STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

PATRICIA W. GORDON, Charging Party, v. CITY OF SANTA MONICA, Respondent.	Case No. LA-CE-426-M PERB Decision No. 2246-M April 6, 2012

Appearance: Patricia W. Gordon, on her own behalf.

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

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Patricia W. Gordon (Gordon) of a PERB Office of the General Counsel's partial dismissal (attached) of her unfair practice charge. The charge, as amended, alleged that the City of Santa Monica (City) violated the Meyers-Milias-Brown Act (MMBA)[1] when it engaged in a variety of unlawful conduct including denial of raises and promotions, interference with union representation by rejecting information requests, retaliation, and intimidation. Having concluded that certain allegations were untimely and other allegations failed to state a prima facie case, the Board agent issued a partial dismissal.[2]

We have reviewed the entire record in this matter. The only issue raised on appeal is whether Gordon has standing to pursue the allegation that the City failed to comply with

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

[2] On July 1, 2011, PERB issued a complaint against the City. The complaint alleged that the City interfered with employee rights in violation of MMBA section 3506 and therefore committed an unfair practice under MMBA section 3509, subdivision (b) and PERB Regulation 32603, subdivision (a) when it changed the notice Gordon would be required to provide in order to take off time for union business. (PERB regulations are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.)

information requests. As the Board agent explained, an individual employee does not have standing to pursue an allegation that an employer engaged in bad faith bargaining by failing to comply with an information request. (*State of California (Department of Corrections*) (2003) PERB Decision No. 1559-S.) Gordon advances no argument on appeal that was not considered and addressed by the Board agent in processing the charge. The Board finds the Board agent's first and second partial warning and partial dismissal letters to be well-reasoned, adequately supported by the record and in accordance with the applicable law. Accordingly, the Board adopts the first and second partial warning and partial dismissal letters as the decision of the Board itself.

ORDER

The partial dismissal of the unfair practice charge in Case No. LA-CE-426-M is hereby AFFIRMED.

Members Dowdin Calvillo and 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) 551-2805
Fax: (818) 551-2820

July 1, 2011

Patricia W. Gordon

Re: *Patricia W. Gordon v. City of Santa Monica*
Unfair Practice Charge No. LA-CE-426-M
PARTIAL DISMISSAL

Dear Ms. Gordon:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) by the Santa Monica Municipal Employees Association (SMMEA or Union) against the City of Santa Monica (City or Respondent) on December 31, 2007 (original charge), and amended on March 12, 2008 (first amended charge), March 26, 2008 (second amended charge), May 2, 2008 (third amended charge), and December 3, 2008 (fourth amended charge). A motion seeking to add Patricia Gordon (Gordon or Charging Party) as a charging party was filed on October 31, 2008 and subsequently granted by PERB. By letter dated November 3, 2010, SMMEA notified PERB of its request to withdraw as a charging party to the charge, and PERB subsequently issued a Notice of such withdrawal on November 8, 2010. Accordingly, SMMEA is no longer a party to and has been removed from the caption in this case.

Charging Party was informed in the attached Partial Warning Letters dated October 26, 2010 and November 8, 2010, that certain allegations contained in the 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 those letters, you should amend the charge. You were further advised that, unless you amended these allegations to state a prima facie case or withdrew them prior to November 15, 2010, the allegations would be dismissed. On November 15, 2010, we spoke on the telephone and discussed your desire to place the charge in abeyance. On that same date you sent a letter to PERB and the Respondent requesting that the charge be placed in abeyance until January 30, 2011, and PERB subsequently issued a letter to the parties acknowledging that the charge was in abeyance.[1] On January 31, 2011, you removed the charge from abeyance and filed a fifth amended charge.[2]

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[1] Because January 30, 2011 fell on Sunday, the charge was placed in abeyance until January 31, 2011.

[2] On February 17, 2011, the City filed a motion to dismiss the charge on the grounds that the conduct alleged in the fifth amended charge does not fall within the six-month period prior to January 31, 2011, and therefore is untimely under *Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Bd.* (2003) 114 Cal.App.4th 46.

