STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SHIRLEY JACKSON, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	Case No. LA-CE-418-M PERB Decision No. 2065-M September 25, 2009

Appearance: Shirley Jackson, on her own behalf.

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

DECISION

DOWDIN CALVILLO, Acting Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Shirley Jackson (Jackson) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the County of Riverside violated the Meyers-Milias-Brown Act (MMBA)[1] by reclassifying Jackson's position in retaliation for filing a grievance. The Board agent dismissed the charge for failure to state a prima facie case of retaliation.

The Board has reviewed the dismissal and the record in light of Jackson's appeal and the relevant law. Based 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, as supplemented by the discussion below.

DISCUSSION

Jackson's appeal contains new supporting evidence not presented to the Board agent. "Unless good cause is shown, a charging party may not present on appeal new charge

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

allegations or new supporting evidence." (PERB Reg. 32635(b).)[2] "The 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." (*Regents of the University of California* (2006) PERB Decision No. 1851-H.) The Board has not found good cause to consider new supporting evidence presented on appeal when the evidence was available to the charging party prior to the dismissal of the charge and the appeal fails to explain why the evidence could not have been presented to the Board agent during the investigation. (E.g., *California School Employees Association & its Chapter 183 (Richards)* (2004) PERB Decision No. 1716; *University of California (Lawrence Berkeley Laboratory)* (1993) PERB Decision No. 998-H.)

In her charge, Jackson alleged that the reclassification resulted in a reduction of pay. On appeal, Jackson provides her pay stubs from December 5 and 19, 2007, in support of this allegation. Jackson clearly had these pay stubs prior to the Board agent's dismissal of the charge on January 30, 2009. The appeal fails to explain why she did not present the pay stubs to the Board agent during his investigation. Accordingly, Jackson has failed to establish good cause for the Board to consider the new supporting evidence presented in her appeal.

ORDER

The unfair practice charge in Case No. LA-CE-418-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Neuwald joined in this Decision.

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

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor
PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
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January 30, 2009

Shirley Jackson
12777 Royal Palm Lane
Riverside, CA 92503

Re: Shirley Jackson v. County of Riverside
Unfair Practice Charge No. LA-CE-418-M
DISMISSAL LETTER

Dear Ms. Jackson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 21, 2007 and amended on January 14, 2009. Shirley Jackson (Jackson or Charging Party) alleges that the County of Riverside (County or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by downgrading her position after she filed a classification grievance.

Charging Party was informed in the attached Warning Letter dated December 16, 2008, 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 December 29, 2008, the charge would be dismissed. After requesting and receiving an extension of time, an amended charge was filed on January 14, 2009.

The facts provided in the original charge are fully set forth in the attached Warning Letter and need not be repeated here. The amended charge provides 44 pages of additional facts and argument, summarized briefly below.

Attached as an exhibit to the amended charge is a step 2 grievance response dated July 12, 2006, from Human Resources Division Manager Tom Prescott (Prescott). The response states the following in relevant part:

> [Jackson] argues that she has been performing the duties of a Social Worker V and provided copies of the job description for that position. The minimum qualifications for that position provide four options of combined education and experience. The first three options all require a Master's degree and Ms. Jackson

[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.

acknowledges that she does not have a Master's degree in any field. The fourth option requires a Bachelor [sic] degree in social work, or a closely related field, plus one year of experience as a Social Worker IV at DPSS. Ms. Jackson has a Bachelor's degree in Business Administration, which is not a closely related field, and has never been a Social Worker IV at DPSS. On that basis, she does not meet the minimum qualifications for the Social Worker V position.

The union argues that Ms. Jackson's failure to have the minimum qualifications is not determinative, as long as she performs the duties of the higher rated position. While there is some logic to that position, there is also an associated problem. The remedy sought is to re-classify Ms. Jackson as a Social Worker V, and that is not possible for two reasons. First, the department does not use the Social Worker V position and, more importantly, Ms. Jackson is not qualified to fill a Social Worker V position. If she were in fact performing those duties the only real remedy is to take them away from her and assign them to an employee who would qualify for the Social Worker V position.

