**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES LOCAL 146, AFL-CIO,<br><br>Charging Party,<br><br>v.<br><br>NEVADA IRRIGATION DISTRICT,<br><br>Respondent. | Case No. SA-CE-496-M<br><br>PERB Decision No. 2052-M<br><br>July 23, 2009 |

Appearances: Beeson, Tayer & Bodine by Peter McEntee, Attorney, for American Federation of State County and Municipal Employees Local 146, AFL-CIO; Minasian, Spruance, Meith, Soares & Sexton by Dustin C. Cooper, Attorney, for Nevada Irrigation District.

Before Dowdin Calvillo, Acting Chair; Neuwald and Wesley, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the American Federation of State County and Municipal Employees Local 146, AFL-CIO (AFSCME) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the Nevada Irrigation District (District) violated the Meyers-Milias-Brown Act (MMBA)[1] by refusing to process or arbitrate a grievance concerning the termination of employee Gary Stoddard.

The Board reviewed the entire record in this matter, including but not limited to the unfair practice charge, the amended charge, the District's position statements, the Board agent's warning and dismissal letters, AFSCME's appeal, and the District's response. Based

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

on this review, the Board finds the Board agent's warning and dismissal letters to be a correct statement of the law and well reasoned, and therefore adopts them as the decision of the Board itself, subject to the discussion below.

## DISCUSSION

### Timeliness

AFSCME argues for the first time on appeal that the statute of limitations should be tolled. The District responds that the Board cannot consider this argument because it was not presented to the Board agent. The District relies on PERB Regulation 32635, subdivision (b),[2] which states in full: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." PERB Regulation 32635, subdivision (b) does not apply here. As the Board stated in *South San Francisco Unified School District* (1990) PERB Decision No. 830, "[t]he purpose of PERB Regulation 32635(b) is to require the charging party to present its allegations and supporting evidence to the Board agent in the first instance, so that the Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case." AFSCME's amended charge alleged that the charge was timely and presented evidence in support of that allegation. AFSCME's equitable tolling argument on appeal is merely a new legal argument on the issue of the timeliness charge, based on the same evidence presented to the Board agent. Thus, the equitable tolling argument does not constitute a new allegation or new evidence and PERB Regulation 32635, subdivision (b) does not preclude the Board from considering the argument.

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

Equitable Tolling

We now turn to AFSCME's argument that the statute of limitations should be tolled. In *Long Beach Community College District* (2009) PERB Decision No. 2002, the Board set forth the limited circumstances in which equitable tolling will apply:

> [T]he statute of limitations is tolled during the period of time the parties are utilizing a non-binding dispute resolution procedure if: (1) the procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent.

The Board noted that the "same dispute" requirement "prevents prejudice to the respondent because the initiation of the dispute resolution procedure puts the respondent on notice of the dispute that is the subject of the unfair practice charge." (*Id.*, citing *Victor Valley Community College District* (1986) PERB Decision No. 570.) Without a "same dispute" requirement, equitable tolling would subject a respondent to "stale claims" of which the respondent had no notice, thereby eviscerating the purpose of the statute of limitations. (*Id.*, see *Addison v. State of California* (1978) 21 Cal.3d 313, 317 ["[T]he primary purpose of statutes of limitation is to prevent the assertion of stale claims by plaintiffs who have failed to file their action until evidence is no longer fresh and witnesses are no longer available."].) In *Solano County Fair Association* (2009) PERB Decision No. 2035-M, the Board held that equitable tolling applies to cases filed under the MMBA.

In the present case, the parties' memorandum of understanding (MOU) contains a negotiated grievance procedure. AFSCME alleges that the District unilaterally abrogated the MOU by refusing to process or arbitrate a grievance in violation of MMBA section 3505. The

grievance, on the other hand, concerned the termination of an employee. Filing a grievance concerning an employee's termination does not put the District on notice of a unilateral change concerning the negotiated agreement. As such, we decline to extend PERB's equitable tolling doctrine.

Sanctions (Attorney Fees)

As set forth in great detail in *City of Alhambra* (2009) PERB Decision No. 2036-M (*Alhambra*), in order for a party to obtain an award of attorneys fees, the moving party must demonstrate that the charge was "without arguable merit" and pursued in "bad faith" (*Alhambra*). In its response to AFSCME's appeal, the District argues that it is entitled to litigation costs and attorneys fees because AFSCME has persisted in bringing frivolous claims, without any merit, at significant costs to the Board, the District, the water customers and taxpayers that the District serves. Based on our review, we find that the record lacks evidence that AFSCME pursued the appeal in bad faith and that the District failed to demonstrate that the appeal was "without arguable merit." Therefore, the Board does not award attorneys fees.

