court action against EBMUD and several EBMUD employees. The petition alleged, in part, that EBMUD had violated Rivera's rights under the MMBA. On January 28, 2015, Rivera sent an e-mail message to Alex Coate, EBMUD General Manager, and Megan Lewis and Richard Bolanos of Leibert, Cassidy, Whitmore, notifying them that she had filed a federal court action.

On February 20, 2015, Rivera gave Lam a copy of the letter she had sent to EBMUD Board Members on February 19, 2015. She also attached to the letter a press release regarding a lawsuit against EBMUD Human Resources manager Delores Turner (Turner), and copies of Government Code sections 53296 and 532977.

On February 20, 2015, and March 10, 2015, Rivera sent an e-mail message to Turner and several other EBMUD representatives. The e-mail message talks about the duty of fair representation and includes Rivera's opinion that it is the duty of government agencies to "disseminate statutes, ordinances and regulations."

On February 20, 2015, Lam issued Rivera a memorandum with the subject, "Confirmation of Counseling Session." The memorandum stated in part, that Rivera's sick leave use for the past six months was 148.9 hours, and that "[t]his amount of sick leave use is unsatisfactory . . . [and] exceedingly high." The memorandum also stated "Please be advised that if your attendance does not improve, disciplinary action could result."

Rivera alleges that in previous years she used sick leave in the following manner: [3]

- 2006-2007: sick leave 424 hours
- 2007-2008: sick leave 39.5 hours
- 2008-2009: sick leave 39.5 hours
- 2009-2010: sick leave 258.3 hours
- 2010-2011: sick leave 124 hours, and an additional 131.2 hours leave without pay
- 2011-2012: sick leave 59.8 hours, and an additional 17 hours leave without pay
- 2012-2013: sick leave 65.7 hours
- 2013-2014: sick leave 112 hours
- Between 8/16/2014 and 2/20/2015 (six months and four days): sick leave 152.9 hours[4]

[3] Rivera included "leave summary reports" with her First Amended Charge. The sick leave numbers cited here include the total sum of all of the leave used for the following time codes: SDI Sick Leave, SDI Vacation, Sick Leave, Sick Leave Extension, and Medical or Dental.

[4] This number shows a four hour difference from the sick leave calculation stated in Lam's counseling memorandum. This difference may be due to the fact that the leave summary report was based on six months and four days instead of six months, or could be due to error or a different calculation method.

On February 20, 2015, Rivera told Lam that it was not fair that she was being disciplined for sick leave usage when she had obtained approval to use sick leave accruals, and that she was "on-call during off hours and regularly responded to request for information[.]" In response, Lam told Rivera she "could no longer answer calls after hours or during approved leave time." Rivera also told Lam that she would have historically applied for FMLA, but she had not done so because she was afraid of what Turner, the Human Resources Director, would do to her. Lam responded that FMLA is only approved for serious illnesses and Rivera didn't qualify.

On February 23, 2015, Rivera filed an unfair practice charge against EBMUD with PERB. The charge was assigned the number SF-CE-1292-M.

On an unspecified date, Rivera submitted a Public Records Act request to EBMUD that asked for grievance logs. On March 4, 2015, Rivera sent an e-mail message to an EBMUD representative stating that the information she received was incomplete.

On March 10, 2015, Rivera sent an e-mail message to Turner. The e-mail message talks about the duty of fair representation and includes Rivera's opinion that it is the duty of government agencies to "disseminate statutes, ordinances and regulations[.]" Rivera sent a copy of the e-mail message to several other EBMUD representatives, but not to Lam.

The District hired a new employee for the position of Gardener II on April 20, 2015. In the past, Rivera regularly signed a hiring authorization form called the "PE80" for new gardener employees. However, before the new employee was hired on April 20, 2015, the District did not ask Rivera to sign the PE80 form authorizing the hire.

On April 20, 2015, Lam denied Rivera's request for a modified work schedule. Rivera told Lam that for ten years she had been allowed "carte-blanc rights to not be physically at work[.]" Rivera indicated that she was "on-call" when she was not physically at work, and she had been allowed not to be physically at work until she "[w]histleblew" against the District and Union. Rivera alleges that since 2006, Lam had "never" denied Rivera's request for modified work. Rivera also alleges that Lam denied her request after he approved a new employee's modified work request.

EBMUD has the following work rules regarding presence on the job: [5]

> Be at the workplace or jobsite for the duration of the assigned work period or shift unless there is prior approval by your supervisor.