[¶]

Although Ms. Jackson did perform some work that might be described in terms similar to that found in the Social Worker V job description, I am not convinced that she performed the whole scope of that job or that she performed those higher ranked duties 86% of her day. On that basis I am unable to conclude that Ms. Jackson is working out of class as a Social Worker V.

Ms. Jackson works side by side with Patricia Puliafico, who is classified as a Social Service Worker III. Ms. Jackson and Ms. Puliafico both indicated they perform identical duties, with the exception that Ms. Puliafico is the designated "lead" on the team. Ms. Jackson's grievance does not allege that she is working out of class as a Social Service Worker III so I am not called upon to decide that issue. However, the evidence presented disclosed that the department has budgeted in this fiscal year for a second Social Service Worker III position. Although Ms. Jackson may have some difficulty meeting the minimum qualifications for the position, on the same basis that she did not meet the requirements for the Social Worker V classification, this may be a better "fit" for her in the department than claiming to be at the "V" level.

Jackson argues that the above response evidences the County's adverse action against her, because she continues to perform the same duties as her coworkers for less pay, and such duties were not reassigned to another "more qualified" employee.

Jackson also references an e-mail communication written by her former manager, Terry Flynn (Flynn), sent to a former supervisor and the Mental Health Assistant Director. Jackson states that Flynn's e-mail appears to support the upgrading of the Social Service Worker positions due to the responsibilities performed, but that the "underlying tone" of his comments indicate that Jackson had "created a problem" by Jackson's desire to be paid the same as others performing the same duties. That e-mail states in part:

> One of the IIs is leaving us at the end of this pay period, in part, because there is no ladder of advancement here. The other is filing a grievance contending that she is being worked out of class for a II. While I do not anticipate that she will win her grievance, I do think her behavior indicates the unsatisfactory nature of our present arrangement....In the future, I believe we should look into having additional steps (i.e. SSW IV and V) available to our investigators.

Subsequent to the step 2 grievance response discussed above, Joseph Valentinetti (Valentinetti) was hired as a Social Service Worker III. Jackson inquired with Manager William Van der Poorten (Van der Poorten) and SEIU (Union) representative Linda Love (Love) about the possibility of Jackson being "grandfathered" into a Social Service Worker III position. Jackson was informed that the County no longer "grandfathered" people into positions. Jackson states, "During this time and since, other employees within the County have been given positions that they did not meet specific qualifications."[2]

Jackson provides the following additional details about the April 30, 2007 arbitration hearing and resulting settlement agreement. Jackson and the other grievant, Patricia Puliafico (Puliafico), met with Union attorney Jim Rutowski (Rutowski) and Love prior to the start of the hearing. During this meeting, Jackson reports that Love stated that Prescott had "threatened" Love by stating that Love "better not show us the documentation where an individual had been working out of class and the County had agreed to upgrade to the higher classification." After this meeting, Jackson, Puliafico, Love, and Rutowski proceeded to County offices for the arbitration.

Prior to the start of the hearing, while there was discussion about the County needing to provide job descriptions for the positions at issue at the time the grievance was filed, Rutowski and Human Resources Analyst Sarah Franco stepped out of the room. When Rutowski came back into the hearing room he stated that the County had agreed to do a study, and then he and

[2] Jackson did not provide the names of these employees citing privacy concerns, but stated that names will be provided upon request.

Love went into the hallway for further discussion. The arbitrator was thereafter excused, and it was decided between the Union and the County that the County would draft the settlement agreement.

Jackson and Puliafico met Van der Poorten and Supervisor Sally Smigin (Smigin) for lunch after settlement was reached to discuss the events of the day. Van der Poorten and Smigin had both been slated to be called as witnesses in the arbitration hearing. Smigin expressed relief at not having to testify at the arbitration. Smigin said Van der Poorten told her she could only testify as to the duties and responsibilities performed by Jackson and Puliafico, but could not state that they were working out of class. Smigin stated that the County "does not want to pay back pay." Puliafico said that she and Jackson were going to celebrate after the study was completed, to which Van der Poorten replied, "You could be Social Service Worker II's and III's working at the River bottom and would not be able to wear nice clothes like that." Jackson states that until Van der Poorten made that comment, she believed that he had wanted the positions to be upgraded.

