

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



CECILIA JAROSLAWSKY,

Charging Party,

v.

CITY & COUNTY OF SAN FRANCISCO,

Respondent.

Case No. SF-CE-778-M

PERB Decision No. 2222-M

November 23, 2011

Appearances: Cecilia Jaroslawsky, on her own behalf; Stephanie G. Bickham, Deputy City Attorney, for City & County of San Francisco.

Before McKeag, Dowdin Calvillo and Huguenin, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Cecilia Jaroslawsky (Jaroslawsky) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleges that the City & County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA)<sup>1</sup> by: (1) discriminating against her because of her age; (2) interfering with her *Weingarten*<sup>2</sup> right to representation; and (3) retaliating against her for engaging in protected activity. The Board agent found that Jaroslawsky failed to state a prima facie case on each allegation and dismissed the charge.

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<sup>1</sup> MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government code.

<sup>2</sup> In *National Labor Relations Board v. Weingarten* (1975) 420 U.S. 251 (*Weingarten*), the U.S. Supreme Court affirmed the decision of the National Labor Relations Board to afford employees the right, upon request, to union representation during investigatory interviews.

On appeal, Jaroslawsky challenges the dismissal of her allegation that the City violated the MMBA by retaliating against her for engaging in protected activity.

We have reviewed the dismissal and the record in light of Jaroslawsky's appeal, the City's response thereto, and 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 accordance with applicable law. Accordingly, the Board adopts the warning and dismissal letters as the decision of the Board itself, supplemented by the discussion below regarding new information and allegations presented by Jaroslawsky on appeal.

#### DISCUSSION

In her appeal, Jaroslawsky alleges the City retaliated against her on May 18, 2010 by terminating her employment because: (1) she participated on a 2009 union committee which modified City Planning Director John Rahaim's (Rahaim) proposal concerning employee classifications because the committee found the proposal unacceptable; (2) she sent an email to Rahaim in February 2009 that criticized the timing of his plans for an employee recognition program in light of impending layoffs; (3) she sent an email to Rahaim on October 21, 2009 in which she complained of unspecified inappropriate and unprofessional behavior of another employee towards her; and (4) she refused initially a supervisor's directive to exclude certain information from a staff report Jaroslawsky prepared in May of 2010.<sup>3</sup>

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<sup>3</sup> Jaroslawsky also alleges on appeal that the City violated her Fourth Amendment rights guaranteed by the U.S. Constitution by investigating her email communications. PERB's jurisdiction does not include enforcement of the U.S. Constitution. (See *Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S.) Thus, we do not address this allegation on appeal.

### Applicable Law

PERB Regulation 32615(a)(5)<sup>4</sup> requires, inter alia, 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.) "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b); see also *CSU Employees Union, SEIU Local 2579 (Kyrias)* (2011) PERB Decision No. 2175-H.)

### Jaroslawska's Participation On The 2009 Committee

In the warning letter, the Board agent advised Jaroslawska that in order to establish a prima facie case of retaliation, she would have to allege facts to support: (1) when Jaroslawska participated on the committee; (2) who at the City received the modified proposal; and (3) when the modified proposal was submitted. In her amended charge, Jaroslawska did not address these deficiencies discussed in the warning letter.

On appeal, Jaroslawska repeats the allegation presented in her original charge that the City retaliated against her for her participation on the 2009 committee. In her appeal, Jaroslawska provides new information that addresses some of the deficiencies in the original charge. This new information is provided for the first time on appeal and references incidents which predate the filing of the original charge. This information was not provided to the Board agent and Jaroslawska provides no reason why this information could not have been presented in the original charge or in the amended charge. Jaroslawska has failed to establish the

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<sup>4</sup> PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

requisite good cause to consider this new information. Thus, we do not consider the new information and we do not address this allegation on appeal.

Jaroslawsy's February 2009 Criticism Of Rahaim's Timing For An Employee Recognition Program

Jaroslawsy alleges that the City retaliated against her after she sent an email in February 2009 that criticized Rahaim's timing for conducting an employee recognition program. This new allegation is presented for the first time on appeal and references incidents which predate the filing of the original charge. This allegation was not presented to the Board agent and Jaroslawsy provides no reason why this allegation could not have been presented in the original charge or in the amended charge. Jaroslawsy has failed to establish the requisite good cause to consider this new allegation. Thus, we do not consider the new allegation.

Jaroslawsy's October 21, 2009 Complaint Concerning The Behavior Of Another Employee

Jaroslawsy alleges that the City retaliated against her because she sent an email to Rahaim on October 21, 2009, in which she complained of unspecified inappropriate and unprofessional conduct toward her by a manager. This new allegation is presented for the first time on appeal and references incidents which predate the filing of the original charge. This allegation was not presented to the Board agent and Jaroslawsy provides no reason why this allegation could not have been presented in the original charge or in the amended charge. Jaroslawsy has failed to establish the requisite good cause to consider this new allegation. Thus, we do not consider the new allegation.

