STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SEIU LOCAL 221, Charging Party, v. COUNTY OF SAN DIEGO, Respondent.	Case No. LA-CE-677-M PERB Decision No. 2258-M April 26, 2012

Appearances: Alexis English, Director, Internal Field Staff, for SEIU Local 221; Clint Obrigewitch, Labor Relations Officer, for County of San Diego.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by SEIU Local 221 (SEIU) from the dismissal (attached) by the Office of the General Counsel of an unfair practice charge. The charge alleged that the County of San Diego violated the Meyers-Milias-Brown Act (MMBA)[1] by retaliating against bargaining unit employee Dennis Bellus (Bellus) for having engaged in protected activity. The Board agent dismissed the charge, finding that it failed to state a prima facie case of retaliation.

The Board has reviewed the dismissal and the record in light of SEIU's appeal and the relevant law. Based on this review, we find the dismissal and warning letters to be well-reasoned, adequately supported by the record, and in accordance with applicable law. Accordingly, the Board adopts the dismissal and warning letters as the decision of the Board itself, subject to a discussion below of the issues raised on appeal.

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

DISCUSSION

Compliance with Requirements for Filing Appeal

Pursuant to PERB Regulation 32635(a),[2] an appeal from dismissal must:

> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the grounds for each issue stated.

To satisfy the requirements of PERB Regulation 32635(a), the appeal must sufficiently place the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H (*State Employees Trades Council*); *City & County of San Francisco* (2009) PERB Decision No. 2075-M.) An appeal that does not reference the substance of the Board agent's dismissal fails to comply with PERB Regulation 32635(a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381 (*Pratt*); *Lodi Education Association (Hudock)* (1995) PERB Decision No. 1124; *United Teachers - Los Angeles (Glickberg)* (1990) PERB Decision No. 846.) Likewise, an appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635(a). (*Pratt*; *State Employees Trades Council*; *Contra Costa County Health Services Department* (2005) PERB Decision No. 1752-M; *County of Solano (Human Resources Department)* (2004) PERB Decision No. 1598-M.)

The appeal in this case merely restates facts alleged in the original charge. It fails, however, to reference any portion of the Board agent's determination or otherwise identify the specific issues of procedure, fact, law or rationale to which the appeal is taken, the page or part

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

of the dismissal to which appeal is taken, or the grounds for each issue. Thus, it is subject to dismissal on that basis. (*City of Brea* (2009) PERB Decision No. 2083-M.)

New Allegations and Evidence on Appeal

In its appeal, SEIU presents new factual allegations that were not presented in the original charge or in an amended charge. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b); see also *CSU Employees Union, SEIU Local 2579 (Kyrias)* (2011) PERB Decision No. 2175-H.) The Board has found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.)

On June 7, 2011, the Board agent issued a letter advising SEIU that the charge failed to state a prima facie case and warning SEIU that the charge would be dismissed unless it amended the charge to state a prima facie case. SEIU did not file an amended charge, despite repeated efforts by the Board agent to contact SEIU's representative. Therefore, on June 22, 2011, the Board agent dismissed the charge. On July 14, 2011, SEIU filed an appeal from the dismissal of the charge. The appeal states that SEIU "is appealing [the dismissal] based on new information that surfaced after the charge was filed and the warning letter was issued." The appeal includes new factual allegations of protected activity by Bellus in March, May and August 2010, as well as new factual allegations and documentary evidence concerning his transfer in February 2011. All of these allegations predate both the filing of the charge and the Board agent's dismissal of the charge. The appeal provides no reason why these allegations and evidence could not have been alleged in the original charge or in an amended charge. Thus, we do not find good cause to consider these new allegations.

ORDER

The unfair practice charge in Case No. LA-CE-677-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Huguenin joined in this Decision.

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2804
Fax: (818) 551-2820

June 22, 2011

Alexis English, Director, Internal Field Staff
SEIU, Local 221
4004 Kearny Mesa Road
San Diego, CA 92111

Re: *SEIU Local 221 v. County of San Diego*
Unfair Practice Charge No. LA-CE-677-M
DISMISSAL LETTER

Dear Ms. English:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 1, 2011. SEIU Local 221 (Union or Charging Party) alleges that County of San Diego (County or Respondent) violated sections 3503, 3502.1, and 3503 of the Meyers-Milias-Brown Act (MMBA or Act)[1] by transferring a Union-represented employee to a different department.

Charging Party was informed in the attached Warning Letter dated June 7, 2011, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to June 16, 2011, the charge would be dismissed.

After not receiving either an amended charge or a request for withdrawal, the undersigned attempted to contact you by telephone on June 16, 2011 to determine whether the Union intended on filing any additional materials with PERB. The undersigned left you a voice-mail message but, to date, the Union has not contacted PERB. In addition, PERB has not received either an amended charge or a request for withdrawal. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the June 7, 2011 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[2] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of

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

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

this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Eric J. Cu
Regional Attorney

Attachment

cc: Susan Brazeau

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2804
Fax: (818) 551-2820

June 7, 2011

Alexis English, Director, Internal Field Staff
SEIU, Local 221
4004 Kearny Mesa Road
San Diego, CA 92111

Re: *SEIU Local 221 v. San Diego County*
Unfair Practice Charge No. LA-CE-677-M
WARNING LETTER

Dear Ms. English:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 1, 2011. SEIU Local 221 (Union or Charging Party) alleges that San Diego County (County or Respondent) violated sections 3503, 3502.1, and 3503 of the Meyers-Milias-Brown Act (MMBA or Act)[1] by transferring a Union-represented employee to a different department.

The Union is an employee organization that represents the interests of workers in the County. Dennis Bellus is employed in the County as a Protective Service Worker and is a steward for the Union. Bellus's responsibilities as a steward include representing co-workers in disciplinary meetings, participating in labor-management meetings, and speaking out regarding employee working conditions.

In February 2011, the County involuntarily transferred Bellus from the Foster Home Licensing Department to the Child Welfare Services Department.

Discussion:

To demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 3506 and PERB Regulation 32603(a),[2] the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) In determining whether evidence of

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

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

adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

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

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104; (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

The Union alleges that the County took adverse actions against Bellus because of his Union activities. PERB has previously found that activities on behalf of a union were protected. (*City of Torrance* (2008) PERB Decision No. 1971-M.) However, there is insufficient information to conclude that the relevant individuals at the County were aware of Bellus's protected acts. In *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2066-M, the Board declined to impute knowledge of an employee's protected activity to decision-makers at the employer where it was shown that the only people aware of such activity were not involved in the decision to take the adverse action. (See also *Regents of the University of California (Los Angeles)* (2008) PERB Decision No. 1995-H.) In this case, the

Union does not establish who made the decision to transfer Bellus and whether that person or those people were aware of his Union activities.

In addition, the Union does not provide sufficient information to conclude that Bellus's involuntary transfer was an adverse employment action. In *Oakland Unified School District* (2004) PERB Decision No. 1645, the Board found that the charging party must demonstrate that a reasonable person in the same circumstance would find the transfer to be objectively adverse to employment. (Citing *Compton Unified School District* (2003) PERB Decision No. 1518.) In contrast, in *Fresno County Office of Education* (2004) PERB Decision No. 1674, the Board found that a transfer was an adverse employment action because, from an objective standpoint, it resulted in less favorable working conditions such as a lengthy commute, less security, and lack of climate control. In the present case, the Union does not establish that the County's decision to transfer Bellus resulted in any change in working conditions. Accordingly, there is insufficient information to conclude whether a reasonable person under the same circumstances would find the transfer to be adverse to employment. (*Newark Unified School District*, *supra*,PERB Decision No. 864.)

In addition, the Union does not establish a sufficient nexus between Bellus's Union activities and the County's decision to transfer him. The Union does not allege when Bellus engaged in his Union-related activities. Thus, PERB is unable to measure the temporal proximity between Bellus's Union activity and the County's decision to transfer him. Nor does the Union provide facts demonstrating the existence of any of the above-referenced nexus factors or any other information supporting a causal connection.

In addition, the Union does not establish a sufficient nexus between Bellus's Union activities and the County's decision to transfer him. The Union does not allege when Bellus engaged in his Union related activities. Thus, PERB is unable to measure the temporal proximity between Bellus's Union activity and the County's decision to transfer him. Nor does the Union provide facts demonstrating the existence of any of the above-referenced nexus factors or any other information supporting a causal connection.

For these reasons the charge, as presently written, does not state a prima facie case.[3] 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

[3] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

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 June 16, 2011,[4] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Eric J. Cu
Regional Attorney

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