Jackson reports that a few days before the agreement was signed, Love stated that there were some discrepancies between the Union's and the County's understanding of terms of the settlement agreement, and the County at that point did not agree to Y-rating. Love also stated that a delay in signing the settlement agreement would result in the study being delayed. Jackson points out that the information regarding Y-rating was not included in the written settlement agreement, and states that it was not explained to her prior to her signing the agreement. Jackson claims that she "would never have agreed to a settlement of this nature" if she had understood that a possible outcome was that her co-workers would retain their salaries, and that Jackson would "*still* receive the lower pay for the same duties." (Emphasis added.)

Jackson states that although she was told the effect of Puliafico and Valentinetti being Y-rated meant that they would not be able to receive salary increases until Jackson's salary level reached theirs, Valentinetti subsequently received a raise and was allowed to keep it. In contrast, Jackson notes that she received a raise that was "reduced to fit in the range of the new classification." Therefore, Jackson argues that the County breached the settlement agreement. Additionally, Jackson notes that Valentinetti reports that he was never informed by the County that he would not receive pay raises until Jackson attained his salary level.

As evidence of unlawful motive, Jackson points out inconsistent statements made regarding the reclassification by Human Resources Director Ron Komers (Komers) in his September 20, 2007 letter to Jackson explaining the study, versus the submittal to the County Board of Supervisors. Komers' letter to Jackson states in relevant part:

> *Labor Market* classification and salary data was collected and internal class and salary comparisons were conducted to ensure that the proposed salary would bear logical relationships to other classes....Based on *market data* and internal salary data, the Public Guardian Investigator was created at the same salary level

> as your current classification of Social Services Worker II; therefore, your salary was not impacted.

(Emphasis added.) However, the June 11, 2007 submittal to the Board of Supervisors states the following regarding market data, "Labor market salary data *was not available*; therefore, internal class relationships were used as the basis for the proposed salary plan/grade." (Emphasis added.)

Jackson also argues that the following statement in the County's November 27, 2007 response to the unfair practice charge is ambiguous:

> The study revealed that a new classification—actually the revival of her former classification—was the most appropriate classification for Ms. Jackson.

Jackson reports that she was originally hired as a Social Services Worker II, and therefore questions the County's statement that a former classification was revived. Jackson also states that in October 2007, Van der Poorten made remarks regarding the "recent upgrade" of the position of "Estate Investigator" to "Public Guardian Investigator." Jackson claims Van der Poorten's characterization of these positions is false, because Puliafico was originally hired as an Estate Investigator, and that position was "upgraded" to Social Services Worker II in the late 1990s. Jackson states that she was hired as a Social Services Worker II, and never held the title of Estate Investigator.

Jackson argues that disparate treatment is shown because she continues to receive lower pay than other employees she contends are performing the same duties, and further argues that her situation is one where duties were increased, but "the salary was lowered." However, it is noted that the evidence shows the salary range for the new classification of Public Guardian Investigator is actually *higher* than the range of the previous Social Service Worker II classification.[3]

Finally, Jackson argues that because this is a case where an existing job classification was replaced by a new classification performing the same duties under similar conditions, the County had a duty to negotiate with the Union over the decision to transfer duties. Further, Jackson argues since the reclassification resulted in the Public Guardian Investigator position being assigned to the bargaining unit represented by Laborers' International Union of North America (LIUNA), that the County denied LIUNA the right to negotiate.

The charge, as amended, still fails to demonstrate a prima facie violation of the MMBA for the reasons that follow.

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[3] The job description for Social Services Worker II states that the hourly salary range is $16.91 to $22.04; and the job description for Public Guardian Investigator states that the hourly salary range is $17.68 to $23.04.

Discussion

The Warning Letter advised Jackson that the charge did not state a prima facie case because there was insufficient evidence that the settlement agreement reached between the Union and the County in the grievance over Jackson allegedly working out-of-class had resulted in adverse action against Jackson. The Warning Letter further advised Jackson that there was insufficient evidence that the County took any alleged adverse action because she filed the grievance.