On May 13, 2015, Dorian West Blair (Blair) an Affirmative Action Officer for EBMUD, wrote an e-mail message to Rivera, stating that she understood Rivera was alleging she was being retaliated against, and that Rivera could call or e-mail Blair regarding any concerns she had.

[5] The charge did not include a copy of EBMUD's work rules. The quote cited here is the text of the work rule as alleged in the charge.

On May 13, 2015, Rivera wrote several e-mail messages back to Blair. The e-mail messages stated that she was filing a retaliation complaint with PERB, the Equal Employment Opportunity Commission, and the Department of Fair Housing and Employment. Rivera also stated that she had told Lam several times that she believed he was retaliating against her. Rivera stated that she had told Lam last year that she had filed unfair practice charges with PERB, and had even shown him the complaints.

On May 15, 2015, Lam issued Rivera a warning memorandum for "excessive use of personal sick leave." Rivera alleges that the contents of the warning memorandum "could not be grieved."

Charging Party alleges, "Unbeknownst to Ted Lam and EBMUD, one day before issuing [Rivera] the Un-warranted warning memo, I filed a tort complaint against him and the District for retaliatory actions taken before May 14, 2015."

On May 19, 2015, Rivera filed another PERB unfair practice charge, which is assigned the number SF-CE-1309-M. Rivera hand-delivered the charge to Michael Rich, Employee Relations Manager.

On May 19, 2015, Kohne sent Rivera a letter retracting the warning memorandum that Lam issued to her on May 15, 2015.

EBMUD EERP

The EBMUD EERP at Section 15 is titled "Grievances" and states:

> A grievance is any dispute concerning the interpretation or application of this Resolution or of rules or regulations governing personnel practices or working conditions or of the practical consequences of a District rights decision on wages, hours and other terms and conditions of employment.

Discussion

The Partial Warning Letter identified several deficiencies in the original Charge. Rivera's First Amended Charge does not cure the deficiencies identified in the Partial Warning Letter.

Rivera's First Amended Charge appears to mostly add allegations to support her claim of discrimination. Rivera's original charge alleged that EBMUD discriminated against her because of protected activity by issuing her a warning memorandum on May 15, 2015. As the Partial Warning Letter noted, this allegation will be addressed in a separate document. Rivera's First Amended Charge alleges that EBMUD also discriminated against her because of her protected activity by:

(1) issuing her a counseling memorandum on February 20, 2015;
(2) denying her request for a modified work schedule; and

(3) not asking for her signature on a hiring authorization form.

This Partial Dismissal Letter discusses these allegations.

Further, this Partial Dismissal letter discusses Rivera's allegation that EBMUD violated EBMUD EERP section 15, PERB Regulation 32603(a), Government Code section 3509(b), and the California Public Records Act. For the reasons below, Charging Party has not stated a prima facie case that these laws, rules, or regulations were violated.

1. Jurisdiction over Alleged Violation of the Constitution, Whistleblower Retaliation Act, and California Public Records Act

Charging Party has not submitted any additional facts to show that PERB has jurisdiction over her constitutional claims or her allegation of whistleblower retaliation. Accordingly, these allegations are hereby dismissed. (*Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S.)

Charging Party's First Amended Charge alleges that her request under the California Public Records Act "has been ignored by Human Resources and EBMUD legal representative, Lourdes Matthew." However, PERB does not have jurisdiction over allegations that the California Public Records Act has been violated. (*State of California (Department of Food and Agriculture)* (1998) PERB Decision No. 1290-S.) Accordingly, this allegation is hereby dismissed.

2. Discrimination

Rivera's First Amended Charge alleges that EBMUD discriminated against her because of her protected activity by issuing her a counseling memorandum, denying her request for a modified work schedule, and not asking for her signature on a hiring authorization form.[6] These allegations must be dismissed for the following reasons.

a. Timeliness

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella*

[6] Charging Party filed another charge on May 19, 2015, unfair practice charge SF-CE-1309-M, where she also alleges that EBMUD retaliated against her for protected activity by issuing her a counseling memorandum, denying her request for a modified work schedule, and not asking for her signature on a hiring authorization form. These allegations will be addressed separately in that charge. The Board has held that the "pursuit of similar charges based on essentially the same circumstances . . . may be considered an abuse of PERB's process" and "[t]he repeated presentation of charges based on circumstances which have been considered by the Board in related cases previously suggests an abuse of that process." (*Los Rios College Federation of Teachers* (*Deglow*) (1996) PERB Decision No. 1133.)

