STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DENNIS DALE HAYES, Charging Party, v. ANTELOPE VALLEY HOSPITAL DISTRICT, Respondent.	Case No. LA-CE-534-M PERB Decision No. 2167-M February 25, 2011

Appearance: Ronald G. Johnson, Representative, for Dennis Dale Hayes.

Before Dowdin Calvillo, Chair; McKeag and Miner, Members.

DECISION

MINER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Dennis Dale Hayes (Hayes) from a Board agent's dismissal (attached) of an unfair practice charge. The charge, as amended, alleged that the Antelope Valley Hospital District (District) violated numerous sections of the Meyers-Milias-Brown Act (MMBA or Act)[1] by, *inter alia*, failing to provide Hayes with a mediator in connection with grievances filed by him; retaliating against him for "promoting" a labor organization, United Healthcare Workers West; failing to provide Hayes with requested information; and failing to adequately process his grievances. The Board agent determined that the charge was untimely filed and failed to establish a prima facie violation of the Act, and therefore dismissed the charge.

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

The Board has reviewed the dismissal and the record in light of Hayes's appeal and the relevant law. Based on this review, the Board finds the Board agent's warning and dismissal letters to be well-reasoned and a correct statement of the law, and therefore adopts them as the decision of the Board itself, subject to the discussion below.

DISCUSSION

An unfair practice charge must include a clear and concise statement of the facts and conduct by the respondent alleged to constitute an unfair practice under the MMBA. (PERB Reg. 32615(a)(5);[2] *State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S; *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient, and the charging party bears the burden of alleging all material facts necessary to state a prima facie case. (*Los Angeles Unified School District* (1984) PERB Decision No. 473.) In processing a charge, the Board agent has a duty to:

> (1) Assist the charging party to state in proper form the information required by section 32615;
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> (2) Answer procedural questions of each party regarding the processing of the case;
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> (3) Facilitate communication and the exchange of information between the parties;
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> (4) Make inquiries and review the charge and any accompanying materials to determine whether an unfair practice has been, or is being, committed, and determine whether the charge is subject to deferral to arbitration, or to dismissal for lack of timeliness.
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> (5) Dismiss the charge or any part thereof as provided in Section 32630 if it is determined that the charge or the evidence is insufficient to establish a prima facie case; or if it is determined

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

> that a complaint may not be issued in light of Government Code Sections 3514.5, 3541.5, 3563.2, 71639.1(c) or 71825(c), or Public Utilities Code Section 99561.2; or if it is determined that a charge filed pursuant to Government Code section 3509(b) is based upon conduct occurring more than six months prior to the filing of the charge.
>
> (6) Place the charge in abeyance if the dispute arises under MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act and is subject to final and binding arbitration pursuant to a collective bargaining agreement, and dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act, as provided in section 32661.
>
> (7) Issue a complaint pursuant to Section 32640.

(PERB Reg. 32620.)

While the Board agent's duties include assisting the charging party in stating the proper form of the charge, making inquiries and reviewing the charge and any accompanying materials, the duty remains with the charging party to provide a clear and concise statement of the facts. (*Regents of the University of California* (2004) PERB Decision No. 1585-H; *Regents of the University of California* (2004) PERB Decision No. 1592-H.)

In this case, the Board agent communicated on numerous occasions with Hayes in an attempt to assist him in filing a charge alleging specific facts that, if proven, would constitute an unfair practice charge. In addition to speaking with him directly, the Board agent allowed Hayes to amend his charge five times.[3] On October 26, 2009, the Board agent issued a warning letter advising Hayes of the deficiencies in the charge. On appeal, Hayes points to no specific factual allegations in the charging documents that would establish a prima facie

[3] Subsequent to the filing of the initial charge, PERB's file contains correspondence from Hayes or his representative dated May 18, 2009, June 4, 2009, June 15, 2009, June 30, 2009 and November 21, 2009.

violation of the MMBA. Instead, as he did before the Board agent, he asserts that he is willing to provide evidence "should it be needed." The purpose of the Board agent's review is to determine if the charge states sufficient facts that, if proven, would constitute an unfair practice. It is incumbent upon the charging party to provide such facts to the Board agent, not merely to assert that the factual information will be made available at a later time. (*Regents of the University of California, supra,* PERB Decision No. 1585-H.) The remainder of the appeal consists of brief, conclusory responses to the dismissal and warning letters but fails to identify any specific factual allegations in the charge that would support finding a prima facie case. Because Hayes failed to provide specific facts to support his charge, it was properly dismissed by the Board agent.[4]

ORDER

The unfair practice charge in Case No. LA-CE-534-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.

[4] Hayes' assertion that the Board agent advised him against providing "too much evidence" does not affect our analysis or the outcome of this case. As the charging party, Hayes had the burden of providing a sufficient statement of the specific facts and conduct by the District alleged to constitute an unfair practice, and that the charge was timely filed.

PUBLIC EMPLOYMENT RELATIONS BOARD

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Fax: (818) 551-2820

January 7, 2010

Ronald Glen Johnson
5711 Columbia Way #174
Quartz Hill, CA 93536

Re: *Dennis Dale Hayes v. Antelope Valley Hospital District*
Unfair Practice Charge No. LA-CE-534-M
DISMISSAL LETTER

Dear Mr. Johnson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 7, 2009, and was amended on May 21, June 8, June 17, and November 21, 2009.[1] In the original charge and first three amended charges, Dennis Dale Hayes (Charging Party) alleged that the Antelope Valley Hospital District (Respondent) violated sections "3500-inclusive; 3500.5; 3501(A), (1), (2), (B), (C), (D), (E); 3504; 3504.5(A); 3505; 3507-(5), (6), [and] (7)" of the Meyers-Milias-Brown Act (MMBA or Act).[2] In the November 21 amended charge, Charging Party alleges that Respondent also violated sections 3501(a) through (i), 3501(b), (d), and (e), 3506, 3507(a) (5), (6), and (7) of the MMBA.

Charging Party was informed in the attached Warning Letter dated October 26, 2009, 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 the Warning Letter, Charging Party should amend the charge. Charging Party was further advised that, unless he amended the charge to state a prima facie case or withdrew it prior to November 3, 2009, the charge would be dismissed.

In a facsimile dated November 14, 2009, Charging Party's representative, Ronald Glen Johnson, notified the undersigned that he did not receive the October 26 Warning Letter until November 4, 2009, and thus he could not file an amended charge on Charging Party's behalf prior to the November 3, 2009 deadline. On November 16, 2009, the undersigned granted Charging Party's request for an extension of time to file an amended charge. As stated above, PERB received Charging Party's fourth amended charge on November 21, 2009.

[1] On May 7, 2009, Mr. Hayes also filed an unfair practice charge against United Healthcare Workers West (LA-CO-97-M), and another against United Healthcare Workers West affiliate, Service Employees International Union (LA-CO-96-M).

[2] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB'S Regulations may be found at www.perb.ca.gov.

The November 21 amended charge provides in relevant part:

1. Withdraw alleged violations to MMBA sections 3500, 3500.5, 3501A-(2), 3501(C), 3504, 3504.5(A), and 3505.

2. The following MMBA section violations we charge:

   3501A-(1), 3501-(B), 3501-(D), 3501-(E), 3506, 3507-(5), 3507-(6), and 3507-(7).

   3501A-(1): Charging [P]arty was in fact an employee of a Special District for many years.

   3501-(B): To the point, Antelope Valley Hospital District is a Special District.

   3501-(D): Charging [P]arty maintains he was a public employee.

   3501-(E): Charging [P]arty was not afforded a mediator at anytime for either grievance.

   3506 Charging [P]arty was protected under this section of MMBA as an employee of a Special District.

   3507A-(5): Charging [P]arty was among the first to promote the Union. Subsequently, [he] was punished. Specifically, with respect to scheduling, wages, hours, and other conditions of employment.

   3507A-(6): Charging [P]arty states that access to his hospital representatives and Union representatives for information concerning scheduling, wages, hours, and seniority was not afforded [to] him by either at any time prior to filing [the above-titled charge] with PERB.

   3507A-(7): An employment position was appointed arbitrarily instead of collectively.

Mr. McKee, I assure you the following statements are based on evidence of the conduct which constitutes unfair labor practices towards Dennis D Hayes under the MMBA guidelines/statutes.

3501A-(1):	No [R]espondent accepted responsibility for grievances or remedies filed from May 2007 through May 2009 from Board of Directors to immediate superiors Maria Kelly, Director of Radiology and Jill Bunch, Ultrasound Section Supervisor at the time, including Vladimir Dominguez, Union Representative or any of his people.
3501-(B)[:]	[Respondent] would not disclose responsibilities under the articles of a Collective Bargaining Agreement from May 2007 through May 2009.
3501-(D)[:]	Human Resources management John Sullivan, Vice President; Gregg Goins, Director; Staci Johnson, Employee Relations Officer; and Rick Rowe, Vice President Clinical Support Services never released information to clarify my status as a Special District employee or as a member of the Collective Bargaining Agreement from May 2007 through May 2009 when [the above-titled charge] was filed with PERB in May 2009.
3501-(E):	Sue Vradenberg, Union Steward; Leo Ward, Union Steward; Alonso Salinas, Union Steward; Rick Rowe, Vice President Clinical Support Services; Staci Johnson, Employee Relations Officer; Dwayne Roberts, Chief Union Steward, Vladimir Dominguez, Union Representative; John Sullivan, Vice President Human Resources; Gregg Goins, Director [of] Human Resources; all could have and should have represented Charging [P]arty comprehensively instead of provable negligence in their duty from May 2007 through May 2009.
3506	No employees of [Respondent] or [United Healthcare Workers West] treated Charging [P]arty's case objectively from May 2007 through May 2009 when complaint of violations of MMBA guidelines/statutes was filed with PERB. Names not withheld but too numerous to list here.

3507A-(5) Directly after [Charging Party's] promotion of the [United Healthcare Workers West] beginning May 2007, John Sullivan, Vice President Human Resources; Rick Rowe, Vice President Clinical Support Services; Maria Kelly, Director Radiology Services; and Jill Bunch, Ultrasound Section Supervisor instigated a document called the Last Chance Agreement (LCA) at which time I was threatened with termination should I choose not to sign. I immediately provided a response to the LCA and all concerned parties.

3507A-(6) In a direct communiqué from Gail Buhler, Union Coordinator I was informed absolutely that any communication with anyone other than her was prohibited and then only by telephone or fax. For a period of months I was unable to contact Ms. Buhler through her office. So I sought alternative means for remedy through John Sullivan, Vice President [of] Human Resources; Rick Rowe, Vice … President [of] Clinical Support Services; Jill Bunch, Ultrasound Section Supervisor; Alonso Salinas, Union Steward; Leo Ward, Union Steward. Come to find out, Ms. Buhler had been dismissed and no one listed above bothered to inform me.

3507A-(7) On or about December 2007, Karina Morales, Ultrasound Student was hired by Jill Bunch, Ultrasound Section Supervisor for a position of which I had made many requests proving neither [Respondent] nor [United Healthcare Workers West] fulfilled any employee agreement related to above.

REMEDY

Financial restitution for loss of monies, long-term detriment to personal character and professional reputation and other adverse impacts on my life.

