STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MICHAEL CRANDELL, Charging Party, v. CITY & COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-665-M PERB Decision No. 2206-M October 5, 2011

Appearance: Michael Crandell, on his own behalf.

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

DECISION

MARTINEZ, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Michael Crandell (Crandell) of a Board agent's dismissal (attached) of Crandell's unfair practice charge against his employer, the City & County of San Francisco (City). The charge alleges that the City violated the Meyers-Milias-Brown Act (MMBA)[1] by stalking Crandell and photographing him using camera-phones during work time in retaliation for filing bureaucratic malpractice reports with City officials. The charge alleges that this conduct violates PERB Regulation 32603.[2] The Board agent dismissed the charge, finding that it failed to state a prima facie case.

We have reviewed Crandell's appeal, the warning and dismissal letters and the entire record in light of the relevant law. Based on this review, we find the Board agent's warning and dismissal letters to be well-reasoned, adequately supported by the record and in

[1] MMBA is codified at Government Code section 3500 et seq.

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

accordance with applicable law. Accordingly, the Board adopts the warning and dismissal letters as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CE-665-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Dowdin Calvillo joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

August 26, 2010

Michael Crandell
P. O. Box 423803
San Francisco, CA 94142

Re: *Michael Crandell v. City & County of San Francisco*
Unfair Practice Charge No. SF-CE-665-M
DISMISSAL LETTER

Dear Mr. Crandell:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 10, 2009. Michael Crandell (Crandell or Charging Party) alleges that the City & County of San Francisco (City or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by, through its agents and managers, stalking him via cell phone camera.

Charging Party was informed in the attached Warning Letter dated July 7, 2010, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to July 19, 2010, the charge would be dismissed.

On July 16, 2010, Charging Party filed with PERB a Tentative First Amended Charge and a request for extension of time to August 11, 2010, to file an amended charge. By letter dated July 20, 2010, PERB granted the request for extension of time. However, PERB has not received a further amended charge. Accordingly, PERB will treat the Tentative First Amended Charge as Charging Party's amended charge. The Tentative First Amended Charge seeks to amend both the instant charge and Unfair Practice Charge No. SF-CE-671-M, filed by the same Charging Party on June 10, 2009.

As discussed below, the Tentative First Amended Charge does not cure the deficiencies discussed in the July 7, 2010 Warning Letter. Therefore, the charge is hereby dismissed based on the facts and reasons set forth below and in the July 7, 2010 Warning Letter.

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

Summary of Facts

The Tentative First Amended Charge alleges the following additional facts relevant to the instant charge (SF-CE-665-M). Additional facts alleged by the Tentative First Amended Charge which are relevant to Charge No. SF-CE-671-M will be addressed by a separate document.

Crandall alleges that the basis of the instant charge is that his supervisor, Tim O'Brien (O'Brien), acting on behalf of the City, repeatedly followed Crandell and used his cell phone camera to photograph Crandell during worktime. He alleges that this stalking via cell phone camera was done in retaliation for Crandell's filing of "malpractice reports" with City officials. Subsequently, Crandell filed a grievance over the stalking via cell phone camera because he found the stalking reasonably adverse to his employment.

Crandell was employed by the City's Workers Compensation Department[2] (Department) where he was a benefits technician

Crandell alleges that Human Resources administrator Pamela Morse (Morse), along with O'Brien, stalked Crandell via cell-phone camera on various occasions between July and December 2008. Crandell alleges that it appeared to him from the behavior of O'Brien and another manager, Robin Masuda (Masuda), that Morse had directed them to maintain close surveillance of him. Crandell also claims that O'Brien, Masuda, and/or Morse would "abnormally monitor" him during staff meetings. O'Brien showed Morse the photographs and O'Brien "was rewarded for the practice with retention and promotion."

On or about August 8, 2008, Crandell sent a report to Morse, the Mayor, and the Board of Supervisors, concerning the Department's policy of over-assigning work to its staff, which Crandell alleged caused late payments of Workers Compensation benefits and forced employees to work overtime without compensation. As a result of this report, the Department reduced its workload assignment for workers within Crandell's classification.

On or about August 15, 2008, Crandell sent a report to the Mayor and the Board of Supervisors concerning a wasteful and improper party the Department had held for staff in February 2008, using City funds. Crandell alleges that City money was spent on items for the party such as professional photography and catered food, during a time of financial suffering.

Crandall prepared a further report dated September 24, 2008, concerning "retaliation for whistleblowing activity, reform candidacy for commissioner, and union stewardship during 2005-2006." This report, however, was "intercepted prior to submission to the Mayor."

[2] It appears the Workers Compensation Department is a division of the Human Resources Department.

On September 10, 2008, Crandell filed a grievance against the employer because of its conduct in stalking him via cell-phone camera. Crandell was terminated on December 19, 2008.