Valley Mosquito and Vector Control District v. Public Employment Relations Board, supra, 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.)

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

Here, Charging Party alleges in her First Amended Charge that EBMUD discriminated against her by: (1) not asking her to sign a PE80 authorization form for a new employee hired on or around April 20, 2015, and (2) denying her request for a modified work schedule on or around April 20, 2015. These alleged events occurred more than six months before Rivera filed her First Amended Charge on February 9, 2016. These allegations are not mentioned in the original charge nor do they relate back to facts alleged in the original charge. Accordingly, these allegations were not filed within the six month statute of limitations period, and are hereby dismissed as untimely.

b. Elements of a Prima Facie Case for 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 <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.) 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 <u>adverse impact on the employee's employment</u>.

(*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).

i. Protected Activity and Employer Knowledge

Rivera's letter and e-mail message to the EBMUD Board of Directors on February 19, 2015, arguably constitutes protected activity. Rivera alleges that she gave a copy of this letter to Lam on February 20, 2015.

Rivera filed unfair practice charges with PERB on February 23, 2015, and on May 19, 2015. Filing unfair practice charges with PERB is a protected activity. (*Jurupa Unified School District* (2015) PERB Decision No. 2420.) Rivera told Lam that she has filed unfair practice charges with PERB. Accordingly, Rivera has sufficiently established protected activity and employer knowledge.

c. Adverse Action and Nexus

Counseling Memorandum[7]

The issuance of the counseling memorandum was arguably an adverse action. (*City of Long Beach* (2008) PERB Decision No. 1977-M.) However, besides temporal proximity, Rivera has not alleged any other facts that establish a nexus between her protected activities and the counseling memorandum. Charging Party alleges that in prior years she never received

[7] Rivera's initial charge alleged that Lam issued her a counseling memorandum.

an adverse action regarding her sick leave. Charging Party includes a leave summary report for every year she has worked since 2006. The amount of sick leave Rivera took each year ranged from 39.5 to 424 hours. In the six month period leading up to the February 20, 2015 counseling memo from Lam, Rivera took 148.9 hours of sick leave. Thus, Rivera was on route to take 297.8 hours of sick leave for the year. Charging Party only previously exceeded that amount of sick leave once before, between 2006 and 2007. Accordingly, Rivera has not submitted sufficient facts to show that EBMUD departed from established procedures and standards when Lam issued her the counseling memorandum. (*Santa Clara Unified School District* (1979) PERB Decision No. 104.) Rivera has not submitted facts that establish a nexus between the counseling memorandum and her protected activities. Accordingly, Rivera's allegation that she was issued the counseling memorandum in retaliation for her protected activity is hereby dismissed.

Hiring Authorization Form Signature

As noted above, Rivera's allegation regarding the hiring authorization form is not timely. Rivera has also failed to submit facts to show that the failure to ask her to sign a hiring authorization form constituted an adverse action. Rivera has not shown that a reasonable person under the same circumstances would consider this action to have an adverse impact on their employment. (*Newark Unified School District, supra*, PERB Decision No. 864.) Accordingly, for this additional reason, Rivera's allegation that EBMUD did not ask her to sign a hiring authorization form in retaliation for her protected activity is hereby dismissed.

3. Self-Representation; Government Code Section 3502 & EBMUD EERP Section 4

As summarized in the Partial 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*.)

Rivera's initial charge alleged that she wrote a letter to EBMUD Board Members stating there was "no administrative remedy at the District available to represented employees to circumvent the union to report an abuse of authority at EBMUD." As the Partial Warning Letter noted,

this allegation is not sufficient to state a prima facie case that EBMUD violated Rivera's right to self-representation.

Rivera's First Amended Charge alleges that she discovered in 2014 that employees at EBMUD cannot grieve performance appraisals, established wages or salaries, or memoranda of understanding. This allegation is not timely. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board*, *supra*, 35 Cal.4th 1072.) Moreover, this allegation does not establish a prima facie violation of the MMBA because 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.) Rivera alleges that she "could not . . . grieve[]" the warning memorandum Lam issued her on May 15, 2015. This allegation is not sufficient to state a prima facie case that EBMUD violated Rivera's right to self-representation. (*Ibid*.) Rivera has not alleged other facts to show that her right to self-representation under the MMBA has been violated. Accordingly, Charging Party's allegation that EBMUD violated her right to self-representation under the MMBA is hereby dismissed.