ORDER

The unfair practice charge in Case No. SA-CE-496-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Acting Chair Dowdin Calvillo and Member Wesley joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
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May 27, 2008

Costa Kerestenzis, Attorney
Beeson, Tayer & Bodine
520 Capitol Mall, Suite 300
Sacramento, CA 95814-4714

Re: AFSCME Local 146, AFL-CIO v. Nevada Irrigation District
Unfair Practice Charge No. SA-CE-496-M
**DISMISSAL LETTER**

Dear Mr. Kerestenzis:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 30, 2007. AFSCME Local 146, AFL-CIO (Union or Charging Party) alleges that the Nevada Irrigation District (District or Respondent) violated the Meyers-Milias-Brown Act (MMBA)[1] by refusing to process or arbitrate a grievance concerning the termination of an employee (Gary Stoddard).

Charging Party was informed by the attached Warning Letter dated April 14, 2008, 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 which would correct the deficiencies explained in that letter, the charge should be amended. You were further advised that, unless the charge was amended to state a prima facie case or withdrawn on or before April 24, 2008, the charge would be dismissed.

We discussed the charge and Warning Letter by telephone on April 24, 2008, and Charging Party was granted additional time in which to amend the charge. Charging Party filed a First Amended Charge on May 1, 2008.

Background

The Union is the exclusive representative of non-management employees of the District. From 1981 until his termination on March 24, 2006, Mr. Stoddard was employed by the District, and at all relevant times his position was included in the bargaining unit represented by the Union. Following Mr. Stoddard's termination, the Union filed a grievance on his behalf.

By letter dated August 30, 2006, addressed to Union Business Agent Judy Steinke, the District General Manager responded to earlier correspondence from the Union regarding the grievance over the termination of Mr. Stoddard. In its letter, the District stated, in relevant part, that the

[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.

"MOU grievance procedure is not available to Mr. Stoddard for three reasons." Among the three reasons cited was the statement that a "separation from employment" is not "a disciplinary termination."

The Union alleges that, between August and November 2006, the Union and District discussed "additional ways of settling the dispute."[2] In support of this assertion, the Union attaches to the First Amended Charge a copy of an e-mail message from Ms. Steinke to Mr. Stoddard, dated October 4, 2006, referencing a conversation with Michael Sexton, an attorney representing the District. The e-mail message, in relevant part, stated that Mr. Sexton had agreed to talk to a Human Resources representative with the District, but added that, "This is about putting you back on leave only."

However, on November 8, 2006, another Union representative, Felix Huerta, sent an e-mail to the District informing them of the death of Ms. Steinke and asking "for a period of abeyance on any and all official union matters for a short period of time." The District agreed to hold matters in abeyance.

On March 27, 2007, responding to another e-mail message from Mr. Huerta,[3] in which the Union sought to elevate Mr. Stoddard's previously denied grievance to the next level, the District again stated its conclusion that the decision to separate Mr. Stoddard from employment was not subject to the grievance procedure. On April 12, 2007, the Union again argued that Mr. Stoddard's termination was grievable, and on April 18, 2007 the District again responded that it would not process the grievance.

Discussion

The allegation that the District refused to process a grievance is properly reviewed as an alleged unilateral abrogation of the MOU. (County of Riverside (2003) PERB Decision No. 1577-M.) Such a unilateral change would violate MMBA section 3505 and is an unfair practice under PERB Regulation 32603(c). (Ibid.)

As discussed in the Warning Letter, a 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.)

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[2] Notably, the charge does not state that the Union appealed the General Manager's August 30, 2006 letter pursuant to the grievance steps outlined in the MOU. Pursuant to Article XIII, the General Manager responds to a grievance at step 2 of the process. The General Manager's reply may be appealed within 10 workdays to the District Labor Committee (step 3). The decision of the Labor Committee can be appealed at step 4 to the District Board of Directors. Step 5 of the grievance procedure is binding arbitration.

[3] The date of Mr. Huerta's e-mail message is not provided either by the First Amended Charge or the contents of the District's March 27, 2007 letter.

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 cases alleging a unilateral change, the statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequent to that date evinces a wavering of that intent. (Peralta Community College District (1998) PERB Decision No. 1281; West Valley-Mission Community College District (1995) PERB Decision No. 1113; Cloverdale Unified School District (1991) PERB Decision No. 911; Regents of the University of California (1990) PERB Decision No. 826-H.)[4]

In the Warning Letter, I concluded in relevant part:

> [I]t appears that the Union had actual notice of the Respondent's position that Mr. Stoddard's termination was not grievable at least as early as August 30, 2006, or 11 months prior to the date the charge was filed. The charge does not provide facts to establish that the District, through its later conduct, evinced a wavering of intent in this regard. Thus, as written, the charge is time-barred and must be dismissed.

