STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JEFFREY F. BRADY, Charging Party, v. CITY OF SANTA BARBARA, Respondent.	Case No. LA-CE-74-M PERB Decision No. 1628-M May 14, 2004

Appearance: Jeffrey F. Brady, on his own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on appeal by Jeffrey F. Brady (Brady) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the City of Santa Barbara violated Brady's right to representation under the Meyers-Milias-Brown Act (MMBA)[1]

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters and Brady's appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

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

ORDER

The unfair practice charge in Case No. LA-CE-74-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8384
Fax: (916) 327-6377

January 7, 2003

Jeffrey F. Brady
153 Santa Monica Avenue
Oxnard, CA 93035

Re: Jeffrey F. Brady v. City of Santa Barbara
Unfair Practice Charge No. LA-CE-74-M
DISMISSAL LETTER

Dear Mr. Brady:

You attempted to file the above-referenced unfair practice charge with the Public Employment Relations Board (PERB or Board) on July 26, 2002, but the charge was not properly filed until August 21, 2002. Therein you allege that the City of Santa Barbara (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by denying you union representation.

I indicated to you in my attached letter dated November 26, 2002, 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 which 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 December 9, 2002, the charge would be dismissed. Because you did not amend the charge or withdraw it prior to December 9, I called you on December 11, 2002. When I spoke with you on December 11, you requested and I agreed to an extension until December 17, 2002 to amend this charge. On December 17, I received a fax from you labeled first amended charge. The fax did not contain a copy of the proof of service. I called you and explained that you needed to serve the City with a copy of the amended charge and send PERB the original amended charge, the original proof of service and two copies by December 20, 2002. I received the properly filed first amended unfair practice charge on December 20, 2002.

You were a Parking Operations Supervisor from 1987 through October 2000 when you went on medical leave. In December 2000 the City asked you to provide an updated medical certificate, but you did not do so. In January 2002, the City sent you a letter notifying you that you had effectively abandoned your position and were no longer a City employee.

In the original charge you recount ten interactions between August 1997 and September 2000 with your supervisors at the City as evidence that the City violated your Weingarten rights.

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

The amended charge contained more than 200 pages of supporting documentation in no chronological or subject matter order. The documentation consists in part of emails between you and your colleagues, performance evaluations, City of Santa Barbara organization values and a publication by the law firm of Leibert, Cassidy et al, regarding the requisite procedures for implementing disciplinary actions. Further, you provide notes recounting your interactions with different coworkers. For example you provide a document entitled "Homer Smiths Trail of Lies and Misrepresentation." In these notes you provide quotes regarding being bullied at work. For example, on several pages of the documentation you quote in bold the following phrase:

> involves the bully alone at first deciding who is targeted, when, where, and how psychological violence will be inflicted. Later others may be coerced to participate in the assaults.

In part in the amended charge you provide the same facts regarding the ten interactions with your supervisors that you assert violated your right to union representation. Further, you explain that in 1997 when the first alleged Weingarten violation occurred, you were not aware of the existence of PERB.

You also explain that you are confused as to what rights of representation you were eligible for as a supervisor and although you attempted to elicit assistance from your union, they would not help you.

In addition to the alleged Weingarten violations, the amended charge alleges that the City terminated you in violation of Government Code section 12940, underpaid you in violation of the MOU, suspended you for five days without pay, denied you a civil service hearing, breached the covenant of good faith and fair dealing, violated Skelly hearing procedures and constructively discharged you. You also allege that the City violated MMBA section 3500, 3501(b), 3507(a), 3507(e), 3507(f) and 3507 (i).

First, Code of Civil Procedure section 338 prohibits PERB from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than three years prior to the filing of the charge. 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.)[2] The 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.)

As explained in the November 26 letter, you properly filed this charge in August 21, 2002. To be timely, conduct underlying this charge must have occurred on or after August 21, 1999. Thus the meeting that occurred on August 26, 1997 is outside of the statute of limitations.

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

Although you did not learn of PERB until after 1997, a charging party's belated discovery of the legal significance of the underlying conduct does not excuse an otherwise untimely filing. (UCLA Labor Relations Division (1989) PERB Decision No. 735-H.) Thus the allegation that the City violated your Weingarten rights in August 1997 is untimely and is dismissed.

Second, 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. (Social Workers' Union, Local 535 v. Alameda County Welfare Department (1974) 11 Cal.3d 382.) 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. (Id.; Civil Service Assn. v. City and County of San Francisco (1978) 22 Cal.3d 552.)

In Social Workers' Union, Local 535, supra at page 391, the Court noted the importance of using federal decisions to guide interpretation of state labor provisions the language of which parallels that of federal statutes. California courts have taken notice of such federal precedent in representation matters, citing with favor the U.S. Supreme Court's ruling in NLRB v. Weingarten (1975) 420 U.S. 251. (Civil Service Assn., supra at 556.) 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, quoting Quality Manufacturing Co. (1972) 195 NLRB 197, 199 [79 LRRM 1269, 1271].)