Crandell alleges that his unfair practice charge is timely filed because there was no deadline for moving his cell phone stalking grievance to arbitration and "it was necessary to allow the grievance process a chance to resolve the situation." The employer's deadline to respond to level three of the grievance process was December 10, 2008. Crandell did not receive any communication from his union representative after December 16, 2008, concerning the status of his grievance or arbitration.

Legal Analysis

To demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 3506 and PERB Regulation 32603(a),[3] the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

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

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

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104; *San Leandro*,

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

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.)

1. Protected Activity

On August 8, 2008, Crandell sent a "malpractice report" to various City officials, including Morse, alerting them to negative working conditions in the Department. Employee complaints which impact employees generally (i.e., not solely the complaining individual) are considered protected activity. (*Los Angeles Unified School District* (2003) PERB Decision No. 1552.) Crandell's report of August 8, 2008, appears to address collective concerns in that he claimed employees of the Department were being assigned too much work and were not receiving appropriate overtime pay. These would be matters of interest to other employees in the bargaining unit and therefore Crandell's August 8, 2008 report constitutes protected activity. The charging party must also show that the employer—specifically, the decision-maker taking adverse action against the employee—had knowledge of the protected activity. (*Metropolitan Water District of Southern California* (2009) PERB Decision No. 2066-M.) This report was given to Morse. It is unclear whether O'Brien, who allegedly took adverse action against Crandell by stalking him via cell phone camera, was aware of this report.

Crandell sent another "malpractice report" to the Mayor and the Board of Supervisors on August 15, 2008. This report concerned Crandell's complaints about a "wasteful and unjustified all-staff party" which Crandell claimed was a waste of public funds. Crandell characterizes this report as a whistleblowing activity and argues that "persons of conscience cannot participate in such misuse of pubic funds." However, Crandell does not allege any facts to demonstrate that his concerns about using public money for Department activities were a collective employment-related concern shared by other bargaining unit members. Therefore this report is not considered protected activity for the purposes of the MMBA.[4] (*Metropolitan Water District of Southern California*, *supra*, PERB Decision No. 2066-M.)

Crandell alleges that he prepared a further report dated September 24, 2008, concerning "whistleblowing activity, reform candidacy for commissioner, and union stewardship during 2005-2006." It cannot be determined from these facts whether the report addressed collective

[4] It also appears that this report was not sent to Morse.

concerns and, therefore, it is not considered protected activity. (*Metropolitan Water District of Southern California, supra*, PERB Decision No. 2066-M.) Further, this report was "intercepted" before it was submitted to the Mayor. From this allegation, it appears that the City never received the report and therefore had no knowledge of this alleged protected activity. Moreover, there is no basis upon which to impute any knowledge of this report to the decision-makers with respect to the adverse action.

Accordingly, Crandell's report dated August 8, 2008, may be considered protected activity, to the extent that the person responsible for taking adverse action against Crandell was aware of it.

2. Adverse Action

As stated in the Warning Letter, the statute of limitations under the MMBA is six months. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The charge was filed on June 10, 2009, therefore, alleged reprisals occurring prior to December 10, 2008, are untimely. (*Los Banos Unified School District* (2009) PERB Decision No. 2063.)[5] Crandell's original unfair practice charge identifies only two instances of stalking via cell phone camera which occurred within the limitations period: (1) on December 11, 2008, O'Brien aimed his cell phone camera at Crandell's cubicle when O'Brien was walking by, and (2) on December 19, 2008, O'Brien followed Crandell out of the building after Crandell was terminated, and O'Brien "may have been using his camera-phone to photograph the departure."[6]

The instant situation is distinguishable from that in *Simi Valley Unified School District* (2004) PERB Decision No. 1714. In that case, PERB found that a school principal's frequent, unannounced, and silent visits to a teacher's classroom for the purpose of observing her work

[5] Arguably, the limitations period would be tolled while the parties are pursuing a bilaterally agreed-upon dispute resolution procedure under a collective bargaining agreement. (*Solano County Fair Association* (2009) PERB Decision No. 2035-M.) Crandell has not provided sufficient information—such as copies of the applicable CBA provisions—to allow PERB to determine whether the tolling doctrine applies. According to documents submitted with the original unfair practice charge it appears that the grievance was summarily denied because it did not comply with applicable CBA provisions. Moreover, it appears from the facts alleged by Crandell in the Tentative First Amended Charge that the grievance process terminated when the exclusive representative did not respond at the third level, on December 10, 2008. If so, then the tolling period would have occurred prior to the commencement date of the limitations period and would not operate to extend the limitations period.

[6] These allegations are not reiterated in the Tentative First Amended Charge. However, because the Tentative First Amended Charge references Charging Party's earlier-filed allegations, all will be treated as one charge. (*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332.)

performance were dramatically different from the classroom visits the principal made for other teachers and that a reasonable person under the same circumstances would view the classroom visits as ominous or threatening, and adverse to his or her employment. Here, it is not objectively reasonable to believe that a supervisor's use of a cell phone camera in the workplace—even on more than two occasions—would have an adverse impact upon an individual's employment.[7] Crandell does not allege any facts to show that he was treated differently from other employees, for example, that O'Brien only used his cell phone camera around Crandell and not around other employees, or that O'Brien used the cell phone camera in evaluating Crandell's work performance. Accordingly, the alleged stalking via cell phone camera does not constitute adverse action under the facts presented.

