

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DENNIS KROMANN,

Charging Party,

v.

CONTRA COSTA COUNTY HEALTH
SERVICES DEPARTMENT,

Respondent.

Case No. SF-CE-224-M

PERB Decision No. 1742-M

January 26, 2005

Appearances: Dennis Kromann, on his own behalf; Esther Milbury, Deputy County Counsel, for Contra Costa County Health Services Department.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a Board agent's dismissal (attached) of an unfair practice charge. The unfair practice charge alleges that Dennis Kromann (Kromann) was terminated from his position as a probationary charge nurse for the Contra Costa County Health Services Department (County) because of his protected activity, in violation of the Meyers-Milias-Brown Act (MMBA).¹

The Board agent dismissed the charge for failure to state a prima facie case. Kromann filed an appeal. The County responded to the appeal stating that the appeal did not meet the requirements of PERB Regulation 32635.²

¹The MMBA is codified at Government Code section 3500, et seq.

²PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

We have reviewed the entire record in this case, including the initial unfair practice charge, the County's response, the amended unfair practice charge, the warning and dismissal letters, Kromann's appeal and the County's response to the appeal. We find the warning and dismissal letters of the Board agent to be free of prejudicial error and adopt them as the decision of the Board itself, as outlined in the discussion below.

DISCUSSION

In the appeal, Kromann does not adhere to the elements of PERB Regulation 32635(a) as required for an appeal to the Board. The appeal fails to set forth "the specific issues of procedure, fact, law or rationale to which the appeal is taken; (2) [i]dentify the page or part of the dismissal to which each appeal is taken; [and] (3) [s]tate the grounds for each issue stated."³

The appeal filed by Kromann reiterates the facts alleged in his unfair practice charge. Kromann does not specifically address why the Board agent's dismissal should be reversed. In County of Solano (Human Resources Department) (2004) PERB Decision No. 1598-M,⁴ the Board dismissed the unfair practice charge for failure to state a prima facie case and because the appeal did not comply with the requirements of PERB Regulation 32635. Here also, Kromann has failed to set forth a prima facie case and has filed an appeal that does not comply with PERB Regulation 32635.

³PERB Regulation 32635(a).

⁴See also United Teachers of Los Angeles (Robinson) (1996) PERB Order No. Ad-273.

ORDER

The unfair practice charge in Case No. SF-CE 224-M is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Whitehead and Shek joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027



November 8, 2004

Dennis Kromann
906 Copper Way
Vacaville, CA 95687

Re: Dennis Kromann v. Contra Costa County Health Serv Dept
Unfair Practice Charge No. SF-CE-224-M; First Amended Charge
DISMISSAL LETTER

Dear Mr. Kromann

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 2, 2004. Dennis Kromann alleges that the Contra Costa County Health Serv Dept violated the Meyers-Milias-Brown Act (MMBA)¹ by discriminating against him because of his protected activity.

I indicated to you in my attached letter dated October 21, 2004, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to October 28, 2004, the charge would be dismissed.

On October 28, 2004, you telephoned me to discuss the charge and to ask for an extension of time to respond to the warning letter. I granted such an extension until November 5, 2004.

On November 5, 2004, you filed a first amended charge. The first amended charge reiterates the facts provided in the first charge and attempts to correct the deficiencies noted in the warning letter. More specifically, the amended charge adds the following.

The original charge states that on April 21, 2004, you had a conversation with fellow Charge Nurse Katherine Heinen. During this conversation, you and Ms. Heinen discussed how to handle the clerical staff's employment issues, as two clerical employees had threatened to report you to the union for contract violations. You indicated to Ms. Heinen that you were pro-union and had served as a union steward during previous employment experiences. You further contend Ms. Heinen responded by stating, "If we had known that we wouldn't have ever hired you.

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

The amended charge also contends that you engaged in protected activity by discussing with employees that the Narcotic Cabinet doors did not lock. During these conversations, all employees and your supervisor Jeff Barnhart informed you that they had been trying to get the County to fix the lock for over two years without success. Additionally, they informed you that a number of work orders had been placed to fix the lock. While it is clear that you discussed the narcotics cabinet with employees and your supervisor, it is unclear how such conduct constitutes protected activity as you did not continue to discuss the issue. Moreover, facts provided with the amended charge demonstrate you did not complain about the narcotics cabinet until after you were terminated from your employment. As such, this action is not protected activity under the MMBA.