1. Discrimination Under the MMBA

As discussed in the Warning Letter, to demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 3506 and PERB Regulation 32603(a), 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);[4] Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 (San Leandro).) The Warning Letter identified several factors relied upon to establish circumstantial evidence that an employer took action against an employee because of an employee's participation in protected activities. In addition to close temporal proximity, one or more of the following factors must also be present: (1) the employer's disparate treatment of the employee; (2) the employer's departure from established procedures and standards when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists; or (7) any other facts that might demonstrate the employer's unlawful motive. (Citations omitted.)

a. Nexus

The amended charge provides additional evidence, that, if all the elements of a prima facie case were otherwise met, has traditionally been used to establish unlawful motive. Specifically, the amended charge provides evidence of: (1) differing accounts between Komers' letter to Jackson and the submittal to Board of Supervisors as to the reliance on labor market salary data; (2) Prescott's statement to Love that Love "better not show" the County an instance where an employee found to be working out-of-class had a position upgraded; (3) Van der Poorten's remark that after the classification study, the employees might be assigned to a

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

presumably less-favorable post where they would not be able to wear nice clothing; and (4) Smigin's comment that the County "does not want to pay back pay." These statements may indicate inconsistent or contradictory justifications for the County's actions. However, the amended charge has not produced evidence to demonstrate that the reclassification resulted in adverse action against Jackson, and therefore, does not state a prima facie case.

b. Adverse Action

As stated in the Warning Letter, 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; (Newark Unified School District (1991) PERB Decision No. 864 (Newark).) The Warning Letter also cited to Oakland Unified School District (2004) PERB Decision No. 1645 (Oakland), a case where the Board declined to find that the settlement of a grievance resulting in a teacher's transfer to a new work assignment, to which the employee later objected, was an adverse action. Oakland also stands for the proposition that a union can bind an employee to a settlement agreement, even if the employee is later dissatisfied with the outcome. (Ibid.)

In this case, Jackson's employment circumstances are unchanged from those which existed, not only prior to the classification study, but also prior to the initial filing of the grievance alleging that Jackson was working out-of-class. Although Jackson claims that her duties have increased while her salary has decreased, this is not borne out by the evidence presented. First, as noted above, the new classification has a higher salary range than the previous one, so it is clear that Jackson's salary has not decreased.[5] Second, there is no evidence that the duties of the Public Guardian Investigator are different than those performed when Jackson's title was Social Services Worker II. While the job descriptions differ slightly, there has been no evidence presented that Jackson's duties increased after her job classification was changed to Public Guardian Investigator.[6]

Further, Jackson continues to assert that adverse action is shown because she is still, after reclassification, receiving a lower rate of pay than other employees performing the same duties. As stated in the Warning Letter, this is the same circumstance that existed prior to reclassification, and in fact, is the same circumstance that existed prior to Jackson engaging in the protected activity of filing a grievance. Actually, it appears this condition has existed since Jackson was first hired in the position of Social Service Worker II. At that time, Puliafico allegedly performed the same duties and was paid at a higher rate of pay.

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[5] Komers' letter to Jackson also notes that her salary was not affected by the change in classification.

[6] Jackson's arguments elsewhere in the amended charge also conflict with the statement that duties increased after the reclassification. For example, on page five of the attachment to the amended charge, Jackson argues that the County had a duty to negotiate because the new classification is performing the same duties under similar conditions.

Accordingly, it cannot be found that Jackson suffered any adverse action as a result of her protected activity, because her duties and salary remain the same as they were before the protected conduct. The only things that have changed are the title of her position and bargaining unit. The issue of whether Jackson was working out-of-class at the time of the grievance, or continues to do so, is not within PERB's review. That is a contractual issue between the Union and the County. Absent a finding of a violation of the Act, PERB is without authority to enforce collective bargaining agreements between an exclusive representative and an employer. (Sacramento City Teachers Association (Marsh) (2001) PERB Decision No. 1458.)[7]

Jackson argues that she would never have signed the settlement agreement and dismissed the underlying grievance if had she understood that a possible outcome of the classification study was that her coworkers may still be paid at a higher rate while performing the same duties. As stated in the Warning Letter, a union may bind an employee to a settlement agreement even if the employee is later unhappy with the outcome. (Oakland, supra, PERB Decision No. 1645.)