The fifth amended charge contains new factual allegations regarding retaliation against Gordon. The first and second Partial Warning Letters fully set forth the pertinent facts underlying the allegations contained in the charge as originally filed and previously amended (amendments one through four), and also provided PERB's rationale regarding the reasons that some of those allegations are found to be deficient. Only facts regarding new allegations in the fifth amended charge are summarized in this Partial Dismissal Letter. In sum, the fifth amended charge alleges that the City retaliated against Gordon for her protected activities in violation of the Meyers-Milias-Brown Act (MMBA)[3] by: (1) failing to provide her an equity salary adjustment per the results of a compensation study; (2) denying her the opportunity to promote by manipulating the testing process for promotional positions; (3) providing negative performance evaluations; (4) requiring a doctor's note for a five-day absence; (5) circulating an e-mail message that stated employees were afraid of Gordon; and (6) involuntarily transferring her to a less-desirable work location when she returned to work after an injury.

Facts as Alleged in the Fifth Amended Charge

Background

Gordon has been employed as a Groundskeeper for the City for approximately 20 years and is also a "Certified Arborist."

1. Failure to Give Equity Salary Adjustment

Gordon alleges that "Donna Peters, Director of Human Resources, is retaliating against me by not giving my classification, Groundskeeper, a deserved 'equity salary adjustment'...."

In "2008," Gordon states that "we"[4] submitted a request for a Compensation study and requested also that the Union take up the compensation issue for Groundskeepers in negotiations. Gordon found errors in the study and "appealed" to the City Human Resources department to remove the City of Long Beach as a comparison city because the City of Long Beach no longer employed Groundskeepers and therefore was inappropriate for comparison. Ms. Peters informed the Union's attorney via e-mail message that Compensation Studies are not grievable. Gordon then sent an e-mail message to Ms. Peters protesting that in 2000 the City made corrections to a Compensation Study that resulted in an equity salary adjustment being awarded. Ms. Peters never responded to Gordon's e-mail message. Gordon alleges that all other classifications within the department received a 5% salary increase as an equity adjustment, and that the City withheld this wage increase from Groundskeepers because she was successful in having CalPERS grant additional years of service credit to now permanent employees who previously had been hired "as needed" and for "other grievances I submitted when I was an SMMEA Union Director."

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

[4] It is not clear to whom "we" refers.

2. Testing for Promotional Positions

Gordon alleges that City management has "retaliated against me because I filed numerous complaints/grievances for myself and on behalf of others while I was an [SM]MEA Director, [SM]MEA Steward and employee."

Gordon states generally that the City has:

> [P]urposefully hindered and/or stopped me from advancing to higher level positions. They did this by ensuring I would not pass tests or I would get a low score so I would not be eligible for an interview.

Gordon provides two specific examples of promotional tests for which she has applied but not passed: Equipment Operator I, "given in 2010"; and Airport Maintenance Worker "in 2009". Regarding the Equipment Operator I exam process, Gordon states that previously the testing process for this position consisted of a performance test and an oral interview panel conducted by an outside panel on the same day, then the top three scoring candidates would be called for an interview by City management at a later time. Instead, Gordon alleges that when she tested for the position in 2010, the process was changed such that the performance test became the final interview. As to the Airport Maintenance Worker exam, the process only consisted of a performance test and did not include an oral component. It appears that all the candidates who tested for these two positions participated in the same process.

3. Negative Evaluations

Gordon alleges that the City "retaliated against me for complaints I filed by giving me negative evaluations." Gordon states that in 2008, Parks Superintendent Darrell Baker stopped her performing specific duties that would make her parks "shine," such as hand mowing the baseball field, thereby making it more difficult for her to receive an "excellent" performance rating. Gordon also states that "last year" Mr. Baker and Parks Supervisor Judy Dragon informed her she could no longer prune trees at Reed Park. Gordon has been pruning trees in City parks for the last 20 years. When Gordon told a Park Ranger that she had been told to stop, the Park Ranger said words to the effect that it was because Gordon made the park "look better." Gordon received an allegedly negative performance evaluation for the period from March 2008 to March 2009.[5] Gordon states, "Management purposefully used one negative instance so they could define my work performance in a negative way."

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[5] The only descriptions of the evaluation in the statement of the charge are comments that Gordon is "close minded" and "argumentative" and that the evaluation "lied about [Gordon's] performance." The copy of the evaluation provided as an exhibit to the fifth amended charge is mostly illegible because of poor copy quality, and the various comments sections could not be deciphered. It is noted that the overall rating on the evaluation was "Meets Standards."

4. Requiring a Doctor's Note

Gordon alleges that Mr. Baker retaliated against her by requiring her to supply a doctor's note when she was absent for five unspecified days in 2010 because she had the flu. Gordon states that in her 20-year employment, and even when absent for more than five days, she had never before been required to submit a doctor's note.

5. E-mail Rumor

Gordon alleges that an e-mail message sent to employees stating "employees are afraid of you" was "attributed to Human Resources by then SMMEA President Jeri Wingo." Gordon requested a meeting over the e-mail and met with Human Resources Director Donna Peters who stated words to the effect that "HR does not act in this manner." Gordon believes that the City spreads rumors about her because she generally has good relations with supervisors, but after they "visit HR these same supervisors do not respond to me or are negative."

6. Transfer to Douglas Park

Gordon alleges that the City "transferred me to Douglas Park in December 2009 because I had filed and won grievances against the City and defended employees on discipline." Gordon broke two ribs in October 2009 while working at Reed Park, which had been her assigned work location for the previous 10 months. As a result of that injury, she was off work for approximately seven weeks. She returned to work on "light duty" per her doctor's instructions at Reed Park. Gordon states that prior to her injury she had done a great deal of work at Reed Park—e.g., pruning, weeding, and planting—and a result of that prior work the Park was "up to par," and therefore suitable for her light duty assignment. On her second day back to work, the City transferred her to Douglas Park. Gordon states that Douglas Park is:

> a much more labor intensive park that has not been maintained properly for many years and required a lot of weed and brush removal entailing much bending, lifting, etc.

Additionally, Gordon states that the children's play area at Douglas Park is twice the size of that at Reed Park and requires an additional hour of raking and sweeping sand, which is a task difficult for someone with a rib injury. Gordon notes that in the past Douglas Park has always had two employees assigned, whereas Reed Park has only had one assigned employee, and that Douglas Park requires much more foot travel to dispose of yard debris than Reed Park. Gordon states that these differences in workload between the two parks is well-known to management and alleges that the reason for her transfer, while she was still recovering from her injury, was therefore retaliatory.

For the reasons to follow, the above-discussed allegations do not demonstrate a prima facie violation of the MMBA and must therefore be dismissed from the charge.

Discussion

The October 26, 2010 Partial Warning Letter (first Partial Warning Letter) advised Charging Party that PERB Regulation 32615(a)(5)[6] 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." A 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.)[7] Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.) A charging party must also demonstrate timeliness of the charge, i.e., that the conduct alleged to violate the MMBA occurred no 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 standard that must be met to demonstrate retaliation for protected conduct under the MMBA was also set forth in the first Partial Warning Letter. To reiterate, a 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*).)

The first Partial Warning Letter further advised that in order to demonstrate the necessary connection or "nexus" between protected conduct and adverse action, in addition to close temporal proximity between the action and the protected conduct, facts establishing one of the following additional factors must be shown: (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,

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

[7] 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.)

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 original charge filed on December 31, 2007 alleged that the City retaliated against Gordon for her protected conduct of filing grievances on her own behalf and on the behalf of other employees, but did not provide any examples of alleged adverse action against Gordon. The amended charges (one through four) did not allege retaliation against Gordon. The first Partial Warning Letter concluded that because no instances of adverse action had been shown in the original charge, this allegation did not state a prima facie case. The first Partial Warning Letter specifically advised Charging Party, at footnote 18:

> In the absence of facts sufficient to establish the requisite "adverse action" element, the "nexus" element is not further analyzed herein. Any amended charge seeking to correct the "adverse action" deficiency should also address the "nexus" element per the factors described above.

The fifth amended charge provides specific examples of alleged adverse actions taken against Gordon, but these new factual allegations fail to state a prima facie case because they are not timely. PERB has found that an amendment "relates back" to the original charge only when it clarifies *facts* alleged in the original charge or adds a new legal theory based on facts alleged in the original charge. (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959; see also, *Sacramento City Teachers Association (Marsh)* (2001) PERB Decision No. 1458 [statute of limitations for a new allegation contained in an amended charge begins to run based on filing date of amended charge, not original charge]; *The Regents of the University of California (Lawrence Livermore National Laboratory)* (1997) PERB Decision No. 1221-H [new legal theories relate back to filing of original charge; new factual allegations do not].)

The fifth amended charge provides new factual allegations regarding alleged adverse actions occurring in 2009 and 2010. These new allegations cannot clarify facts related to allegations of retaliation in the original charge, because they occurred long after the statutory period for the original charge (i.e., June 30, 2007 through December 31, 2007). Accordingly, the allegations discussed herein do not relate back to the original charge. (*Sacramento City Teachers Association (Franz)*, *supra*, PERB Decision No. 1959.) Furthermore, these allegations are untimely because they all occurred more than six months prior to the filing of the fifth amended charge on January 31, 2011.[8] (*Sacramento City Teachers Association (Marsh)*, *supra*, PERB Decision No. 1458.) Therefore, these allegations must be dismissed.[9]

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[8] It is noted that none of the allegations recounting events in 2010 provided any specific dates, so it cannot be determined whether those allegations occurred within six months of the filing of the fifth amended charge on January 31, 2011. A lack of specific dates of conduct

Conclusion

For the reasons discussed herein, and for the facts and reasons stated in the October 26, 2010 and November 8, 2010 Partial Warning Letters, the following allegations fail to state a prima facie case and are dismissed from the charge: (1) all allegations regarding conduct occurring prior to June 30, 2007; (2) "Me Too" clause; (3) denial of promotional opportunities for unit employees; (4) retaliation against Gordon regarding: failure to provide equity salary adjustment, testing for promotional positions, negative evaluations, requiring a doctor's note, e-mail rumor, and transfer to Douglas Park; (5) City "tacitly instilling fear in employees"; (6) unit employees' CalPERS accounts grievance; (7) Workers' Compensation/Code 40 grievance (including retaliation against unit employees); (8) unit employees' compensation study grievance; (9) unit employees' out-of-class pay grievance; (10) letter to City Council (interference); (11) number of Union representatives allowed to attend employee discipline meetings; (12) general pattern of interference; and (13) all allegations related to requests for information.

Right to Appeal

Pursuant to PERB Regulations, 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. (PERB 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. (PERB Regulations 32135(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. (PERB Regulation 32135(b), (c) and (d); see also PERB Regulations 32090 and 32130.)

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does not meet Charging Party's burden to state a prima facie case. (*United Teachers of Los Angeles (Seliga)* (1998) PERB Decision No. 1289.)

[9] Even if timeliness of the retaliation allegations was established, they would still fail to state a prima facie case. Charging Party does not provide specific facts (e.g., dates and descriptions) regarding her protected conduct other than to state generally that she filed grievances and made complaints. This does not satisfy the Charging Party's burden of pleading the charge with requisite specificity. (*United Teachers-Los Angeles* (*Ragsdale*), *supra*, PERB Decision No. 944.) Additionally the lack of specific dates of protected conduct make it impossible to establish the temporal proximity element required to show a nexus between protected conduct and adverse action. (*North Sacramento School District*, *supra*, PERB Decision No. 264.)