As such, the only protected activity demonstrated by the charge is your statement to Ms. Heinen. In my warning letter, I specifically noted that the charge failed to demonstrate the employer had knowledge of your protected activity. The amended charge calls Ms. Heinen "Mr. Barnhart's protégé" but does not provide any facts demonstrating Ms. Heinen is an agent of the employer. Ms. Heinen is not a supervisor and did not serve as your supervisor in any capacity. To establish an agency relationship between an employee and the employer, the Board has held that a charging party must allege facts which show that the employee was acting with some direction, instigation, approval or ratification by the employer. (Compton Community College District (1987) PERB Decision No. 649; Inglewood Unified School District (1990) PERB Decision No. 792.) In Moreland Elementary School District (1982) PERB Decision No. 227, the Board stated that nonsupervisory employees would not be found agents of the employer absent evidence that such employees were informants or were in some other manner serving as agents or representatives of the employer. Herein, the charge fails to present any facts demonstrating Ms. Heinen was acting as an informant for management. While Ms. Heinen may have oriented you upon your arrival at the County, such conduct is not out of the ordinary as Ms. Heinen is the most senior Charge Nurse at the Facility. As such, this allegation fails to state a prima facie case.

Even assuming the charge demonstrates employer knowledge, the charge still fails to demonstrate the requisite nexus. While your termination came three weeks after your statements to Ms. Heinen, your previous evaluation noted several areas of concern, including communication and attention to detail. These same concerns were noted in your termination letter. You further contend the Employment Development Department found your termination to be without cause. However, information provided with the amended charge states as follows:

When you filed your claim you stated:

* * * * *

3. The reason you are no longer working for the above employer is: TERMINATED ON PROBATION WITHOUT CAUSE

In fact, the EDD's letter is nothing more than a restatement of your allegations and is not a finding of wrongdoing on the County's part. Lastly, you allege Mr. Barnhart was not specific enough in discussing your work problems. However, in order to demonstrate shifting justifications for the adverse action, one had to demonstrate the employer provided different reasons for the action. While you may not believe Mr. Barnhart's reasons to be specific enough, such an allegation does not demonstrate the requisite nexus. As such, this charge must be dismissed.

Right to Appeal

Pursuant to PERB Regulations,² you 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. (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 before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of 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. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
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. (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 Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

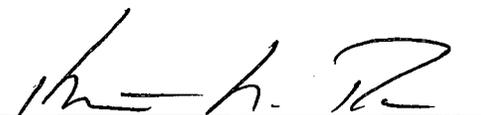
A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. 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. (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,

ROBERT THOMPSON
General Counsel

By 

Kristin L. Rosi
Regional Attorney

Attachment

cc: Shelley Pighin

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
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October 21, 2004

Randal Barnum, Attorney
2044 Columbus Parkway
Benicia, CA 94510

Re: Dennis Kromann v. Contra Costa County Health Serv Dept
Unfair Practice Charge No. SF-CE-224-M
WARNING LETTER

Dear Mr. Barnum:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 2, 2004. Dennis Kromann alleges that the Contra Costa County Health Serv Dept violated the Meyers-Milias-Brown Act (MMBA)¹ by discriminating against him because of his protected activity.

Investigation of the charge revealed the following. Mr. Kromann was employed as a Probationary Charge Nurse with the County's Detention Health Services facility.² As such, Mr. Kromann was exclusively represented by the California Nurses Association. CNA and the County are parties to a collective bargaining agreement that expires on June 30, 2005. With regard to probationary employees, Article 19.5 prohibits rejection during a probationary period for union activity.

On February 4, 2004, Mr. Kromann was hired as a Charge Nurse³ in the Detention Health Services facility. On April 12, 2004, Mr. Kromann received his first performance evaluation from Supervisor Jeff Barnhart. The evaluation states in relevant part as follows:

Communications: Your expression of issues, weather (sic) good or bad, is usually lengthy. When talking with employees about work related issues, you need to make an effort to keep it short and concise. You have been perceived to be condescending with your current style of communications.