Through the First Amended Charge, the Union attempts to address this statute of limitations issue by alleging that the Union and District continued to discuss Mr. Stoddard's termination following the August 30, 2006 refusal to process the grievance, that the District agreed to hold all pending union matters in abeyance for a period of time following the death of Ms. Steinke, and that the District responded to Union correspondence concerning Mr. Stoddard's grievance on March 27 and April 18, 2007. The Union further notes that the August 30, 2006 letter closed with the comment, "Please feel free to contact me if you wish to discuss this matter [Mr. Stoddard's grievance] further." The Union also alleges that, after Mr. Huerta assumed responsibility for the matter on behalf of the Union, that it "was understood by the parties during that process that the parties were still trying to determine the grievability of Stoddard's termination."

In addition, the Union notes that the District's March 27, 2007 letter does not state that a final decision had previously been made with regard to the issue of grievability, and thus concludes that, only with the April 18, 2007 correspondence did the District signal its final decision and

[4] 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.)

refusal to engage in further discussion of the matter. Thus, according to the Union, the charge was timely filed as it was filed within six months of the April 18, 2007 "final decision."

However, like the layoff decision considered by the Board in West Valley-Mission Community College District, supra, PERB Decision No. 1113, there is no evidence that "indicated the possibility that [the Respondent] was reconsidering" the objected-to decision. The October 4, 2006 e-mail message, from Ms. Steinke to Mr. Stoddard, makes clear that the discussions with the District only encompassed the possibility that Mr. Stoddard would be placed on leave. But the decision to terminate Mr. Stoddard (or separate him from employment) is not the decision that lies at the heart of the instant matter.

The unfair practice charge, instead, concerns the decision by the District to deem a grievance filed over a termination (or separation from employment) as outside the bounds of the grievance and arbitration processes negotiated by the parties. While the Union asserts, in conclusory fashion, that "the parties were still trying to determine the grievability of Stoddard's termination" in November 2006, and later, the facts alleged in the charge do not support this conclusion. The October 4, 2006 e-mail from Ms. Steinke to Mr. Stoddard reveals no discussions on-going between the Union and the District concerning the grievability of the issue; rather, the discussions referenced concerned Mr. Stoddard's employment status.

Further, while the Union argues that the April 18, 2007 letter from the District constituted the "definitive and final decision" on the issue of grievability, this conclusion is inconsistent with the Union's actions, or inaction, vis-à-vis pursuit of the grievance through the steps defined in the MOU following August 30, 2006. It is clear that the Union continued to seek discussions with the District over Mr. Stoddard's termination, and that the District responded to those inquiries on more than one occasion, but there is simply no evidence to support the conclusion that the District "was reconsidering" the August 30, 2006 decision that the Union could not grieve Mr. Stoddard's separation from employment. (West Valley-Mission Community College District, supra, PERB Decision No. 1113; City of Santa Barbara, supra, PERB Decision No. 1628-M.)

Finally, even if the period of time during which the parties agreed to hold matters in abeyance, following the death of Ms. Steinke, is held to toll the statute of limitations period, the charge would still be untimely. As noted previously, 11 months elapsed between the date (August 30, 2006) that the District informed the Union that the grievance would not be processed and the date (July 30, 2007 ) that the instant charge was filed.[5] The "hold" that was placed on matters

[5] It is, at best, questionable whether the equitable tolling described by the Board in Long Beach Community College District (2003) PERB Decision No. 1564 is applicable under the facts of the instant case. In Long Beach, the Board held that the six-month limitation period "should be extended equitably only when a party utilizes a bilaterally agreed upon dispute resolution procedure," and "that the statute of limitations is tolled during the period of time the grievance is being pursued if: (1) the charging party reasonably and in good faith pursues the grievance; and (2) tolling did not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent." (Id.)

extended only from November 8, 2006 to the date on which Mr. Huerta again contacted the District concerning Mr. Stoddard's termination. Since the District's next response was dated March 27, 2007, the maximum span of the "hold" was for fewer than five months.[6] Thus, the charge was filed beyond the six-month statute of limitations period even if this "hold" is considered to "toll" the statute of limitations period.

Therefore, the charge is hereby dismissed as untimely filed based on the facts and reasons set forth above.

Right to Appeal

Pursuant to PERB Regulations,[7] 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. (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 during a regular PERB business day. (Regulations 32135(a) and 32130; see also Government Code section 11020(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 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 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If Charging Party files 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).)