Jaroslawsy's May 2010 Refusal To Follow Employer Direction

Jaroslawsy alleges that the City retaliated against her because she refused to follow the employer's directive in May 2010. This new allegation is presented for the first time on appeal

and references incidents which predate the filing of the original charge. This allegation was not presented to the Board agent and Jaroslawsky provides no reason why this allegation could not have been presented in the original charge or in the amended charge. Jaroslawsky has failed to establish the requisite good cause to consider this new allegation. Thus, we do not consider the new allegation.

In sum, we conclude that Jaroslawsky has failed to establish the requisite good cause for the Board to consider any of the new information and allegations advanced in her appeal of the Board agent's dismissal of her claim of retaliation.

After review of the dismissal and the entire record, we find that the Board agent's decision is well-reasoned, adequately supported by the record, and in accordance with applicable law. Accordingly, we affirm the Board agent's decision that Jaroslawsky failed to state a prima facie case of retaliation against her by the City for engaging in protected activity.

ORDER

The unfair practice charge in Case No. SF-CE-778-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Dowdin Calvillo joined in this Decision.



**PUBLIC EMPLOYMENT RELATIONS BOARD**

Sacramento Regional Office  
1031 18th Street  
Sacramento, CA 95811-4124  
Telephone: (916) 327-8386  
Fax: (916) 327-6377



January 26, 2011

Cecilia Jaroslawsky  
403 Monterey Road  
Pacifica, CA 94044

Re: *Cecilia Jaroslawsky v. City & County of San Francisco*  
Unfair Practice Charge No. SF-CE-778-M  
**DISMISSAL LETTER**

Dear Ms. Jaroslawsky:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 5, 2010. Cecilia Jaroslawsky (Jaroslawsky or Charging Party) alleges that the City & County of San Francisco (City and County or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)<sup>1</sup> by: (1) discriminating against her because of her age; (2) interfering with her *Weingarten*<sup>2</sup> right to representation; and (3) retaliating against her for engaging in protected activity.

Charging Party was informed in the attached Warning Letter dated January 18, 2011, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to January 25, 2011, the charge would be dismissed.

On January 21, 2011, Charging Party filed a first amended charge.

The attached Warning Letter explained in detail why the above-referenced charge did not initially state a prima facie case. The Warning Letter included an explanation of the pleading burden that a charging party must satisfy in order to have a complaint issue. PERB Regulation 32615(a)(5)<sup>3</sup> requires, *inter alia*, that an unfair practice charge include a "clear and concise

<sup>1</sup> 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](http://www.perb.ca.gov).

<sup>2</sup> In *National Labor Relations Board v. Weingarten* (1975) 420 U.S. 251 (*Weingarten*), the U.S. Supreme Court granted employees the right to representation during disciplinary interviews.

<sup>3</sup> PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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.)

With respect to Charging Party’s allegation that the City and County discriminated against her because of her age, Charging Party was informed that PERB has no jurisdiction over a claim of age discrimination. (*United Teachers – Los Angeles (Glickberg)* (1990) PERB Decision No. 846.) Moreover, nothing in the amended charge addresses this allegation. Therefore, Charging Party’s allegation that the City and County discriminated against her because of her age is hereby dismissed based on the facts and reasons set forth herein and in the January 18, 2011 Warning Letter.

With respect to Charging Party’s allegation that the City and County violated her *Weingarten* right to representation on April 30, 2010 when she was issued a Letter of Intent to Terminate from her supervisor, Charging Party was informed that in order to establish a *prima facie* violation, she must establish that the April 30, 2010 meeting was: (1) investigatory in nature; and (2) that she requested union representation. (See *Redwoods Community College District v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617; *Freemont Union High School District* (1983) PERB Decision No. 301.) Nothing in the amended charge addresses whether the April 30, 2010 meeting was investigatory in nature or whether Charging Party requested union representation. Therefore, Charging Party’s allegation that the City and County violated her *Weingarten* right to representation hereby dismissed based on the facts and reasons set forth herein and in the January 18, 2011 Warning Letter.

Lastly, with respect to Charging Party’s allegation that the City and County retaliated against her for engaging in protected activity, Charging Party was informed that in order to demonstrate that an employer discriminated or retaliated against an employee in violation of the MMBA section 3506, the charging party must show that: (1) the employee exercised rights under the 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 action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision

January 26, 2011

Page 3

No. 210.) Specifically, Charging Party's allegation failed to establish *when* Charging Party engaged in protected activity, *how* the City and County gained knowledge of Charging Party's alleged protected activity and that the City and County took action *because of* her protected activity.

