

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DONALD E. NEAL, RNC,

Charging Party,

v.

CONTRA COSTA COUNTY HEALTH
SERVICES DEPARTMENT,

Respondent.

Case No. SF-CE-730-M

PERB Decision No. 1752-M

February 11, 2005

Appearances: Donald E. Neal, RNC, on his own behalf; Beatrice Liu, Deputy County Counsel, for Contra Costa County Health Services Department.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a Board agent's dismissal (attached) of an unfair practice charge. The unfair practice charge alleges that Donald E. Neal, RNC (Neal) was terminated from his position as a probationary charge nurse for the Contra Costa County Health Services Department (County) because of his protected activity, in violation of the Meyers-Milias-Brown Act (MMBA).¹

The Board agent dismissed the charge for failure to state a prima facie case. Neal filed an appeal. The County responded to the appeal stating that the appeal did not meet the requirements of PERB Regulation 32635.²

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

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

We have reviewed the entire record in this case, including the initial unfair practice charge, the County's response, the warning and dismissal letters, Neal's appeal and the County's response to the appeal. We find the warning and dismissal letters of the Board agent to be free of prejudicial error and adopt them as the decision of the Board itself, as outlined in the discussion below.

DISCUSSION

In the appeal, Neal does not adhere to the elements of PERB Regulation 32635(a) as required for an appeal to the Board. The appeal fails to set forth "the specific issues of procedure, fact, law or rationale to which the appeal is taken; (2) [i]dentify the page or part of the dismissal to which each appeal is taken; [and] (3) [s]tate the grounds for each issue stated."³

The appeal filed by Neal reiterates the facts alleged in his unfair practice charge. Neal does not specifically address why the Board agent's dismissal should be reversed. In County of Solano (Human Resources Department) (2004) PERB Decision No. 1598-M and Contra Costa County Health Services Department (2005) PERB Decision No. 1742-M,⁴ the Board dismissed the unfair practice charges for failure to state a prima facie case and because the appeals did not comply with the requirements of PERB Regulation 32635. Here also, Neal has failed to set forth a prima facie case and has filed an appeal that does not comply with PERB Regulation 32635.

³PERB Regulation 32635(a).

⁴See also, United Teachers of Los Angeles (Robinson) (1996) PERB Order No. Ad-273.

ORDER

The unfair practice charge in Case No. SF-CE 730-M is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Whitehead and Shek joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027



December 2, 2004

Donald Neal

Re: Donald E. Neal, Rnc v. Contra Costa County Health Serv Dept
Unfair Practice Charge No. SF-CE-730-M
DISMISSAL LETTER

Dear Mr. Neal:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 15, 2004. Donald E. Neal alleges that the Contra Costa County Health Service Department violated the Meyers-Milias-Brown Act (MMBA)¹ by terminating his employment.

I indicated to you in my attached letter dated November 24, 2004, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to December 1, 2004, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my November 24, 2004 letter.

Right to Appeal

Pursuant to PERB Regulations,² you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

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

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

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

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Final Date

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

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Beatrice Liu

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027



November 24, 2004

Donald Neal

Re: Donald E. Neal, Rnc v. Contra Costa County Health Serv Dept
Unfair Practice Charge No. SF-CE-730-M
WARNING LETTER

Dear Mr. Neal:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 15, 2004. Donald E. Neal alleges that the Contra Costa County Health Service Department violated the Meyers-Milias-Brown Act (MMBA)¹ by terminating his employment.

Investigation of the charge revealed the following. You were employed by the County as a Charge Nurse at the County's Detention Facility in Martinez. As such, you are exclusively represented by the California Nurses Association. CNA and the County are parties to a collective bargaining agreement that expires on June 30, 2005. With regard to Probation, Article 19 of the Agreement provides as follows:

19.1 Duration. All appointments from officially promulgated employment lists for original entrance or promotion shall be subject to a probationary period. This period shall be from six (6) months to two (2) years duration.