Discussion

1. A Charging Party's Burden to Provide PERB with a Clear and Concise Statement of Facts and Conduct Alleged to Constitute an Unfair Practice

Charging Party was advised in a letter dated May 8, 2009 and in the October 26 Warning Letter that PERB Regulation 32615(a)(5)[3] requires, among other things, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging 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, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The November 21 amended charge does not provide a clear and concise statement of fact. Instead, the November 21 amended charge is comprised mostly of conclusions and citations to Government Code sections with little or no explanation why Charging Party believes the particular Government Code section was violated by Respondent. Consequently, Charging Party has failed to satisfy his burden of providing PERB with a clear and concise statement of facts and conduct alleged to constitute a violation of the MMBA. (PERB Regulation 32615(a)(5).)

2. The MMBA's Six-Month Statute of Limitations

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.)

In *Oakland Unified School District* (2003) PERB Decision No. 1544, the Board held that the statement, "within the past six months," does not specify the time of a violation sufficient to make the charge timely. (See also, *City of Santa Barbara* (2004) PERB Decision No. 1628-M [by failing to allege the date of a meeting at which an alleged violation occurred, the charging party failed to demonstrate that the charge was timely].) In the October 26 Warning Letter, Charging Party was advised that since the above-titled charge was filed on May 7, 2009, PERB

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

is prohibited from issuing a complaint based upon an alleged unfair practice by Respondent occurring prior to November 7, 2008. The November 21 amended charge alleges that Respondent violated the MMBA from "May 2007 through May 2009" but fails to provide specific day(s) or even the month(s) Respondent allegedly violated the MMBA. Thus, Charging Party has failed to establish that the above-titled charge was filed within six-months of the date Charging Party knew or should have known of the conduct alleged to violate the MMBA. Accordingly, for this reason alone, the above-titled charge does not state a prima facie case. (*City of Santa Barbara, supra*, PERB Decision No. 1628-M; *Oakland Unified School District, supra*, PERB Decision No. 1544.) Even if the above-titled charge was filed within the MMBA's six-month statute of limitations, it does not state a prima facie case for the following reasons.

3. Failing to Provide Charging Party a Mediator

Charging Party alleges that "[he] was not afforded a mediator at anytime for either grievance." Nothing contained in the MMBA requires that public employers provide grievants with a mediator or utilize a mediator as part of a grievance procedure. Accordingly, this allegation is dismissed.

4. Retaliation for "Promoting" United Healthcare Workers West

Charging Party alleges that he was "punished" for being "among the first to promote the Union." Charging Party also alleges that Respondent threatened to terminate his employment unless he signed a last-chance agreement because he "promoted" United Healthcare Workers West. To demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*); *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)[4] 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

[4] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

> the action to have an adverse impact on the employee's employment.

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

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; *Campbell*, *supra*, 131 Cal.App.3d 416); (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; *San Leandro*, *supra*, 55 Cal.App.3d 553); (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; *San Leandro*, *supra*, 55 Cal.App.3d 553); (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.)

The charge and amended charges are devoid of facts demonstrating that Respondent knew that Charging Party "promoted" United Healthcare Workers West. Additionally, even if Respondent knew that Charging Party "promoted" United Healthcare Workers West, there are no facts establishing a causal connection or "nexus" between Charging Party's protected activity and Respondent's insistence that Charging Party sign a last-chance agreement. Accordingly, Charging Party's allegation that Respondent retaliated against him for exercising his rights under the MMBA is dismissed.

5. Failure to Provide Charging Party with Requested Information

Individual employees lack standing to allege that their employer violated the Act by failing to provide requested information. (*State of California (Department of Corrections)* (2003) PERB Decision No. 1559-S.) Charging Party filed the above-titled charge as an individual employee. Consequently, Charging Party lacks standing to allege that Respondent violated the MMBA by not providing him with requested information. Accordingly, all of Charging Party's allegations that Respondent failed to provide him with requested information are dismissed.