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 (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (PERB 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 PERB 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. (PERB 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. (PERB 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,

M. SUZANNE MURPHY
General Counsel

By _____
Valerie Pike Racho
Regional Attorney

Attachment

cc: Barbara Greenstein, Deputy City Attorney

STATE OF CALIFORNIA

ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
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Telephone: (818) 551-2805
Fax: (818) 551-2820

November 8, 2010

Patricia W. Gordon

Re: *Patricia W. Gordon v. City of Santa Monica*
Unfair Practice Charge No. LA-CE-426-M
SECOND PARTIAL WARNING LETTER

Dear Ms. Gordon:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) by the Santa Monica Municipal Employees Association (SMMEA, Union, or Charging Party) against the City of Santa Monica (City or Respondent) on December 31, 2007 (original charge), and amended on March 12, 2008 (first amended charge), March 26, 2008 (second amended charge), May 2, 2008 (third amended charge), and December 3, 2008 (fourth amended charge). A motion seeking to add Patricia Gordon (Gordon or Charging Party) as a charging party was filed on October 31, 2008 and subsequently granted by PERB.

PERB informed Charging Parties in a Partial Warning Letter dated October 26, 2010 that allegations of unfair practices under the Meyers-Milias-Brown Act (MMBA)[1] occurring prior to June 30, 2007, as well as allegations that the City failed to follow the memorandum of understanding (MOU) between SMMEA and the City, and certain allegations of interference with protected activity, did not state a prima facie case.[2] Charging Parties were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, they should amend the charge. Charging Parties were also advised that, unless they further amended the charge to state a prima facie case or withdrew it prior to November 9, 2010, the charge would be dismissed.

On October 28, 2010, Gordon advised the undersigned in a telephone conversation that she had received the October 26 Partial Warning Letter, did not intend to file an amended charge in

[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] The letter also advised that allegations that the City failed to provide information requested after June 30, 2007, and interfered with protected activity, specifically, by changing required notice of requests for release time, were to be addressed in a separate PERB document.

response to the Partial Warning Letter, and understood that all of the allegations identified as deficient in that letter would therefore be dismissed from the charge.

In a telephone conversation with the undersigned on or about November 1, 2010, SMMEA President Martha Santana confirmed receipt of the October 26 Partial Warning Letter issued by PERB in this matter. By letter dated November 3, 2010, SMMEA notified PERB of its desire to withdraw as a charging party to the charge.[3]

Because the Union is no longer a party to the charge, the allegation that the City failed to respond to an information request (which was not addressed in the Partial Warning Letter; see footnote 2 above) will be addressed herein and subsequently dismissed per the discussion below.[4]

Discussion: Standing

An employer's duty to provide, upon request, necessary and relevant information to an exclusive bargaining representative derives from the duty to bargain in good faith. (*Trustees of the California State University* (1987) PERB Decision No. 613-H.)[6] As discussed in the previous Partial Warning Letter, the duty to bargain in good faith is only owed between an employee organization and the employer, and does not apply to the relationship between an individual employee and the employer. (*Bay Area Air Quality Management District* (2006) PERB Decision No. 1807-M.) By this rationale, PERB has found that an individual employee does not have standing to pursue an allegation that an employer failed to comply with a request for information, because the duty to provide information only extends to an employee organization. (*State of California (Department of Corrections)* (2003) PERB Decision No. 1559-S.) Accordingly, Gordon, as an individual, lacks standing to allege that the City

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[3] PERB subsequently issued a Notice of such withdrawal on November 8, 2010. Accordingly, SMMEA is no longer a party to and has been removed from the caption in this case.

[4] As more fully set forth in the October 26 Partial Warning Letter, Gordon, on or around June 30 and August 7, 2007, at a time when she held a leadership position in the Union (i.e., the position of "director"), requested that the City provide her with certain information pertaining to the City's conduct of compensation and classification studies. The City, allegedly, did not provide the information requested.