The other nine interactions between you and your supervisors occurred since August 1999 and thus fall within the statute of limitation. However, none of them demonstrate a violation of your right to union representation. As explained in the November letter, although you may have believed that these interactions were investigatory meetings that might lead to disciplinary action, in none of the interactions did Mr. Smith or Mr. Gerth require you to attend an investigatory interview after you requested union representation. Without the employer's refusal to allow union representation, there is no denial of an employee's right to such representation. Thus the allegations that the City violated your Weingarten rights are dismissed.

Third, you allege that the City violated Government Code section 3507, which provides in part:

> A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under this chapter (commencing with Section 3500).
>
> Such rules and regulations may include provisions for

> (a) verifying that an organization does in fact represent employees of the public agency
>
> . . . . . .
>
> (e) additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment
>
> (f) access of employee organization officers and representatives to work locations
>
> . . . . . .
>
> (i) such other matters as are necessary to carry out the purposes of this chapter.
>
> . . . . . .

PERB Regulation 32603 provides in pertinent part:

> It shall be an unfair practice for a public agency to do any of the following:
>
> . . . . . .
>
> (f) Adopt or enforce a local rule that is not in conformance with the requirements of Government Code section 3507, 3507.1 and/or 3507.5.
>
> . . . . . .

You allege that the City violated the above provisions of Government Code section 3507. In order to establish such a violation, a charging party must show that under PERB Regulation 32603(f), the employer adopted or enforced a local rule not in conformance with Government Code section 3507. Here, you have not provided any local rules adopted pursuant to Government Code section 3507. Without such local rules, it is not possible to determine that the City violated PERB Regulation 32603 and this allegation is dismissed.

Finally, PERB's unfair practice jurisdiction with regard to City employees is limited in scope to specific violations of the MMBA. Although you allege that the City terminated you in violation of Government Code section 12940, underpaid you in violation of the MOU, suspended you for five days without pay, denied you a civil service hearing, breached the covenant of good faith and fair dealing, violated Skelly hearing procedures and constructively discharged you, you provide no facts or explanation as to how such allegations constitute unfair practice violations of the MMBA within PERB's jurisdiction.

Therefore, I am dismissing the charge based on the facts and reasons above as well as those contained in my November 26, 2002 letter.

Right to Appeal

Pursuant to PERB Regulations,[3] you 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. (Regulation 32635(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 before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of 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. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
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. (Regulation 32635(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 Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered

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

or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

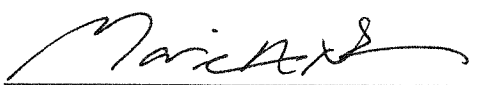
A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. 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. (Regulation 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,

ROBERT THOMPSON
General Counsel

By 
Marie A. Nakamura
Regional Attorney

Attachment

cc: Barbara Barker

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8384
Fax: (916) 327-6377

November 26, 2002

Jeffrey F. Brady
153 Santa Monica Avenue
Oxnard, CA 93035

Re: Jeffrey F. Brady v. City of Santa Barbara
Unfair Practice Charge No. LA-CE-74-M
WARNING LETTER

Dear Mr. Brady:

You attempted to file the above-referenced unfair practice charge with the Public Employment Relations Board (PERB or Board) on July 26, 2002, but the charge was not properly filed until August 21, 2002. Therein you allege that the City of Santa Barbara (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by denying you union representation.

Facts

You originally attempted to file this charge on July 26, 2002. The statement of the facts contained in the charge was handwritten and illegible. In addition the proof of service by personal delivery attached to the form was blank except for a notation in the address section. In that section was a note providing, "sent via certified mail 7/26/02 7002 0860 0007 6327-3971 7-26-02." On August 1, 2002, you were contacted by Cyndy Sullivan from PERB, who explained that you needed to properly serve the City of Santa Barbara with a copy of the unfair practice charge, and provide PERB's Los Angeles Regional Office with the original unfair practice charge as well as two copies. You explained to her that the information you needed was packed away but that you would find the information and refile the charge. Because PERB had not received an amended charge as of August 21, 2002, I sent you a letter explaining that the charge as filed was deficient as pursuant to PERB's Regulations. However, on August 28, 2002, that letter was returned because the address we had for you was incorrect.

On August 26, 2002, the Los Angeles Regional Office received the charge properly served on the City of Santa Barbara. There is no phone number for you on the charge form. The charge provides in part, "I was mislead as to whether the City of Santa Barbara Supervisors Association was a union or a bargaining unit," but offers no explanation for this statement.

You were a Parking Operations Supervisor from 1987 through October 2000 when you went on medical leave. In December 2000 the City asked you to provide an updated medical

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

certificate, but you did not do so. In January 2002, the City sent you a letter notifying you that you had effectively abandoned your position and were no longer a City employee. [2]

The charge recounts ten interactions between you and your supervisors.

On August 6, 1997, Mike Lowe, Parking Superintendent at the time, sent you an email requesting that you meet in Streets, Transportation Operations & Parking Manager George Gerth's office to review leave request procedures. At the beginning of the meeting you asked Mr. Gerth if this meeting could lead to discipline. When Mr. Gerth said that it could, you requested union representation. Mr. Gerth became angry, and told you to call your union representative. You advised him that it would take time to get a representative. The meeting was cancelled.

At the next meeting, on an undisclosed date, you and a union representative met with Mr. Gerth. During that meeting Mr. Gerth stated that he was disappointed that you needed a union representative, because the two of you could have had a more open conversation without the representative.

On October 1, 1999, Mr. Gerth called you into his office to discuss a "RR depot report." You thought you were going to receive a compliment. Instead, Mr. Gerth was angry, yelled and accused you of purposely placing mistakes in a council report. You asked him to stop yelling and because you were unable to withstand his yelling, you left the meeting. Mr. Gerth used this incident to issue you a written reprimand and suspend you. The charge does not provide the dates or factual details of the reprimand or suspension. According to the charge, if you had any idea that the meeting would lead to disciplinary action, you would have requested union representation.

On February 8, 2000, you received your 1999 performance evaluation from Mr. Gerth. The evaluation, which is not provided with the charge, refers to a written reprimand from Mr. Gerth. Because you had never received such a reprimand, you checked you personnel file and found no written reprimand.

On February 18, 2000, you advised Homer Smith, whose position with the City is not identified in the charge, by email that any meeting that might lead to personnel actions against you would require union representation. According to the charge, the email was attached to the charge. However, there was no email attached to the charge.

On February 29, 2000, you met with Mr. Gerth and Mr. Smith. When you asked if the meeting could lead to discipline, Mr. Gerth said, "I do not know." You then walked out of the meeting.

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[2] In the charge you do not explain what position you held with the City of Santa Barbara or what positions are held by the other City employees identified in your charge, such information was provided by the Respondent.

Later on February 29, 2000, Mr. Gerth walked into your office and placed an envelope on your desk then abruptly left. When you asked Mr. Gerth what was in the envelope, he yelled that it was a letter for you. You then asked him if the letter related to disciplinary action. Mr. Gerth then ran out of the building. You then asked Mr. Smith what was in the letter. When he would not give you an answer, you gave him the envelope and advised him that if relates to discipline, you have the right to union representation. Mr. Smith placed the envelope in your box in your office. The two of you argued and you missed work for the next week because you were afraid of "aggression in the work place."

On June 7, 2000, you attended a meeting with Judd Connely, whose position at the City is not explained in the charge, Mr. Smith and Mr. Gerth. According to the charge, "in notes of meeting – George planned on giving me this meeting on June 24th, with out (sic) advance notice and with out (sic) union representation." The charge does not indicate the topic of the June 7 meeting.

On August 23, 2000, you met with Mr. Smith. When you asked if the meeting could lead to discipline, Mr. Smith responded that he did not know. You and Mr. Smith agreed that nothing said in the meeting could be used in future personnel actions. You discussed sick leave you used when you and your daughter were ill. These incidents were later used to suspend you for 5 days.

On September 11, 2000, Mr. Smith called you and asked to meet with you regarding your timesheet. When asked, Mr. Smith responded that he did not know if the meeting could lead to discipline. You explained that you would not meet with him unless he knew. Mr. Smith threatened to not turn in your timesheet until you met with him. You were later given a written reprimand regarding the timesheet.

Discussion

For the following reasons, the charge as written fails to establish a prima facie violation of the MMBA.

Code of Civil Procedure section 338 prohibits PERB from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than three years prior to the filing of the charge. 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.)[3] The 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.)

[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. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

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. (Social Workers' Union, Local 535 v. Alameda County Welfare Department (1974) 11 Cal.3d 382.) 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. (Id.; Civil Service Assn. v. City and County of San Francisco (1978) 22 Cal.3d 552.)

In Social Workers' Union, Local 535, supra at page 391, the Court noted the importance of using federal decisions to guide interpretation of state labor provisions the language of which parallels that of federal statutes. California courts have taken notice of such federal precedent in representation matters, citing with favor the U.S. Supreme Court's ruling in NLRB v. Weingarten (1975) 420 U.S. 251. (Civil Service Assn., supra at 556.) In approving the Weingarten rule, the U.S. Supreme Court noted with approval 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, quoting Quality Manufacturing Co. (1972) 195 NLRB 197, 199 [79 LRRM 1269, 1271].)

Here, you recount ten interactions with your supervisors as evidence that the City violated your Weingarten rights.

First, you properly filed this charge in August 21, 2002. To be timely, conduct underlying this charge must have occurred on or after August 21, 1999. Thus the meeting that occurred on August 26, 1997 is outside of the statute of limitations. Further, you state that there was a "next meeting" on an undisclosed date. Until you provide the date of that meeting, you have not met your burden as Charging Party of demonstrating that the conduct of that meeting falls within the three year statute of limitation.

Second, although the other interactions between you and your supervisors occurred since August 1999, none of them demonstrate a violation of your right to union representation. Although you may have reasonably believed that some of these interactions were investigatory meetings that might lead to disciplinary action, in none of the interactions did Mr. Smith or Mr. Gerth require you to attend an investigatory interview after you requested union representation. Without the employer's refusal to allow union representation, there can be no denial of an employee's right to such representation.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please 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 the 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 I do not receive an

amended charge or withdrawal from you before Monday, December 9, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Marie A. Nakamura
Regional Attorney

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