6. Grievances Filed by Charging Party

It appears that Charging Party is not satisfied with how Respondent processed his grievance(s). As explained in the October 26 Warning Letter, while the MMBA may provide individual employees the right to *file* grievances on their own behalf (Gov. Code, § 3503; see also *Omnitrans* (2009) PERB Decision No. 2010-M [exclusive representatives have the statutory right to file grievances in their own name]), nothing contained in the MMBA requires that an employer *process* an employee's grievance. Grievance procedures are a creation of contract. "[T]hus[,] 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." (*Lillebo v. Davis* (1990) 222 Cal.App.3d 1421, 1445-1446.) PERB does not have jurisdiction "to remedy a violation of a collective bargaining agreement. . . ." (*City of Long Beach* (2008) PERB Decision No. 1977-M.) Thus, even if Respondent failed and/or refused to process Charging Party's grievance(s), Charging Party has not established that doing so violates his rights under the MMBA.

7. Remaining Allegations

As previously stated, Charging Party alleges that numerous MMBA sections were violated by Respondent but provides no facts, theories, or arguments in support of his allegations.[5] Furthermore, Charging Party lacks standing to allege that Respondent violated sections of the MMBA applicable to the collective bargaining relationship between employee organizations and employers. (See generally *Oxnard Educators Association (Gorcey and Tripp)* (1988) PERB Decision No. 664.) Accordingly, the above-titled charge is hereby dismissed for the reasons stated above and for the reasons stated in the October 26 Warning Letter.

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

[5] For example, Charging Party alleges that Respondent violated MMBA section 3501. MMBA section 3501 merely defines words used in the MMBA. MMBA section 3501 does not convey rights or prohibit conduct and thus, MMBA section 3501 cannot be violated.

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 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 copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, § 32132.)

Final Date

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

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Sean McKee
Regional Attorney

Attachment

cc: Troy A. Schell, Vice President and General Counsel

PUBLIC EMPLOYMENT RELATIONS BOARD

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October 26, 2009

Ronald Glen Johnson
5711 Columbia Way #174
Quartz Hill, CA 93536

Re: *Dennis Dale Hayes v. Antelope Valley Hospital District*
Unfair Practice Charge No. LA-CE-534-M
WARNING LETTER

Dear Mr. Johnson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 7, 2009, and was amended on May 21, June 8, and June 17, 2009.[1] Dennis Dale Hayes (Charging Party) alleges that the Antelope Valley Hospital District (Respondent) violated sections "3500-inclusive; 3500.5; 3501(A), (1), (2), (B), (C), (D), (E); 3504; 3504.5(A); 3505; 3507-(5), (6), [and] (7)" of the Meyers-Milias-Brown Act (MMBA or Act).[2]

Background as Alleged

The original charge provides in relevant part: "Due to the volume of evidence, I request a meeting for review with myself & my advocate—Ron Johnson." Attached to the charge is a copy of a National Labor Relations Board form titled, "NOTICE AND ACKNOWLEDGEMENT OF FILING OF CHARGE."

On May 7, 2009, I contacted Mr. Hayes[3] via telephone and advised him that the above-titled charge had been assigned to me for processing. I also advised Mr. Hayes that the charge was not properly filed in accordance with PERB's Regulations.[4] Specifically, PERB Regulation 32615(a)(5) requires, among other things, that an unfair practice charge include a "clear and

[1] On May 7, 2009, Mr. Hayes also filed an unfair practice charge against United Healthcare Workers West (LA-CO-97-M), and another against United Healthcare Workers West affiliate, Service Employees International Union (LA-CO-96-M).

[2] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB'S Regulations may be found at www.perb.ca.gov.

[3] Mr. Hayes did not complete a notice of appearance form designating Mr. Johnson as his representative until May 21, 2009.

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

concise statement of the facts and conduct alleged to constitute an unfair practice." In addition, PERB Regulations 32615(c) and 32140 require that a copy of an unfair practice charge be served on the respondent.