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

4. EBMUD EERP section 15

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

5. Government Code section 3507

The Partial Warning Letter noted that Charging Party had failed to set forth sufficient facts to show that EBMUD adopted an unreasonable rule or regulation. Charging Party has not set forth any additional facts to show that EBMUD violated Government Code section 3507. Accordingly, the allegation that EBMUD violated Government Code section 3507 is hereby dismissed.

6. Government Code section 3509(b)

Government Code section 3509(b) states:

> A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge by

> the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board, except that in an action to recover damages due to an unlawful strike, the board shall have no authority to award strike-preparation expenses as damages, and shall have no authority to award damages for costs, expenses, or revenue losses incurred during, or as a consequence of, an unlawful strike. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

Charging Party has not set forth any facts to show that EBMUD violated Government Code section 3509(b). Accordingly, the allegation that EBMUD violated Government Code section 3509(b) is hereby dismissed.

Conclusion

For these reasons and incorporating the discussion in the attached Partial Warning Letter, Charging Party's allegations that fail to state a prima facie case are hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations,[8] 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. (PERB Regulation 32635(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. (PERB Regulations 32135(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. (PERB Regulation 32135(b), (c) and (d); see also PERB Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street

[8] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of PERB's Regulations may be found at www.perb.ca.gov.

Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If Charging Party files a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (PERB Regulation 32635(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 PERB Regulation 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. (PERB Regulation 32135(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. (PERB Regulation 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

JSK:jk
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

February 24, 2016

Ivette Rivera

Re: *Ivette Rivera v. East Bay Municipal Utility District*
Unfair Practice Charge No. SF-CE-1310-M
PARTIAL WARNING LETTER

Dear Ms. Rivera:

The above-referenced unfair practice charge was filed on June 2, 2015.[1] Ivette Rivera (Rivera or Charging Party) alleges that the East Bay Municipal Utility District (EBMUD or Respondent) violated the Meyers-Milias-Brown Act (MMBA). Rivera alleges that EBMUD: (1) discriminated against her for her protected activity; (2) violated Government Code Sections 3502 and 3507; (3) violated the East Bay Municipal Utility District Employer-Employee Relations Resolution (EBMUD EERP) at Section 4; (4) violated her constitutional rights including her rights to due process and free speech; and (5) retaliated against her for whistle-blowing. This partial warning letter addresses the second through fifth allegations. The first allegation will be addressed in a separate document.

FACTS AS ALLEGED

Rivera is employed by EBMUD as a Gardener Foreman.

On February 19, 2015, Charging Party sent an e-mail message to EBMUD Board Members. The message stated in part:

> There is no administrative remedy at the District available to represented employees to circumvent the union to report an abuse of authority at EBMUD.

[1] On July 16, 2015, Rivera filed a letter with the subject line: "Charging Party, Ivette Rivera, Opposes EBMUD's attempt to consolidate and dismiss PERB Charge SF-CE-1310-M[.]" It appears this letter was not intended to serve as an amended charge. Further, PERB Regulation 32615 requires a charge to be signed under penalty of perjury, and the letter was not signed under penalty of perjury. For these reasons, the undersigned Board agent did not treat the letter as an amended charge. However, the Board agent has considered the contents of the letter.

> I believe this practice, policy and custom at EBMUD violates the East Bay Municipal Utility district Employer-Employee Relations Policy/Resolution, the Meyers-Milias-Brown-Act under 3502 and the State of California Local Government Disclosure of Information Act: Government Code 53297[.]"

Charging Party sent a letter to the same Board Members with a similar message on the same day.

EBMUD received a copy of Charging Party's "PERB complaint" on March 19, 2015.[2]

On May 15, 2015, Ted Lam (Lam), a Maintenance Superintendent for EBMUD, issued Rivera a letter. The subject of the letter was: "Warning for Unsatisfactory Job Performance." The letter stated it was issued because of Rivera's "excessive use of personal sick leave." The letter stated that Rivera's sick leave between August 2014 and May 2015 was 158.9 hours and that usage "exceeds acceptable levels of absences." The letter stated that if Ms. Rivera's behavior did not change Lam would "consider further disciplinary action."