19.2 Those classes represented by the Association which have probation periods in excess of six (6) months: None.

19.5 Rejection During Probation. An employee who is rejected during the probation period and restored to the eligible list shall begin a new probationary period if subsequently certified and appointed.

A. Appeal from rejection. Notwithstanding any other provisions of this section, an employee (probationer) shall have the right to

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.

appeal from any rejection during the probationary period based on political, or religious or union activities, or race, color, national origin, sex, age, disability, or sexual orientation.

B. The appeal must be written, must be signed by the employee and set forth in facts by which it is claimed that grounds for appeal exist under Subsection A and must be filed through the Director of Human Resources to the Merit Board by 5:00 p.m. on the seventh (7th) calendar day after the date of delivery to the employee of notice of rejection.

C. The Merit Board shall consider the appeal, and if it finds probable cause to believe that the rejection may have been based on grounds prohibited in Subsection A, it may refer the matter to a Hearing Officer for hearing, recommended findings of fact, conclusions of law and decision, pursuant to the relevant provisions of the Merit Board rules in which proceedings the rejected probationer has the burden of proof.

D. If the Merit Board finds no probable cause for a hearing, it shall deny the appeal. If, after hearing, the Merit Board upholds the appeal, it shall direct that the appellant shall begin a new probationary period unless the Merit Board specifically reinstates the former period.

On May 24, 1993, the federal Office of Personnel Management proposed your debarment for a period concurrent with its Department of Health and Human Services exclusion. OPM's debarment became effective July 16, 1993. This debarment prevented you and your subsequent employers from billing any federal insurance programs for services you provide. It appears you did not inform the County of this debarment when you applied for your position.

On or about March 13, 2004, the County hired you as a probationary Charge Nurse. On March 31, 2004, the County became aware of the sanctions placed upon you by the OPM. The County advised you that the sanction needed to be removed as it rendered the County unable to bill the federal government for any Medicare/Medical services provided by you.

On September 13, 2004, the County terminated your employment during your probationary period. Although not required by law, the County indicated that it terminated you for the following reasons: (1) From the period of May 5, 2004 through September 2004, you were absent 88 hours out of a total of 518 hours or 17% of the time; and (2) you failed to secure removal of the federal sanctions against you.

On September 24, 2004, pursuant to Article 19 of the Agreement, you appealed your termination to the Merit Board. The appeal alleged that you were not excessively absent

during this time period and that the sanctions against you were irrelevant to your job performance.

On October 12, 2004, the Merit Board considered your appeal. At the beginning of the hearing, the Merit Board made clear that probationary employees may appeal their termination only if they allege unlawful discrimination based on some protected class. You responded to this statement by arguing that a misstatement of facts in your termination letter was discriminatory. When the Merit Board rejected this argument, you then argued the termination was unlawful based on your use of sick leave. The Merit Board rejected this argument as well noting that you only took two days of sick leave during the time period considered, and two days was not excessive use of sick leave. The Merit Board again reiterated that even if the facts of your termination were incorrect, a probationary employee may be terminated for any reason that is not discriminatory in nature. As such, the Board rejected your appeal and denied you a hearing on the matter. On October 20, 2004, the Board memorialized this finding by letter.

Based on the above stated facts, the charge as presently written, fails to state a prima facie violation of the MMBA, for the reasons provided below.

As the charge does not allege any specific violations of the MMBA, I must assume that the Charging Party intends to allege the County discriminated against him in terminating his employment.

To establish a prima facie case of discrimination 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; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employee because of the exercise of those rights. (Campbell Municipal Employees Association v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Association v. City of San Leandro (1976) 55 Cal.App.3d 553.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action in protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following nexus factors should be present: (1) the employer's disparate treatment of the employee (Campbell, supra); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro Police Officers Association, supra); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro Police Officers Association, supra); (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; or (6) employer animosity towards union activists (San Leandro Police Officers Association, supra; Los Angeles County Employees Association v. County of Los Angeles (1985) 168 Cal.App.3d 683.).

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Herein, you did not engage in any activity considered protected by the MMBA. As such, any allegation that the County discriminated against you because of your protected activity must be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before December 1, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR