STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

VICKI A. HAINES, Charging Party, v. MARIN COUNTY SUPERIOR COURT, Respondent.	Case No. SF-CE-22-C PERB Decision No. 2216-C November 9, 2011

Appearances: Richard L. Manford, Attorney, for Vicki A. Haines; Judicial Counsel of California by Patti L. Williams and Tim J. Emert, Attorneys, for Marin County Superior Court.

Before McKeag, Dowdin Calvillo and Huguenin, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (Board) on appeal by Vicki A. Haines (Haines) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleges that the Marin County Superior Court (Court) violated the Trial Court Employment Protection and Governance Act (Trial Court Act)[1] by terminating her employment on February 19, 2011 without providing the Service Employees International Union Local 1021 (SEIU)[2] with reasonable opportunity to meet and confer over the Court's decision to layoff four employees, including Haines.[3] The Board agent found that Haines lacked standing to allege violations of the rights and duties that attach to the exclusive representative and the employer.

[1] The Trial Court Act is codified at Government Code section 71600 et seq.

[2] SEIU is the exclusive representative of employees at Marin County Superior Court.

[3] In an unfair practice charge pending before a PERB administrative law judge, Case No. SF-CE-21-C, SEIU alleges that the Court violated the Trial Court Act by breaching its duty to meet and confer in good faith.

On appeal, Haines challenges the dismissal of her allegation that the Court violated the Trial Court Act by failing to provide SEIU with reasonable opportunity to meet and confer regarding the reduction in force.[4] We have reviewed the dismissal and the record in light of Haines' appeal and the relevant law. Based on this review, we find that the warning and dismissal letters are well-reasoned, adequately supported by the record and in 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-22-C is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Dowdin Calvillo joined in this Decision.

[4] Haines requests oral argument. Pursuant to PERB Regulation 32635, there is no provision for requesting oral argument on appeal of a Board agent's dismissal. Accordingly, we deny Haines' request for oral argument.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1023
Fax: (510) 622-1027

March 1, 2011

Richard L. Manford, Attorney
3081 Swallows Nest Drive
Sacramento, CA 94123

Re: *Vicki A. Haines v. Marin County Superior Court*
Unfair Practice Charge No. SF-CE-22-C
DISMISSAL LETTER

Dear Mr. Manford:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 30, 2010. Vicki A. Haines (Haines or Charging Party) alleges that the Marin County Superior Court (Court or Respondent) violated the Trial Court Employment Protection and Governance Act (Trial Court Act or Act)[1] by terminating her employment on February 19, 2010.

Charging Party was informed in the attached Warning Letter dated February 18, 2011, 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 February 28, 2011 the charge would be dismissed.

PERB has not received either an amended charge or a request for withdrawal. In a telephone conversation on March 1, 2011, Charging Party's representative stated that no amended charge would be filed. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the February 18, 2011 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[2] 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

[1] The Trial Court Act is codified at Government Code section 71600 et seq. The text of the Trial Court Act and PERB Regulations may be found at www.perb.ca.gov.

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

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 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,

WENDI L. ROSS
Interim General Counsel

By _____
Alicia Clement
Regional Attorney

Attachment

cc: Tim J. Emert, Senior Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1023
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February 18, 2011

Richard L. Manford, Attorney
3081 Swallows Nest Drive
Sacramento, CA 94123

Re: *Vicki A. Haines v. Marin County Superior Court*
Unfair Practice Charge No. SF-CE-22-C
WARNING LETTER

Dear Mr. Manford:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 30, 2010. Vicki A. Haines (Haines or Charging Party) alleges that the Marin County Superior Court (Court or Respondent) violated the Trial Court Employment Protection and Governance Act (Trial Court Act or Act)[1] by terminating her employment on February 19, 2010.