On May 19, 2015, Phillip C. Kohne (Kohne), Manager of Facilities Maintenance and Construction, issued a letter with the subject "Retraction of May 15, 2015 Warning Memo." The letter stated in part:

> Based on further review, your attendance record does not warrant the subject warning memo. Although the total sick leave of 158.9 hours as of May 3, 2015 is unsatisfactory, during the period following a counseling memo issued to you in February 2015, your sick leave has averaged 3 hours per month . . .
>
> The May 15, 2015 warning memo will be removed from your file and from files of recipients of the memo. Thank you for your improvement in attendance.

Rivera alleges that even when she is away from work she is "on call." Rivera alleges that there was not an ongoing expectation for her to be present at her work place until after she whistle blew.

Rivera alleges that in previous years she used "approved leave time" in the following manner:

- 2006-2007: 523.0 hours

[2] Rivera alleges that EBMUD received her "PERB complaint" on March 19, 2015. Rivera has filed multiple unfair practice charges with the Public Employment Relations Board (PERB). However, there is no record of PERB issuing a complaint against EBMUD based on any of these charges as of January 7, 2016. It appears that Rivera may have meant to allege that EBMUD received a copy of one of her unfair practice charges on March 19, 2015.

- 2007-2008: 198.7 hours
- 2008-2009: 274.1 hours
- 2009-2010: 467.9 hours
- 2010-2011: 614.9 hours
- 2011-2012: 295.7 hours
- 2012-2013: 241.7 hours
- 2013-2014: 353.0 hours

Charging Party alleges that despite exceeding leave balances in several previous years, she never received an adverse action.

EBMUD EERP

The EBMUD EERP at Section 4 is titled "Employee Rights" and 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.

DISCUSSION

1. Charging Party's Burden

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

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

2. Jurisdiction over Alleged Constitutional Rights Violation and Whistleblower Retaliation

Charging Party alleges that EBMUD violated her constitutional rights including her rights to due process and free speech. Charging Party also alleges that EBMUD has retaliated against her for whistleblowing. 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.) PERB's jurisdiction does not include enforcement of the Whistleblower Protection Act. (*Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S.)

Accordingly, PERB does not have jurisdiction to adjudicate Charging Party's allegation that EBMUD violated her constitutional rights or her rights under the Whistleblower Protection Act.

3. Self-Representation; Government Code Section 3502 & EBMUD EERP Section 4

Charging Party alleges that EBMUD violated Government Code Section 3502. 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.

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.)

Charging Party alleges that she wrote a letter to EBMUD Board Members stating there was "no administrative remedy at the District available to represented employees to circumvent the union to report an abuse of authority at EBMUD." However, this allegation is not sufficient to show that EBMUD violated Rivera's right under the MMBA to self-representation. Accordingly, Charging Party has not alleged sufficient facts to show a prima facie case that EBMUD violated Government Code section 3502.

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

Charging Party alleges EBMUD violated the EBMUD EERP at Section 4. This section 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.

Further, Charging Party has not alleged facts to show that EBMUD's alleged failure to provide an opportunity for "employees to circumvent the union to report an abuse of authority" occurred within six months of the time that she filed her unfair practice charge. Accordingly, Charging Party has not shown that her allegation that EBMUD violated her self-representation rights is timely. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board*, *supra*, 35 Cal.4th 1072.)

4. Government Code section 3507

Government Code section 3507 permits public agency to "adopt reasonable rules and regulations[.]" 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.)

Because Charging Party alleges a violation of Government Code Section 3507, it appears that she is alleging that EBMUD adopted an unreasonable rule and regulation. Charging Party does not identify which EBMUD rule or regulation she asserts is unreasonable. Rivera alleges that EBMUD violated the EBMUD EERP at Section 4. However, it appears that she would like to rely on this section, and not try to allege that the section is unreasonable. Accordingly, she has not stated a prima facie case that EBMUD violated Government Code Section 3507.

CONCLUSION

Rivera alleges that EBMUD violated Government Code Sections 3502 and 3507, the EBMUD EERP at Section 4, the Whistleblower Protection Act, and the constitution. For the reasons above, these allegations, as presently written, do not state a prima facie case.[3] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before February 9, 2016,[4] PERB will dismiss the above-described allegation from your charge. If you have any questions, please call me at the telephone number listed above.

Sincerely,

Jessica Kim
Regional Attorney

JSK:jk

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[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 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.)