During our May 7 telephone conversation, I explained to Mr. Hayes that the above-referenced charge did not provide a clear and concise statement of conduct alleged to constitute an unfair practice or a completed proof of service form. I advised Mr. Hayes that his failure to correct the above-described deficiencies by May 18, 2009, could result in the above-titled charge being dismissed. On May 8, 2009, I sent Mr. Hayes a letter confirming our May 7 conversation. I also included instructions with my May 9 letter on how to file an unfair practice charge.

PERB received an amended charge from Mr. Hayes on May 21, 2009. The May 21 amended charge was accompanied by a deficient proof of service form (the name and address of the person served the unfair practice charge does not appear on the proof of service form). (PERB Regulation 32140.) Nevertheless, Respondent has not denied receiving a copy of the May 21 amended charge. To the contrary, on June 2, 2009, Respondent filed a response to the above-referenced charge.

The May 21 amended charge consists of a letter dated February 4, 2008, an undated letter signed by Vladimir Dominguez concerning a meeting that took place in April 2008, several e-mail messages dated between March and April 2008, one e-mail message dated January 6, 2009, and a timeline titled, "Statement of Facts." The "Statement of Facts provides verbatim:

> #1. On or about 8/22/2007, a collective bargaining agreement was signed by all parties authorized to make it a legal document.
>
> #2. From September 2007 to February 2008: I personally contacted every steward available to me with questions regarding scheduling, seniority, and bargaining unit language. Their names include Sue Vradenburg, Leo Ward, Vladimir Dominguez, Alonso Salinas, and Duane Roberts, among others.
>
> #3. 2/04/2008: Personally delivered the attached document (#1 of the evidence packet), to the Union and the hospital with proof of service.
>
> #4. 3/26/2008: All attempts failing, I wrote a letter to the Union (#2 of evidence packet) expressing my dismay over the utter lack of representation for which I had been paying.
>
> #5. 4/20/2008: This document (#3 of the evidence packet) proves the Union and the hospital acknowledged that there was a grievance. It further proves they chose to ignore the collective bargaining agreement and refused grievance procedures.

> #6. 4/21/2008: This document (#4 of the evidence packet) is proof of collusion between UHW-West and AV Hospital authorities. Other evidence is available.
>
> #7. 4/25/2008: This document was acquired by a demand from me alluding to charges in an attempt to justify his station. Mr. Dominguez must have sent this to himself. His error is evident.
>
> #8. 4/26/2008: This (#6 of evidence packet) was evidence of Mr. Vladimir Dominguez' refusal to represent me in my grievance is proved by the date(s) cited this document sent to me as an attachment to an e-mail.
>
> #9. 4/26/2008: (#7 in the evidence packet): In my attempts for recognition of my grievance I made everyone accountable, aware of the Union's failure to represent. The result was the denial of access to any person other than one Gail Buhler, and only by personal phone or fax.
>
> #10. 1/07/2009: (#8 in evidence packet): To this date I have not been afforded representation by SEIU, UHW-West, AV Hospital, or NLRB.

The e-mail message dated January 1, 2009, was sent from Mr. Ward to Ms. Buhler with a simultaneous copy of the e-mail sent to Mr. Dominguez. The January 1 e-mail message provides in relevant part:

> Dennis Hayes spoke to me last night inquiring about the status of a Grievance filed on his behalf several months back regarding Seniority/Job Vacancies as it pertains to night-shift weekends (his previous schedule which he wants reinstated). I confirmed with Alonso Salinas that Alonso Salinas did contact you regarding 3 past attempts by Mr. Hayes to contact you through Alonso. Mr. Hayes stated that he has not heard from you regarding this matter. I told Mr. Hayes that I would follow up with you on his behalf and provide you with contact numbers and include him (Cc) in this correspondence. Since I am not privy to the status of his Grievance or the progression of the steps I can only inquire.