In the amended charge, Charging Party provided a two-page response setting forth Charging Party's argument in support of establishing that the City and County took action *because of* her protected activity. For example, Charging Party states that: (1) she was the only female employee and one of only two non-managers terminated for violating the City and County computer and e-mail policies therefore establishing disparate treatment; (2) her disciplinary process was "totally politicized" therefore establishing that the City and County departed from established procedures and past practices; and (3) no discussion or consideration was given to her "prior exemplary record" therefore establishing that the City and County engaged in a cursory investigation.

However, as written, Charging Party's amended statement does not address all the deficiencies outlined in the Warning Letter. Nothing in the charge as amended states: (1) *when* Charging Party participated on the committee of City and County Planning Department employees to discuss a proposal submitted by the City and County Planning Director; (2) *who* at the City and County received the modified proposal; or (3) *when* the modified proposal was submitted. Without a clear and concise statement of facts and conduct addressing the deficiencies outlined in the Warning Letter, Charging Party has failed to satisfy PERB Regulation 32615(a)(5) and fails to state a *prima facie* case. Therefore, the allegation that the City and County discriminated against Charging Party for engaging in protected activity is hereby dismissed based on the facts and reasons set forth herein and in the January 18, 2011 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 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.)

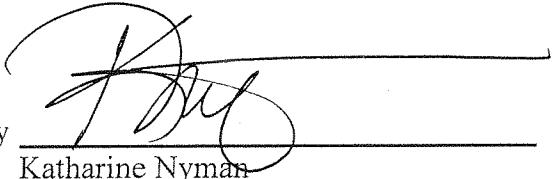
SF-CE-778-M  
January 26, 2011  
Page 5

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   
Katharine Nyman  
Regional Attorney

Attachment

cc: Gina Rocanova, Deputy City Attorney



**PUBLIC EMPLOYMENT RELATIONS BOARD**

Sacramento Regional Office  
1031 18th Street  
Sacramento, CA 95811-4124  
Telephone: (916) 327-8386  
Fax: (916) 327-6377



January 18, 2011

Cecilia Jaroslawsky  
403 Monterey Road  
Pacifica, CA 94044

Re: *Cecilia Jaroslawsky v. City & County of San Francisco*  
Unfair Practice Charge No. SF-CE-778-M  
**WARNING LETTER**

Dear Ms. Jaroslawsky:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 5, 2010. Cecilia Jaroslawsky (Jaroslawsky or Charging Party) alleges that the City & County of San Francisco (City and County or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)<sup>1</sup> by: (1) discriminating against her because of her age; (2) interfering with her *Weingarten*<sup>2</sup> right to representation; and (3) retaliating against her for engaging in protected activity.

**Factual Background as Alleged**

In 2009, a committee of City and County Planning Department employees was formed to discuss a proposal submitted by City and County Planning Director John Rahaim (Rahaim) regarding placing “special conditions” on certain employee classifications to protect them from impending layoffs. Jaroslawsky was one of the participants on the committee. The committee determined that Rahaims’ proposal was not acceptable and modified the proposal substantially.

On March 30, 2010, after a six-week disability leave, Jaroslawsky was “interrogated” by the City and County Human Resources Department regarding her use of the City and County e-mail system. Charging Party states that she was “approximately the 35th employee to be interrogated” and that a union representative was present at all interrogations, yet she did not receive any advance information regarding the interrogation.

On April 30, 2010, Jaroslawsky was given an Intent to Terminate Letter (Letter) by Rahaim “without a union representative.” Charging Party states that none of her direct supervisors had

<sup>1</sup> 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](http://www.perb.ca.gov).

<sup>2</sup> In *National Labor Relations Board v. Weingarten* (1975) 420 U.S. 251 (*Weingarten*), the U.S. Supreme Court granted employees the right to representation during disciplinary interviews.

any knowledge of or participated in the decision to issue her the Letter. Charging Party further states that:

Upon receipt of the Intent to Terminate, my name was leaked to the press, even though this was a confidential issue. I was contacted by several people outside the Department, including a writer at SF Weekly, two to three days after receipt of the Intent to Terminate.

On May 18, 2010, Charging Party was terminated from employment with the City and County “without being given an opportunity to address the charges and instructed by [Rahaim] to keep all details confidential.” Charging Party states that four other employees were also terminated in a similar fashion and that all were over the age of 50.

On February 18, 2010, during a public budget hearing held by the City and County Planning Commission, Rahaim was directed to “hang on to the younger planners as ‘one gets more bang for their buck’.”

### Discussion

PERB Regulation 32615(a)(5)<sup>3</sup> requires, *inter alia*, 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.)