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² The probationary period for this position is six (6) months.

³ The Charge Nurse position comes with some supervisory requirements but is not considered a supervisory position.

Task Orientation: You seem to latch onto an issue and make it much larger than it needs to be; for example, the issue about perfume and persons with allergies. It simply needed to be approached with the offending employee that a staff or some staff are having a negative reaction to your perfume, could you please not use as much and/or avoid this particular brand.

Detail Orientation: You do not appear to be detail oriented. This position requires a lot of detail; i.e. in schedules, in documentation, in keeping others to task and schedule. You have had meeting or discussions or conferences with staff that have kept the staff member from doing their job at the scheduled time. Discussions are to take place (unless it is an emergency) when the staff member is not needed to do a specific scheduled function.

The evaluation also noted previous discussions between Mr. Barnhart and Mr. Kromann, and reminded Mr. Kromann that it is the responsibility of the Charge Nurse to fill in for absent employees.

See
On April 21, 2004, Mr. Kromann had a conversation with fellow Charge Nurse Katherine Heinen. During this conversation, you and Ms. Heinen discussed how to handle the clerical staff's employment issues, as two clerical employees had threatened to report Mr. Kromann to the union contract violations. Mr. Kromann indicated to Ms. Heinen that he was pro-union and had served as a union steward during previous employment experiences. Mr. Kromann contends Ms. Heinen responded by stating, "If we had known that we wouldn't have ever hired you."

On May 5, 2004, Mr. Barnhart terminated Mr. Kromann's employment citing the original concerns from the April evaluation and noting other problems. Specifically, Mr. Barnhart indicted that several employees had complained about Mr. Kromann's ability to serve in a leadership capacity. The employees indicated Mr. Kromann was not decisive in his role and was not quick to respond to concerns.

Based on the above stated facts, the charge as presently written fails to state a prima facie violation of the MMBA, for the reasons provided below.

To establish a prima facie case of discrimination 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; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employee because of the exercise of those rights. (Campbell Municipal Employees Association v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Association v. City of San Leandro (1976) 55 Cal.App.3d 553.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action in protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following nexus factors should be present: (1) the employer's disparate treatment of the employee (Campbell, supra); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro Police Officers Association, supra); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro Police Officers Association, supra); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) employer animosity towards union activists (San Leandro Police Officers Association, supra; Los Angeles County Employees Association v. County of Los Angeles (1985) 168 Cal.App.3d 683.).

Assuming Mr. Kromann's statement constitutes protected activity, the charge still fails to meet the above quoted test. The charge fails to demonstrate that the County knew of Mr. Kromann's pro-union statements. Mr. Kromann's statements were made to a fellow Charge Nurse, who is also a union member. Ms. Heinen is not a supervisor and did not serve as Mr. Kromann's supervisor in any capacity. To establish an agency relationship between an employee and the employer, the Board has held that a charging party must allege facts which show that the employee was acting with some direction, instigation, approval or ratification by the employer. (Compton Community College District (1987) PERB Decision No. 649; Inglewood Unified School District (1990) PERB Decision No. 792.) In Moreland Elementary School District (1982) PERB Decision No. 227, the Board stated that nonsupervisory employees would not be found agents absent evidence that such employees were informants or were in some other manner serving as agents or representatives of the employer. Herein, the charge fails to present any facts demonstrating Ms. Heinen was acting as an informant for management. As such, this allegation fails to state a prima facie case.

Even assuming Mr. Kromann engaged in protected activity that was known to the County, the charge still fails to demonstrate the requisite nexus. While Mr. Kromann's termination came within three weeks of his protected statement, Mr. Kromann received his first negative evaluation before he made the statement. Additionally, while the charge alleges Ms. Heinen made anti-union statements, Ms. Heinen is not an agent of the employer and as such her opinions cannot be impugned upon the County. Lastly, the charge fails to present any other nexus factors, including disparate treatment or failure to follow procedures. As such, this charge fails to state a prima facie case.

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

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representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before October 28, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

A handwritten signature in black ink, appearing to read "K. L. Rosi". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

Kristin L. Rosi
Regional Attorney

KLR