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-671-M PERB Decision No. 2207-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 wrongfully terminating Crandell 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

[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.

and dismissal letters[3] to be well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself, supplemented by the brief discussion below.

DISCUSSION

PERB Regulation 32635(a) provides that an appeal from a dismissal "shall" comply with the following requirements:

> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the grounds for each issue stated.

To satisfy the requirements of PERB Regulation 32635(a), the appeal must sufficiently place the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H.) An appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635(a). The appeal in this case merely restates facts alleged in the charge and arguments made before the Board agent. It fails to sufficiently place the Board on notice of the issues raised on appeal and is therefore subject to dismissal on that basis alone. (See, e.g., *City of Brea* (2009) PERB Decision No. 2083-M.)

[3] By the Board's decision, we hereby correct typographical errors in various dates contained in the warning and dismissal letters. The warning letter states the dates of two bureaucratic malpractice reports to be October 8 and 15, 2008. Crandell alleges that those reports are dated August 8 and 15, 2008. The dismissal letter refers to a positive performance evaluation of November 2007. The date of the evaluation as alleged by Crandell is December 2007. These corrections affect no change in either the analysis or disposition of this matter.

ORDER

The unfair practice charge in Case No. SF-CE-671-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Dowdin Calvillo joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

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-671-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 18, 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 allowing a hostile and retaliatory work environment.

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

Crandell alleges that the City terminated him in retaliation for "filing malpractice reports with the Mayor, Board of Supervisors and City administrators on behalf of workers and citizens." These reports were based upon the City's: (1) out of class assignment of claims workers; (2) over-assignment of employees; (3) suppression and substitution of documents; (4) false accusations; (5) illegitimate accusations which are not valid or violate a Collective Bargaining Agreement (CBA); (6) inconsistent standards; (7) retroactive actions; (8) untimely actions; (9) non-substantive actions (those not affecting employees) and (10) malicious conduct.

Crandell alleges he has a long history of filing reports to complain about working conditions. He filed malpractice reports in 1999 and 2000. In 2006 he was transferred to a different worksite, allegedly in retaliation for his activities as a union and citizen advocate. In 2006 through 2008, Crandell reported, apparently to City management, regarding violations by the City in over-assigning work to staff in the Workers' Compensation Department (Department) and in requiring workers in the Department to perform out-of-class work. Crandell alleges that Human Resources Division administrator, Priscilla Morse (Morse) misused department funds for improper activities such as parties, despite budget cuts. In 2008, Crandell reported these abuses to the Mayor and Board of Supervisors.

As a result of Crandell's whistle-blowing activities and efforts at advocacy on behalf of citizens and employees, the City imposed upon him a retaliatory performance improvement plan. Crandell received a positive performance evaluation in November 2007. However, in August 2008 he received a negative performance evaluation which, Crandell claims, "suppressed" the earlier positive evaluation. Crandell alleges that "this was disparate hostile and deceptive treatment unlike or inconsistent with that imposed on any other staff."

During 2008 Morse exhibited "patterns of immaturity and infantile hostility" towards Crandell and "revealed a hyper-vindictive mental disposition." Morse, along with Crandell's supervisor Tim O'Brien (O'Brien), subsequently 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. Crandell also alleges that managerial staff changed wall clocks, and then accused Crandell of being late for work. On September 10, 2008, Crandell filed a grievance against the employer because of its conduct in stalking him via cell-phone camera.

On or about August 8, 2008, Crandell sent a report to the Human Resources administrator (presumably 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."

Crandell alleges that these three reports constitute protected activity. Further, he alleges he engaged in protected activity on unspecified dates by advising Workers' Compensation claimants of their rights. Crandell alleges that these reports were "cited in employer accusations in order to impose suspension and termination."[2] Specifically, it appears that the City alleged that Crandell improperly used work time in preparing them; Crandell denies that he did this.

As stated in the Warning Letter, Crandell was terminated on December 19, 2008.

Legal Analysis

As explained in the Warning Letter, 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

[2] These documents are not supplied.

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

> 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*, *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

Crandell alleges that he had a long history of activism as a citizen and union advocate from 1999 through 2008. On August 8, 2008 he 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, who presumably was the decision maker with respect to

Crandell's dismissal. Therefore, it appears that employer had adequate knowledge of this protected activity.

Crandell's 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 filed a grievance on September 10, 2008, presumably pursuant to a CBA between the City and Crandell's exclusive representative, concerning the employer's alleged activity in stalking him via cell-phone camera. The filing of a grievance is protected activity. (*City of Modesto* (2008) PERB Decision No. 1994-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 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 in Crandell's termination.

Crandell's allegations that he engaged in protected activity by advising Workers Compensation claimants of their rights do not address collective concerns and therefore are not protected activity within the meaning of the MMBA.

Accordingly, Crandell has alleged facts sufficient to find that he engaged in protected activity with employer knowledge by (1) on August 8, 2008, submitting a "malpractice report" to Morse and others, complaining about working conditions; and (2) on September 10, 2008, filing a grievance with the employer.

2. Adverse Action

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

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

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.)[5] A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.) The instant charge was filed on June 18, 2009. The only alleged adverse action which occurred within the limitations period was Crandell's termination, on December 19, 2008. (*Los Banos Unified School District* (2009) PERB Decision No. 2063 [limitations period for retaliation claim based on adverse action of termination begins on date of termination].) Alleged reprisals occurring prior to December 18, 2008, cannot be used as a basis for a charge of retaliation. (*Ibid.*) Dismissal of an employee is an adverse action. (*Rainbow Municipal Water District* (2004) PERB Decision No. 1676-M.) Accordingly, Crandell's termination on December 19, 2008, constitutes adverse action for purposes of the MMBA.