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<sup>3</sup> PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

1. Age Discrimination

PERB's jurisdiction is limited to the determination of unfair labor practice claims arising under the MMBA and various other public-sector collective bargaining statutes. (*Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S.) PERB's jurisdiction does not include, among other things, enforcement of the Americans with Disabilities Act, the U.S. Constitution, the Whistleblower Protection Reporting Act, laws governing improper government activity, laws governing sexual harassment, laws governing defamation, or laws governing the unemployment insurance process. (*Ibid.*) Thus, allegations regarding statutes other than the MMBA are dismissed as outside of PERB's jurisdiction. (*Ibid.*)

Charging Party alleges that the City and County discriminated against her because of her age. However, PERB has no jurisdiction over a claim of age discrimination. (*United Teachers – Los Angeles (Glickberg)* (1990) PERB Decision No. 846.) Therefore, Charging Party's allegation that the City and County discriminated against her because of her age must be dismissed as being outside of PERB's jurisdiction.

2. Weingarten

Though unclear, Charging Party also appears to allege that the City and County violated her *Weingarten* right to representation on April 20, 2010 when she was issued the Letter without union representation.

An employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. PERB adopted the *Weingarten* rule in *Rio Hondo Community College District* (1982) PERB Decision No. 260. In order to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation; (b) for an investigatory meeting; (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. (See *Redwoods Community College District v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617 (*Redwoods*); *Fremont Union High School District* (1983) PERB Decision No. 301; see also, *Social Workers' Union, Local 535 v. Alameda County Welfare Department* (1974) 11 Cal.3d 382.)

In *Rio Hondo Community College District, supra*, PERB Decision No. 260, the Board cited with approval *Baton Rouge Water Works Company* (1979) 246 NLRB 995, that provided:

the right to representation applies to a disciplinary interview, whether labeled as investigatory or not, so long as the interview in question is not merely for the purpose of informing the employee that he or she is being disciplined.

In approving the *Weingarten* rule, the U.S. Supreme Court noted with approval that the National Labor Relations Board would not apply it to "such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of

work techniques.” (*Weingarten, supra*, 420 U.S. 251, quoting *Quality Manufacturing Co.* (1972) 195 NLRB 197, 199.)

A right to union representation may be held to exist, in the absence of an objectively reasonable fear of discipline, only under “highly unusual circumstances.” (*Redwoods, supra*, 159 Cal.App.3d 617.) The finding of “highly unusual circumstances” in the *Redwoods* case was based on the requirement that the employee attend a meeting that she no longer sought over her appeal of a negative performance rating; the fact that the interview was investigatory and formal; the interview was held by a high-ranking official of the employer; and the hostile attitude of the official toward the employee.

Here, the facts demonstrate that, on April 30, 2010, Charging Party attended a meeting with Rashaim. No facts were provided to demonstrate an investigatory purpose of the meeting such as whether Rashaim interrogated Charging Party or otherwise sought to obtain facts to support disciplinary action against her. No facts were provided to demonstrate that Charging Party at any point requested union representation. The charge states only that Charging Party received the Letter on April 30, 2010. The Board has held that if the purpose of an employer-employee meeting is to present a final disciplinary memo and is not investigatory, the employee has no right to union representation at the meeting. (*Regents of the University of California (Los Alamos National Laboratory)* (2003) PERB Decision No. 1519-H.) Accordingly, Charging Party has not established a prima facie case that the City and County violated her *Weingarten* rights by issuing her the Letter.

### 3. Retaliation

Thought not expressly articulated in the charge, it appears Charging Party is also alleging that the City and County retaliated against her for engaging in protected activity.

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*).) 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.)

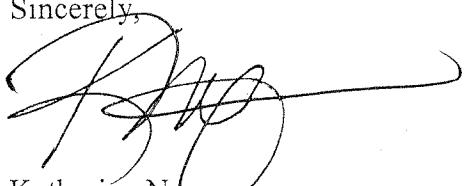
Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse 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); (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.)

As stated above, PERB Regulation 32615(a)(5) requires that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." A 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)*, *supra*, PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)*, *supra*, PERB Decision No. 944.)

As presently written, the charge fails to provide a complete statement of facts upon which to base a retaliation allegation. Specifically, Charging Party does not allege any facts to support: (1) *when* Charging Party participated on the committee; (2) *who* at the City and County received the modified proposal; or (3) *when* the modified proposal was submitted. Therefore, this allegation fails to satisfy the *Ragsdale* burden, and thus fails to demonstrate a prima facie violation of discrimination. (*United Teachers-Los Angeles (Ragsdale)*, *supra*, PERB Decision No. 944.) It is further noted that the charge does not demonstrate disparate treatment of Charging Party; instead, the charge alleges that four other employees were terminated at the same time as Charging Party.

For these reasons the charge, as presently written, does not state a *prima facie* case.<sup>4</sup> 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 January 25, 2011,<sup>5</sup> PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,



Katharine Nyman  
Regional Attorney

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<sup>4</sup> 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.*)

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