Finally, Jackson argues that adverse action is shown because other employees have been allowed to fill positions for which they did not meet specific qualifications, and she has not been allowed to do the same.[8] Even assuming that is true, that does not demonstrate that the reclassification of Jackson's position in this instance amounted to adverse action for the reasons stated above.

2. Standing to Allege Bargaining Violations

Jackson argues that the County had a duty to negotiate over its decision to reclassify her position with the Union, and that the exclusive representative in her new bargaining unit, LIUNA, was similarly denied its right to negotiate. However, Jackson does not have standing to assert a duty to negotiate. The Board has held that an individual employee does not have standing to pursue violations of the rights of an employee organization. (State of California (Department of Corrections) (1993) PERB Decision No. 972-S.) The duty to meet and confer arises between an employer and an exclusive representative, and therefore, an individual employee lacks standing to allege a breach of that duty. (Alum Rock Union Elementary School District (2005) PERB Decision No. 1748.) In addition, individual employees lack standing to allege that an employee organization has failed to bargain in good faith, or that an

[7] The same rationale applies to Jackson's arguments that the County violated the settlement agreement by allowing Valentinetti to receive a raise, and that she is performing the same duties as prior to the initial grievance, but such duties have not been given to a "more qualified" employee. PERB is without authority to enforce agreements between the parties, absent a violation of a collective bargaining statute. (Sacramento City Teachers Association (Marsh), supra, PERB Decision No. 1458.)

[8] See discussion at page three of this letter, regarding Jackson's request to be "grandfathered" into the Social Services Worker III position, and footnote 2.

employer has failed to bargain in good faith. (Oxnard Educators Association (1988) PERB Decision No. 664; Oxnard School District (1988) PERB Decision No. 667.) Therefore, this allegation is also without merit.

Conclusion

For all of the above-discussed reasons, and for the facts and reasons provided in the December 16, 2008 Warning Letter, this charge fails to state a prima facie case and must be dismissed.

Right to Appeal

Pursuant to PERB Regulations,[9] 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, sec. 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. (Cal. Code Regs, tit. 8, secs. 32135(a) and 32130; see also Gov. Code, sec. 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 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, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 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, sec. 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

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

party or filed with the Board itself. (See Cal. Code Regs., tit. 8, sec. 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, sec. 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. (Cal. Code Regs, tit. 8, sec. 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 _____
Valerie Racho
Regional Attorney

Attachment

cc: Tom Prescott, Employee Relations Division Manager

PUBLIC EMPLOYMENT RELATIONS BOARD

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December 16, 2008

Shirley Jackson
12777 Royal Palm Lane
Riverside, CA 92503

Re: Shirley Jackson v. County of Riverside
Unfair Practice Charge No. LA-CE-418-M
WARNING LETTER

Dear Ms. Jackson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 21, 2007. Shirley Jackson (Jackson or Charging Party) alleges that the County of Riverside (County or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by downgrading her position after she filed a classification grievance. Investigation of the charge revealed the following information.

At the time of the filing of the unfair practice charge, Jackson was employed by the County as a Social Service Worker II, and a member of a bargaining unit exclusively represented by Service Employees International Union (SEIU or Union) Local 721. In or about April 2006, in concert with the Union, Jackson and fellow employee Patricia Puliafico (Puliafico)[2] filed a grievance with the County alleging that they were working out of class based on the duties and responsibilities of their positions. Jackson and Puliafico believed that they were actually performing the duties of a Social Service Worker V, a position with a higher salary range. Jackson states that her manager encouraged the grievance, because he agreed that Jackson and Puliafico were performing out of class duties, and he believed that it would be good for the department to have the positions upgraded in order to attract and retain experienced employees.

On May 31, 2006, the grievance was denied at Step I. Union Representative Linda Love (Love) requested that the grievance proceed to Step II. On June 29, 2006, a meeting was held between the grievants and Human Resources Manager Tom Prescott (Prescott).[3] Prescott said

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[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.

[2] Puliafico was employed as a Social Service Worker III. Puliafico filed PERB Unfair Practice Charge Case No. LA-CE-420-M on December 4, 2007, regarding similar facts as the instant charge. Puliafico resigned from the County in July 2007 after 16 years of employment.