PERB's investigation revealed the following facts. From 1982 until February 19, 2010, Haines was employed by the Court as a regular, full-time court reporter. Haines is a member of a bargaining unit that is exclusively represented by the Service Employees International Union, Local 1021 (Union). The Court and Union are signatories to a collective bargaining agreement that was valid at all times relevant to the acts giving rise to the allegations in this charge.

On or about January 29, 2010, the Court purchased twelve electronic recording (ER) setups at a cost of over $46,000.00. On February 8, 2010, the Court notified the Union that it was contemplating a reduction in force (RIF) and requested that the parties meet and confer regarding the impacts of the RIF. The Union and the Court met on February 18, 2010. At this meeting, the Court advised the Union that it would be laying off four court reporters and one information technology (IT) employee. Bumping rights of other represented employees were also discussed. The Union first learned on February 18 that the RIF would be made effective February 19, 2010. Upon inquiring how the workload from the laid off court reporters would be redistributed to the remaining employees, the Court stated that it would be utilizing ER to a greater degree.

At the beginning of her work day on February 19, 2010, Haines received an e-mail message with the subject line, "reduction in force," which instructed her to attend a meeting with her superiors at 1:20 p.m. that day. At the meeting, Haines was given a letter informing her that

[1] The Trial Court Act is codified at Government Code section 71600 et seq. The text of the Trial Court Act and PERB Regulations may be found at www.perb.ca.gov.

she was being laid off, informing her that she could contest the layoff within three working days of receipt of the letter, and she was given four separate checks representing salary, accrued sick and vacation time, an insurance premium refund and one week's severance. Her termination was made effective at 4:00 p.m. that same day.

In the days following the RIF, the Court sent out an e-mail message to all court reporters informing them that it would soon install ER equipment in every courtroom, and that the remaining staff reporters would be trained on the new equipment in the near future.

Haines timely appealed the Court's notice of layoff by complying with the instructions provided in the notice of layoff. Haines has not filed a separate grievance as that procedure is defined under the collective bargaining agreement.

On March 9, 2010, the Court announced that it was changing its policies and procedures regarding the assignment of court reporters. This change involved the fee that reporters could charge for copies of transcripts in their capacity as independent contractors.

In its response to the charge, the Court argues that it complied with all the meet and confer requirements under the Act, and that Charging Party lacks standing to allege violations of the duty to meet and confer.

Discussion

Violations of the Trial Court Act are contained in PERB Regulation 32606[2], which states that it is an unfair practice for an employer to: a) interfere with employees' rights; b) interfere with employee organization's rights; c) fail to meet and confer in good faith with an exclusive representative; d) dominate an exclusive representative; e) fail to participate in impasse in good faith with an exclusive representative; f) adopt or enforce an unreasonable local rule; or g) violate a local rule.

In this case, Charging Party does not specify which subsection of Regulation 32606 was allegedly violated. Where a charging party fails to allege any specific theory of a violation, a Board agent, upon review of the charge, may determine under what section the charge should be analyzed. (See *Los Angeles County Education Association, CTA/NEA (Burton)* (1999) PERB Decision No. 1358.) Review of the facts alleged to constitute an unfair practice tends to demonstrate that the crux of Charging Party's concern is that the Court failed to provide sufficient notice to the Union of the need for a RIF, and because of its delay, the Union was unable to present cost-savings alternatives that may have saved Haines's job. According to Charging Party, had good faith negotiations taken place as mandated by the Act, Haines's position may not have been eliminated. Accordingly, she seeks reinstatement to her former

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Copies may be purchased from PERB's Publications Coordinator, 1031 18th Street, Sacramento, CA 95811-4124, and the text is available at www.perb.ca.gov.

position. As discussed at greater length below, even taking Charging Party's facts as true, the charge fails to establish a prima facie case that a violation of the Trial Court Act has occurred.