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[6] As noted previously, the date on which Mr. Huerta contacted the District and thus terminated the "hold" is not specified in the charge. Thus, the "fewer than five months" calculation is based on the period from November 8, 2006 to March 27, 2007, even though the "hold" likely terminated earlier.

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

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.) 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. (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,

TAMI R. BOGERT
General Counsel

By _____
Les Chisholm
Division Chief

Attachment

cc: Michael Sexton

# PUBLIC EMPLOYMENT RELATIONS BOARD

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April 14, 2008

Costa Kerestenzis, Attorney
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520 Capitol Mall, Suite 300
Sacramento, CA 95814-4714

Re: AFSCME Local 146, AFL-CIO v. Nevada Irrigation District
Unfair Practice Charge No. SA-CE-496-M
**WARNING LETTER**

Dear Mr. Kerestenzis:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 30, 2007. AFSCME Local 146, AFL-CIO (Union or Charging Party) alleges that the Nevada Irrigation District (District or Respondent) violated the Meyers-Milias-Brown Act (MMBA)[1] by refusing to process or arbitrate a grievance concerning the termination of an employee (Gary Stoddard).

The Union is the exclusive representative of non-management employees of the District. From 1981 until his termination on March 24, 2006, Mr. Stoddard was employed by the District, and at all relevant times his position was included in the bargaining unit represented by the Union. Following Mr. Stoddard's termination, the Union filed a grievance on his behalf, attempted to meet with the District regarding the termination, and sought to have the grievance elevated to the arbitration step of the grievance procedure.

Citing a letter from the District dated April 18, 2007, the Union alleges that the District violated the MMBA by refusing to process the grievance concerning Mr. Stoddard's termination. The April 18 letter, in part, states that Mr. Stoddard was "separated from his employment" and that such action is "not subject to the District's established grievance procedure."

The charge does not attach a copy of the parties' memorandum of understanding (MOU), if any, nor a copy of the grievance procedure under which the Union sought to appeal Mr. Stoddard's termination.

[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.

Discussion

The central violation asserted in this charge is that the District refused to process a grievance. This allegation will be reviewed as an alleged unilateral abrogation of the MOU. Such a unilateral change violates MMBA section 3505 and is an unfair practice under PERB Regulation 32603(c).

PERB Regulation 32615(a)(5)[2] 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.) The District has also raised the statute of limitations as an affirmative defense.

Statute of Limitations

With its August 20, 2007 response to the instant unfair practice charge, the District attached a copy of a letter dated August 30, 2006, addressed to Union Business Agent Judy Steinke.[3] The August 30, 2006 letter responds to earlier correspondence from the Union regarding the filing of a grievance over the termination of Mr. Stoddard. In its letter, the District stated, in relevant part, that the "MOU grievance procedure is not available to Mr. Stoddard for three reasons." Among the three reasons cited was the argument that a "separation from employment" is not "a disciplinary termination."

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

[3] Nothing in the MMBA or PERB case law requires a Board Agent to ignore the facts provided by the Respondent, and to only consider the facts provided by the Charging Party. (Service Employees International Union #790 (Adza) (2004) PERB Decision No. 1632-M.)

In cases alleging a unilateral change, the statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequent to that date evinces a wavering of that intent. (Cloverdale Unified School District (1991) PERB Decision No. 911; Regents of the University of California (1990) PERB Decision No. 826-H.)

As discussed above, it appears that the Union had actual notice of the Respondent's position that Mr. Stoddard's termination was not grievable at least as early as August 30, 2006, or 11 months prior to the date the charge was filed. The charge does not provide facts to establish that the District, through its later conduct, evinced a wavering of intent in this regard. Thus, as written, the charge is time-barred and must be dismissed.

Prima Facie Case

Even if not time-barred, the charge as presently written fails to provide sufficient, specific facts to support finding a prima facie violation. As noted above, the charge alleges that the District abrogated a negotiated grievance and arbitration procedure by refusing to process the grievance for Mr. Stoddard, but the charge does not attach the MOU or grievance procedure. Thus, for example, it is not possible to determine what the definition of a grievance is under the established procedure, nor what limitations on filing a grievance may be present. Without such information, it is not possible to conclude that the District's conduct was at variance with the negotiated or established procedures. As also noted above, the allegation of legal conclusions is not sufficient to state a prima facie case. (State of California (Department of Food and Agriculture), supra, PERB Decision No. 1071-S.)

Conclusion

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 the charge is not amended or withdrawn on or before April 24, 2008, I shall dismiss the charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Division Chief