[3] It is not clear that Love attended this meeting.

that there was "no way" Jackson and Puliafico would be promoted from their current positions to the Social Service Worker V position, but that they should try to "convince" him. Jackson and Puliafico provided copies of the relevant descriptions of the job classifications at issue, and completed a Position Description Questionnaire.

On July 14, 2006, Prescott issued a written denial of the grievance at Step II, stating that Jackson and Puliafico were not performing the duties of a Social Service Worker V, and that the Department of Mental Health did not currently employ anyone in the Social Service Worker IV or V categories. Prescott further stated that neither Jackson or Puliafico were qualified for the Social Service Worker V position. After discussing the denial with Love, Jackson and Puliafico determined to proceed to Step III of the grievance process—arbitration. A hearing date was set for April 30, 2007.

On April 30, 2007, Jackson and Puliafico appeared at the arbitration hearing. The Union and the County then entered into a settlement agreement to dismiss the grievance, specifying that the County would conduct a classification study of Jackson's and Puliafico's positions to be completed by May 25, 2007.[4]

On June 6, 2007, Jackson contacted Love to inquire about the outcome of the classification study. Love told Jackson to contact Human Resources Analyst Sarah Franco (Franco). Franco informed Jackson that the County had made an initial determination. Franco told Jackson that Puliafico's current salary was above the range as determined appropriate for the position. Jackson expressed surprise at this outcome, and informed Franco that another employee, Joseph Valentinetti (Valentinetti), would be affected by the classification study.[5] Franco expressed her belief that Valentinetti was currently classified as a Social Service Worker II, and Jackson informed her that Valentinetti was actually serving as a Social Service Worker III. Franco stated that it was possible that this information could change the outcome of the study, and that Valentinetti should be interviewed. Jackson reports, however, that Valentinetti was not subsequently interviewed. A meeting was arranged for June 11, 2007 to further discuss the outcome of the classification study,

On June 11, 2007, Jackson and Puliafico were told that due to the classification study, their job had been reclassified and "downgraded" to the position of Public Guardian Investigator, with the same salary range as that of a Social Service Worker II. Jackson and Puliafico protested that in February 2006, prior to the filing of the grievance, they were told that management had submitted a request to Mental Health Administration that all Social Service Worker II positions be upgraded to Social Service Worker III positions. Jackson and Puliafico further stated that department management had agreed with them that they were performing duties of a higher classification. Human Resources staff asserted that the decision was not made based on

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[4] It is unclear at what point in the hearing process that settlement was reached, whether prior to the start of the hearing, or at some point in progress.

[5] Valentinetti was hired in November 2006, and was therefore not a party to the classification grievance filed by Jackson and Puliafico in April 2006.

"duties and responsibilities" of their positions, but on "Class Concept." A copy of the proposed job description was shown to Jackson and Puliafico, with "verbatim" language as that submitted in the Position Description Questionnaire. Jackson and Puliafico were told that a "final" decision had not yet been made, and that they would be contacted.

On or around June 14, 2007, Jackson was informed that her salary would not change as a result of the classification study, and that Puliafico's and Valentinetti's salaries would also remain unchanged, as they would be "Y-rated" into the new classification. Jackson was told that her salary was approximately 13.9% lower than Puliafico's and Valentinetti's, and that as a result, neither Puliafico or Valentinetti would receive a salary increase until Jackson attained their salary level, and that would take approximately five years.

On September 20, 2007, Human Resources Director Ron Komers sent a letter to Jackson, attempting to "address [Jackson's] concerns and clarify the actions taken by Human Resources" in relation to the classification study. The letter stated in part:

> The purpose of this study was to determine if the SSW II position was appropriately classified, and if not, reclassify it to an appropriate existing classification or create a new classification that more adequately describes the nature and level of work performed.
>
> [B]ased on the information collected, it was determined that the Social Services Worker II classification did not appropriately describe the scope of responsibility or the body of work which you performed. Since there were no existing County classifications that accurately described your work, a new classification of Public Guardian Investigator was developed.
>
> [S]ubsequent to the Exception Study results, you and Mrs. Puliafico met with the Human Resources staff to discuss the study and address some of your concerns. It appears that part of the discussion was regarding the class concept. This [is] an appropriate discussion point because the class concept provides a concise definition of the type of work performed (i.e., duties and responsibilities) by positions in this class as well as the level of responsibility and reporting relationships.

The letter also informed Jackson that the proposal to reclassify her position was submitted to the Board of Supervisors on June 19, 2007, and that after the Mental Health Department completed the necessary paperwork to complete the reclassification, the Public Guardian Investigator classification would be assigned to a bargaining unit represented by Laborers' International Union of North America (LIUNA). Jackson reports that as of the date this charge was filed, her job title remained Social Service Worker II, and her position had not been reassigned to the bargaining unit represented by LIUNA.

Jackson argues that the classification study was not performed in good faith because human resources staff did not observe Jackson or Puliafico performing their duties for the usual one-to-two week time period. Further, Jackson states that the County has not explained the term "Class Concept," and that the Union would not inquire as to the Class Concept methodology. Jackson maintains that the classification study should have been based upon duties and responsibilities of her position, and believes that the County did not gather enough information to make an informed decision. Jackson asserts that the grievance was not actually settled because there was not a "meeting of the minds" as to the manner of the classification study.

Jackson further argues that disparate treatment is shown because after the study, Puliafico and Valentinetti retained their previous salaries through the Y-rating, and although Jackson performs the same duties as these employees, she is still paid at a lower rate. In addition, Jackson states that the recommendation sent to the Board of Supervisors for approval did not state that the new Public Guardian Investigator was a reclassification of other positions. Jackson asserts that

> [i]n reviewing other recommendations for approvals submitted to the Board of Supervisors where studies were conducted in the documents it discussed whether they were new, upgraded, or reclassified positions.

The document submitted to the Board of Supervisors states the following in relevant part under the heading, "Background":

> [T]he Mental Health Department's Public Guardian Office evaluates and investigates probate and Lanterman-Petris-Short (LPS) conservator referrals to determine the need and eligibility for public conservators for individuals who may be gravely disabled or legally incompetent. To more accurately describe the level of difficulty and responsibility as well as the nature of the duties performed by the incumbents, the Department has requested that a class of Public Guardian Investigator be established.

Jackson states that after the reclassification, the Union refused to further act on the grievance stating that "we signed the agreement and there is nothing that [can] be done."

The above-discussed facts fail to demonstrate a prima facie case for the reasons that follow.

Discussion

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);[6] Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 (San Leandro).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(Newark Unified School District (1991) PERB Decision No. 864 (Newark); 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; Campbell, supra, 131 Cal.App.3d 416); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104; San Leandro, supra, 55 Cal.App.3d 553); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; San Leandro, supra, 55 Cal.App.3d 553); (4) the employer's cursory investigation of the employee's misconduct (City of Torrance (2008) PERB Decision No. 1971-M; Coast Community College District (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons (County of San Joaquin (Health Care Service) (2001) PERB Order No. IR-55-M); (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.)

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

Turning to the facts of this case, although the first two elements of the Novato test are met because Jackson engaged in protected activity by filing a grievance,[7] and the County is aware of that protected conduct by its actions in processing and ultimately settling the grievance, the final two elements of the test are not established. Specifically, the reclassification of Jackson's position is not shown to be objectively adverse, and it is not demonstrated that the reclassification was undertaken for a discriminatory purpose.

1. Adverse Action

As discussed above, the test for determining whether adverse action is established is not determined by the subjective reaction of the employee, but rather evaluated under an objective standard. (Newark, supra, PERB Decision No. 864.) Additionally, where an employee's duties and compensation are the same in transfer situations, the employee must present some facts demonstrating that a reasonable employee would consider the transfer an adverse action. (Compton Unified School District (2003) PERB Decision No. 1518.) Although Jackson was not technically transferred to a different assignment, the above rationale applies because her compensation remained the same and there are no facts suggesting that Jackson's duties changed after the reclassification.

The situation in this charge is similar to that in Oakland Unified School District (2004) PERB Decision No. 1645 (Oakland), a case where the Board declined to find that the settlement of a grievance resulting in a teacher's transfer to a new work assignment was an adverse action. In Oakland, the employee's union and the employer settled a grievance by transferring the employee to an assignment at a different school. The employee's duties and compensation were unchanged after the transfer. The employee argued that there was no settlement reached because he was unable to choose the location of his new assignment. The Board stated the following:

> There is no demonstration that the action by the District was in retaliation for the filing of the grievance. To the contrary, it was a settlement of the charges. There is, therefore, no demonstration that the transfer is an adverse action. It is undisputed that [the employee] agreed to teach only at the middle school level. There is some disparity about his understanding of whether or not he would get to choose at which middle school. He is the only one at the...meeting who believes there was no settlement of his grievance. *The Association can bind him to an agreement even if he is unhappy with the outcome...*
>
> [The employee] continues to be paid the same salary and to teach the same classes he was previously assigned. There is no

[7] It is well-established that filing a grievance is protected activity under the MMBA. (City of Long Beach (2008) PERB Decision No. 1977-M.)

> information provided as to why a reasonable person would find this adverse.

(Id. at p. 6. Emphasis supplied.)

Similarly, here, the settlement of Jackson's grievance was that the County would conduct a classification study, which was done. Jackson continues to earn the same salary and perform the same duties as prior to the reclassification, and in fact, her job title has not been changed to Public Guardian Investigator, but remains Social Service Worker II. There is no indication that any guarantee was made to Jackson that the study would result in her position being upgraded to a higher level within the Social Service Worker classification, or that her salary would be increased. Ultimately, the settlement of the grievance was the study itself, not a particular outcome of the study. Likewise, although Jackson disagrees with Class Concept as the methodology used for reclassification, and states that duties and responsibilities of the position should have been the benchmark, there is no information presented that shows any particular methodology was agreed upon as part of the settlement agreement.[8] As previously stated, a union can bind an employee to an agreement even if the employee is unhappy with the outcome. (Oakland, supra, PERB Decision No. 1645.) Therefore, under the precedent discussed above, there is insufficient evidence of adverse action against Jackson.

2. Nexus

Even if Jackson provides additional facts to show the reclassification is adverse action, there is insufficient evidence that the County took that action in retaliation for Jackson having filed the grievance. Jackson argues that disparate treatment is shown because she is still making a lower salary but performing the same duties as Puliafico and Valentinetti. However, that was also the case before the reclassification study. Puliafico and Valentinetti both earned higher salaries and were employed at a higher rank within the Social Service Worker classification prior to the results of the study being released.[9] Therefore, Jackson is not being treated any differently by the County than she was prior to the action taken in this case, and so the reclassification does not demonstrate disparate treatment against Jackson.

Jackson also argues that the documentation submitted to the Board of Supervisors did not state that the recommendation to create the Public Guardian Investigator classification was the result of reclassification of existing positions, as was the case in similar recommendations that she

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[8] In its letter to Jackson after the study, the County described Class Concept as "provid[ing] a concise definition of the type of work performed (*i.e., duties and responsibilities*) by positions in this class as well as the level of responsibility and reporting relationships." [Emphasis supplied.]

[9] It is noted that Puliafico worked at the County for approximately 10 years longer than Jackson.

reviewed.[10] Jackson may be arguing that this is a departure from established procedures. However, the document submitted to the Board of Supervisors states the following:

> To more accurately describe the level of difficulty and responsibility as well as the nature of the duties performed *by the incumbents*, the Department has requested that a class of Public Guardian Investigator be established. [Emphasis supplied.]

The reference to incumbents implies that some employees already perform the duties in question, which suggests that the Public Guardian Investigator classification replaces or supplements an existing job class. There is insufficient evidence to conclude that the County departed from an established procedure in its reclassification of Jackson's position based on the wording of the recommendation submitted to the Board of Supervisors.

Additionally, there has been no evidence of inconsistent justifications, union animus, or any other factor discussed above that would provide the requisite nexus between an alleged adverse action and protected activity to support finding a violation of the MMBA.

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, 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 December 29, 2008, PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Valerie Racho
Regional Attorney

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[10] No other such recommendations were included in the charge.