The June 8 amended charge provides in its entirety:

> In response to the correspondence sent [to] me from Mr. Schell, attorney for AVHD, I would clarify our position. Mr. Schell's own admission verifies prior knowledge of my grievance with

> AVHD. He further concedes a second grievance provable on 4/22/2008.
>
> Issues at the forefront stand on their merit! They clearly show absolutely no one from SEIU, UHW-West, or AVHD did anything but ignore a simple problem and impugn Mr. Hayes' integrity and professionalism. The very fact that Mr. Schell used an opinionated response to describe certain e-mails prior to 4/22/2008 proves lack of representation and collusion between both UHW-West and AVHD.
>
> Mr. McKee, please be assured we've much more evidence than the one's sent. The box simply wouldn't fit in the envelope.
>
> A solution can be reached.

The June 17 amended charge provides in relevant part: "It seems a hearing is forthcoming. I'd appreciate any correspondence from Mr. D. Regan to your agency. The only communication I've had thus far from Mr. Regan is that he dialed my personal cell by mistake."

On July 6, 2009, PERB received a letter from Mr. Johnson re-requesting "correspondence between [PERB] and [Respondent]." On July 9, 2009, I contacted Mr. Johnson via telephone and informed him that PERB Regulation 32620, subdivision (c), requires that any written response filed by a respondent with PERB must be simultaneously served on the charging party. I also assured Mr. Johnson that the only response I had received from Respondent regarding the above-titled charge was Respondent's response to the above-titled charge dated June 2, 2009. Mr. Johnson confirmed that he had received a copy of the response filed by Respondent dated June 2, 2009.

Discussion

1. PERB's Jurisdiction

PERB is a quasi-judicial administrative agency charged with administering California's collective bargaining statutes covering public employees. One of the statutes PERB administers is the MMBA, a comprehensive statutory scheme governing labor relations in California cities, counties, and special districts. (Gov. Code, §§ 3500, 3509.) However, the MMBA is limited in scope, regulating only certain conduct by employers and unions and not every aspect of an employer's conduct. (*Los Angeles Community College District* (1979) PERB Order No. Ad-64.[5]) For example, the MMBA does not specially address allegations of

[5] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

"collusion" between employee organizations and employers. Additionally, "PERB has no jurisdiction to remedy a violation of a collective bargaining agreement. . . ." (*City of Long Beach* (2008) PERB Decision No. 1977-M.)

2. Charging Party's Burden and the MMBA's Six-Month Statute of Limitations

PERB Regulation 32615(a)(5) requires, among other things, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging 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, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) 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.)

In *Regents of the University of California* (2004) PERB Decision No. 1592-H, a charging party filed a charge that consisted of a brief conclusory statement followed by approximately 300 pages of attached documents. The Board agent assigned to investigate the charge issued the charging party a Warning Letter advising the charging party that the charge did not comply with PERB Regulation 32615(a) because it did not contain "a clear and concise statement of facts." (*Ibid.*) On appeal of the Board agent's decision to dismiss the charge, the charging party argued that the charge need only "alert the [respondent] of the general nature of the allegations made." (*Ibid.*) The Board disagreed and affirmed the Board agent's application of PERB Regulation 32615(a). (*Ibid.*)

As previously stated, the above-titled charge was filed on May 7, 2009. Thus, PERB is prohibited from issuing a complaint based upon an alleged unfair practice by Respondent occurring prior to November 7, 2008. Nothing Charging Party has filed with PERB to date alleges that Respondent violated the MMBA on or after November 7, 2008. Similarly, the current record does not establish that Respondent violated the MMBA on or after November 7, 2008. The only fact provided by Charging Party that occurred on or after November 7, 2008 is the January 1, 2009 e-mail message between United Healthcare Workers West representatives. The January 1 e-mail provides no facts demonstrating that Respondent has violated the MMBA. In addition, Charging Party provides no explanation regarding why he believes that the January 1 e-mail message demonstrates that Respondent violated the MMBA.

Accordingly, Charging Party has failed to provide a clear and concise statement of facts establishing that Respondent violated the MMBA within the MMBA's six-month statute of limitations.

3. Interference

It appears that Charging Party is alleging that Respondent violated the MMBA by failing and/or refusing to process one or more grievances filed by Charging Party.[6] The MMBA provides that public employers may not interfere with, intimidate, restrain, coerce, or discriminate against public employees because of the exercise of their protected rights. (Gov. Code, § 3506.) The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons.

(*Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807.)

While the MMBA may provide individual employees the right to *file* grievances on their own behalf (Gov. Code, § 3503; see also *Omnitrans* (2009) PERB Decision No. 2010-M [exclusive representatives have the statutory right to file grievances in their own name]), nothing contained in the MMBA requires that an employer *process* an employee's grievance. Grievance procedures are a creation of contract. "[T]hus[,] 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." (*Lillebo v. Davis* (1990) 222 Cal.App.3d 1421, 1445-1446.) As previously stated, PERB does not have jurisdiction "to remedy a violation of a collective bargaining agreement. . . ." (*City of Long Beach, supra*, PERB Decision No. 1977-M.) Thus, even if Respondent failed and/or refused to process Charging Party's grievance(s), Charging Party has not established that doing so violates his rights under the MMBA.

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[6] Charging Party has not provided a copy of the Collective Bargaining Agreement (CBA or Agreement) between the Respondent and his union, United Healthcare Workers West or described the grievance procedure set forth in the CBA.

4. Collusion

While the MMBA does not specifically address allegations of collusion between an employer and an employee organization, the MMBA does make it unlawful for an employer to dominate or interfere with the internal activities of an employee organization. (Gov. Code, §§ 3502, 3503; *Redwoods Community College District* (1987) PERB Decision No. 650; *Santa Monica Community College District* (1979) PERB Decision No. 103.) However, only employee organizations have standing to file unfair practice charges alleging that a employer unlawfully dominated or interfered with the internal activities of the employee organization. (*State of California (Department of Corrections)* (1993) PERB Decision No. 972-S.) In *State of California (Department of Corrections)*, *supra*, PERB Decision No. 972-S, the Board stated in relevant part:

> The rights at issue in this case, the right to represent and the right to be free from employer interference with internal union activities, are union rights which require that an alleged violation of these rights be prosecuted by the union. To grant an individual standing to file charges of this nature would undermine stable labor-management relations existing between the employer and the exclusive representative.

The above-titled charge was filed by Mr. Hayes. Mr. Hayes is an individual employee, not an employee organization. Accordingly, Mr. Hayes does not have standing to allege that Respondent violated the MMBA by dominating or interfering with the internal activities of United Healthcare Workers West.

5. Remaining Allegations

As previously stated, Charging Party alleged sections "3500-inclusive; 3500.5; 3501(A), (1), (2), (B), (C), (D), (E); 3504; 3504.5(A); 3505; 3507-(5), (6), [and] (7)" of the MMBA were violated by Respondent. However, Charging Party provides no facts, theories, or arguments regarding why he believes these sections of the MMBA were violated by Respondent. Additionally, PERB has held that individual employees do not have standing to allege unilateral change violations (*Oxnard School District (Gorcey and Tripp)* (1988) PERB Decision No. 667), nor allege violations of sections that protect the collective bargaining rights of employee organizations. (*State of California (Department of Corrections)* (1993) PERB Decision No. 972-S.) A number of the MMBA sections Charging Party alleges Respondent violated protect the collective bargaining rights of employee organizations. For example, MMBA section 3505 requires that public employers and employee organizations negotiate in good faith. Charging Party lacks standing to pursue alleged violations of these sections of the MMBA.

For these reasons the charge, as presently written, does not state a prima facie case.[7] 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 Fourth Amended Charge, contain all the facts and allegations Charging Party wishes 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 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 November 3, 2009,[8] PERB will dismiss the above-titled charge. Questions concerning this matter should be directed to me at the above telephone number.

Sincerely,

Sean McKee
Regional Attorney

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[7] 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.*)

[8] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)