3. Nexus

Crandell's termination occurred more than four months after his protected activity of submitting the August 8, 2008 report, and more than three months after filing his grievance on September 10, 2008. Even if these events are considered close in time, an employer's unlawful motive cannot be inferred from temporal proximity alone. (*Moreland Elementary School District*, *supra*, PERB Decision No. 227.)

Crandell does not allege any other facts to show that the City terminated him because of his protected activity. He does not allege, for example, that the City conducted a cursory investigation of him or that it lacked justification for its action in terminating his employment.

Crandell's allegation that his negative performance evaluation in August 2008 was "disparate hostile and deceptive treatment unlike or inconsistent with that imposed on any other staff" is not supported by specific factual allegations. Mere legal conclusions are not sufficient to state a prima facie case. (*Charter Oak Unified School District* (1991) PERB Decision No. 873.)

Crandell's general allegations that City personnel stalked him or conducted surveillance of him by cell phone camera[6] and that Morse exhibited hostility towards him, lack any specific factual basis which would establish that there was a connection between his protected activity and his

[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.)

[6] 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.)

termination, or that the City possessed anti-union animus.[7] Accordingly, these allegations do not support a finding of unlawful motive by the City.

Because Crandell does not establish that the City took adverse action against him because of his protected activity, no prima facie case is stated.

Right to Appeal

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

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

The Board's address is:

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

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

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required

[7] These allegations are raised in more detail by Unfair Practice Charge No. SF-CE-665-M.

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, Deputy City Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
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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-671-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 18, 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 allowing a hostile and retaliatory work environment.

Summary of Facts

On or about December 19, 2008, Crandell was terminated from his employment with the City. Crandell had been employed as a Workers Compensation benefits technician in the City's Human Resources Department. Tim O'Brien (O'Brien) is the Workers Compensation supervisor, Priscilla Morse (Morse) is the Workers Compensation Director, and Micki Callahan (Callahan) is the Human Resources Director.

On October 8, 2008, Crandell submitted a "bureaucratic malpractice report" to City Hall. In this report, Crandell complained about the declared policy of overassignment in the Workers Compensation division. On October 15, 2008, Crandell submitted another report to City Hall which complained about the lack of efficiency, incompetence and wasteful practices within the Workers Compensation division. On an unspecified date, Morse replaced a positive performance evaluation of Crandell with a negative one. It appears that, at some point in 2008, Crandell was placed upon a three month "work plan," which he alleges was retaliatory. Crandell also alleges that Morse and O'Brien stalked him via cell-phone camera and searched his desk.

On October 2, 2008, the City provided a Notice of Suspension and Skelly Recommendations (apparently, recommendations regarding Crandell the City made following a *Skelly*[2] hearing.)

[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.

[2] This is an apparent reference to pre-termination due process required by *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.

Crandell disputes many of the findings of this Notice. On December 19, 2008, the City provided a Notice of Termination and Skelly Recommendations. Contrary to the allegations of the December 19, 2008 Notice of Termination and Skelly Recommendations, Crandell alleges that: his performance was not poor or substandard; he had a backlog of work due to his suspension; the City had a practice of overassignment and assigned him too much work without providing sufficient training or assistance; the stalking via cell-phone camera created a hostile work environment; and he did not use work site resources for personal purposes.

Legal Analysis

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.[3]

The charge was filed on June 18, 2009. Therefore, any events occurring before December 18, 2008, are untimely. Most of the allegations in the charge occurred outside of the limitations period, except for the termination which occurred on December 19, 2008, within the limitations period.

Retaliation On the Basis of Protected Activity

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.

[3] 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.)

(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.

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. (*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*, *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

Employee complaints may be considered protected activity if they are "a logical continuation of group activity" and address concerns impacting employees generally. (*Los Angeles Unified School District* (2003) PERB Decision No. 1552.) Complaints undertaken for the benefit of a single employee, however, are not protected activity. (*Ibid.*) From the facts alleged, it is unclear whether the "bureaucratic malpractice reports" Crandell sent to unspecified individuals at City Hall were designed to address collective concerns of employees or whether they were intended to redress Crandell's own concerns. Accordingly, Charging Party does not establish this element of a prima facie case, and thus cannot establish employer knowledge of protected activity.

2. Adverse Action

Termination from employment constitutes adverse action for purposes of a discrimination analysis. (*Rainbow Municipal Water District* (2004) PERB Decision No. 1676-M.)

3. Nexus

Even assuming, arguendo, that Crandell's complaints to City Hall constitute protected activity within the meaning of the MMBA, Crandell alleges no facts to show that the adverse action of termination was taken because of his protected activity.[4] The reports were filed in August and Crandell's termination was four months later in December; therefore close temporal proximity is not demonstrated. Nor does Crandell allege facts to establish any other indicia of unlawful motive. In short, Crandell does not allege sufficient facts to show that the employer had an unlawful motive in terminating him.

For these reasons the charge, as presently written, does not state a prima facie case.[5] 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

[4] Mere legal conclusions are not sufficient to state a prima facie case. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

[5] 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.*)

number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before **July 19, 2010**,[6] 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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[6] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)