3. Nexus

Even assuming, arguendo, that the alleged stalking via cell phone camera constitutes adverse action, Crandell has not alleged any factors, apart from arguably close temporal proximity, to demonstrate a nexus between his protected activity in filing reports and the alleged adverse action. Accordingly, Crandell does not state a prima facie case of retaliation. (*Novato*, *supra*, PERB Decision No. 210; *Moreland Elementary School District*, *supra*, PERB Decision No. 227.)

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

[7] In determining whether a prima facie case exists, PERB must accept Charging Party's facts as true. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

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

Extension of Time

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

Final Date

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

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Laura Davis
Regional Attorney

Attachment

cc: Gina Roccanova

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
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July 7, 2010

Michael Crandell
P. O. Box 423803
San Francisco, CA 94142

Re: *Michael Crandell v. City & County of San Francisco*
Unfair Practice Charge No. SF-CE-665-M
WARNING LETTER

Dear Mr. Crandell:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 10, 2009. Michael Crandell (Crandell or Charging Party) alleges that the City & County of San Francisco (City or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by, through its agents and managers, stalking him via cell phone camera.

Summary of Facts As Alleged

On or about December 19, 2008, Crandell was terminated from his employment with the City. According to the City, Crandell had been employed as a benefits technician in the City's Human Resources Department.

Crandell generally alleges that on numerous dates between July 25, 2008 and December 19, 2008, various employees and managers of the City conducted surveillance of Crandell and stalked him at the workplace by using cell phones equipped with cameras. The individuals Crandell believes conducted or colluded in the surveillance and/or stalking include: Tim O'Brien (O'Brien), the Workers Compensation supervisor; Priscilla Morse (Morse), the Workers' Compensation Director, and Micki Callahan (Callahan), the Human Resources Director.

In September 2008, Crandell began wearing a hat or hooded jacket to deter the surveillance and stalking and to protect himself from being photographed. Crandell also arranged boxes, a cardboard barrier and a protective curtain around his work area to deter the surveillance and stalking. On approximately September 2, 2008, Morse forcibly removed the curtain. On September 8, Crandell submitted "bureaucratic malpractice reports" to City Hall.

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

On September 10, 2008, Crandell filed a first level grievance against O'Brien and Morse complaining that O'Brien and Morse were conducting surveillance and stalking him via cell phone camera. On October 24, 2008, Morse sent Crandell a letter denying the grievance, which Crandell subsequently appealed to the second and third levels of the grievance procedure. Crandell alleges the stalking by cell phone camera continued through October, November and December 2008. On December 19, 2008, Crandell was terminated.

Statute of Limitations

The charging party's burden 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 *Saddleback Valley Unified School District* (1985) PERB Decision No. 558, the Board held that the six months statute of limitations period provided by the Educational Employment Relations Act "is to be computed by excluding the day the alleged misconduct took place and including the last day." Thus, where the school employer adopted a proposal on June 20, 1984, the Board calculated that "the six-month period started on June 21, 1984, the day after the school board adopted the proposal, and ended at the close of business on December 20, 1984." (*Ibid.*; see also *California State University, Fullerton* (1986) PERB Decision No. 605-H.) The same method of calculation should be applied to the statute of limitations under the MMBA.[2]

The charge was filed on June 10, 2009. Therefore, any events occurring before December 10, 2008, are untimely. Only two of the allegations in the charge occurred within the limitations period: (1) on December 11, 2008, O'Brien aimed his cell phone camera at Crandell's cubicle when O'Brien was walking by, and (2) on December 19, 2008, O'Brien followed Crandell out of the building after Crandell was terminated, and O'Brien "may have been using his camera-phone to photograph the departure." These allegations do not state a cognizable violation of any provision of the MMBA.

[2] 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.)

Interference

It should be noted that the MMBA does not extend a remedy against all acts of perceived unfairness or discrimination against public employees. Rather, PERB's jurisdiction is limited to resolving claims of unfair practices, as defined, which violate the Acts enforced by PERB. (See, e.g., *Los Angeles Unified School District* (1984) PERB Decision No. 448.) In an attempt to assist the Charging Party, the following information is provided.

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.)

Under the MMBA, protected activity refers to the right of public employees to form, join, and participate in the activities of employee organization as well as the right for public employees to represent themselves with respect to the employment relationship. (Gov. Code §3502.) Here, Crandell does not allege that he took part in any protected activity within the limitations period, and therefore does not state a prima facie case that the employer unlawfully interfered with his exercise of protected activity.

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

[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.*)

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 **July 19, 2010**,[4] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Laura Davis
Regional Attorney

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