Standing

The issue of "standing," or jurisdiction over the parties, is separate and distinguishable from the issue of whether the elements of a prima facie case exist. (*Los Angeles Community College District* (1994) PERB Decision No. 1060.) The Act requires PERB to dismiss a charge for lack of Board jurisdiction if a party has no standing to file a charge or fails to make a prima facie case for the charge filed. (*Ibid.*) "Standing" for the purpose of establishing PERB's jurisdiction should be inquired into by the Board agent. (*Ibid.*) If found, the Board agent would then inquire into the existence of a prima facie case. (*Ibid.*)

The purpose of this agency is to insure the statutory rights of the parties, so that the employer and the exclusive representative may meet and negotiate on terms and conditions of employment as defined in the Act. (*Oxnard Educators Association (Gorcey and Tripp)* (1988) PERB Decision No. 664.) The Board has recognized that the exclusivity of the chosen employee organization in representing unit employees is crucial to its ability to negotiate effectively and to stable employment relations generally. (*Ibid.*)

As demonstrated by the discussion above, individuals do not have standing to allege violations of the rights and duties that attach to the exclusive representative and the employer. (*State of California (Department of Corrections)* (1993) PERB Decision No. 972-S.) Accordingly, to the extent that Charging Party seeks to remedy violations of an alleged failure to meet and confer in good faith, a failure to participate in impasse in good faith, or interference with an exclusive representative's right to represent its members, these allegations must be dismissed due to Haines's lack of standing.

Notwithstanding the above, if Charging Party wishes to allege that Haines was discriminated against or that Haines's rights were interfered with, the charge should be amended according to the following discussion.

Discrimination

To demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 71635.1 and PERB Regulation 32606(a), the charging party must show that: (1) the employee exercised rights under the Trial Court Act; (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*).) 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; (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.)

At present, there are no facts demonstrating that Haines engaged in any protected activity. Being laid off from employment is clearly an adverse act. However, in order to establish that Haines was laid off because of her protected activity, Charging Party must allege facts demonstrating not only some temporal proximity between Haines's protected activity and the Court's adverse act, but some additional nexus linking the two events. At present, there are no facts demonstrating that the Court deviated from its negotiated standards and procedures when determining whom to lay off, or that Haines was singled out among her peers for layoff.

Although it is clear that the Court did not negotiate with the Union before announcing its decision to implement a RIF, this facts alone does not demonstrate the appropriate nexus between the decision to implement layoffs and any possible protected conduct by Haines. This is because the recent California Supreme Court decision *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, reaffirmed PERB's long-held ruling that a public employer's decision to implement layoffs is not within

the scope of representation, rather, only the effects of a layoff are within scope. Given the lack of any duty for the Court to negotiate over its decision to implement layoffs, it is not clear how its failure to do so constitutes evidence that the RIF was motivated by any anti-union animus. Thus, to the extent that Charging Party asserts this fact as evidence of a nexus between some protected conduct and the layoff, it must be rejected.

In light of the above discussion, the charge must be amended to include facts demonstrating that Haines engaged in some protected conduct and that the Court laid her off because of her protected conduct, or the allegation that the Court discriminated against Haines will be dismissed.

Interference

The test for whether a respondent has interfered with the rights of employees under the Meyers-Milias-Brown Act (MMBA)[3] 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.)

When interpreting the Trial Court Act, it is appropriate to take guidance from cases interpreting the MMBA and other California labor relations statutes with parallel provisions. (Government Code section 71639.3; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

As noted above, it is not clear that Haines was engaged in protected activity at any time prior to the Court's RIF. Even assuming Haines had been engaged in some protected activity prior to the RIF, there are no facts demonstrating how the Court's RIF tends to interfere with, restrain or coerce employees in the exercise of those activities, or that the Court's conduct was not justified by legitimate business reasons. Absent these additional facts, Charging Party has not established the prima facie elements of a complaint for interference, and the charge must be amended or this allegation will be dismissed.

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

For these reasons the charge, as presently written, does not state a prima facie case.[4] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before February 28, 2011,[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Alicia Clement
Regional Attorney

AC

[4] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie 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.*)

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