[5] 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.)

failed to respond to information requested in June and August 2007, and this allegation must, based on the current record, be dismissed.

For these reasons the allegation that the City did not provide requested informationdoes not state a prima facie case.[7] 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 Fifth 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 November 15, 2010,[8] PERB will dismiss the above-described allegation from your charge. If you have any questions, please call me at the telephone number listed above.

Sincerely,

Valerie Pike Racho
Regional Attorney

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[6] 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.*)

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

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
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October 26, 2010

Patricia W. Gordon

Re: *Santa Monica Municipal Employees Association & Patricia W. Gordon v. City of Santa Monica*
Unfair Practice Charge No. LA-CE-426-M
PARTIAL WARNING LETTER

Dear Ms. Gordon:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 31, 2007 (original charge), and amended on March 12, 2008 (first amended charge), March 26, 2008 (second amended charge), May 2, 2008 (third amended charge), and December 3, 2008 (fourth amended charge). A motion seeking to add Patricia Gordon as a charging party was filed on October 31, 2008 and subsequently granted by PERB. The Santa Monica Municipal Employees Association (SMMEA, Union, or Charging Party) and Patricia W. Gordon (Gordon or Charging Party) allege that the City of Santa Monica (City or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act),[1] by interfering with protected activity, failing to provide requested information, and failing to follow the parties' memorandum of understanding (MOU). Investigation of the charge revealed the following information.[2]

The charge, as amended, is approximately 500 pages including exhibits. This letter provides a summary of pertinent information.[3] Gordon filed the unfair practice charge on behalf of the

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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] This letter does not address allegations of failure to provide information requested after June 30, 2007, or certain allegations of interference with protected activity (i.e., required notice of requests for release time) occurring after June 30, 2007. Information regarding such is provided herein for background purposes only. Those allegations will be addressed by PERB in a separate document.

[3] As will be discussed in more detail below, much of the information provided in the charge and amendments involves allegations of unfair practices occurring prior to the six-month period preceding the filing of the charge, and are therefore untimely and will not be discussed substantively in this letter. In brief, these incidents include, but are not limited to: (1) all documents related to a civil lawsuit by Gordon against the City in 2000 (including the

Union on the last day that she held the Union leadership position of "Director."[4] In its position statement filed January 22, 2008, the City alleges that Gordon lacks standing to file the unfair practice charge on behalf of the Union because the address supplied for the Charging Party is Gordon's home address, and as of January 9, 2008, the Union president was unaware that a charge had been filed. However, on April 23, 2008, PERB sent a facsimile copy of the original charge to the Union's attorney.[5] In addition, voice-mail messages were left by PERB for the Union president and Union attorney over a period of several months, and the Union did not respond to PERB's inquiries. Therefore, as it is clear that the Union is aware that a charge was filed with PERB and it took no action regarding such, it appears that the Union intends to pursue the charge.

Facts as Alleged by the Charging Parties

Original Charge

The Union and the City were, at all times relevant to this matter, parties to a memorandum of understanding (MOU) containing a "me too" clause. Beginning in July 2007, the City bargaining unit exclusively represented by the United Transportation Union (UTU) received a 4.5% salary increase. The bargaining unit represented by SMMEA did not receive the same salary increase.

Gordon states that City employees are deprived of the ability to promote by the City's Human Resources Department (HR). Supervisory positions require "supervisory experience." To qualify for supervisory positions, Gordon contends that an employee would have to leave City employment, gain the necessary experience, and then re-apply for a supervisor position within the City. The City offers a program called the "In House Academy" to substitute for supervisory experience in some instances, but Gordon asserts that the City is not offering enough classes in the In-House Academy.

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decision issued in that case, the appeal thereto, and excerpts from a related deposition); (2) all documents referring to grievances and/or information requests made before June 30, 2007; (3) allegations that Gordon was denied a City e-mail address and purposefully left off certain important City e-mails; (4) a "chronology of errors" in classification studies performed between 1999 and 2005; and (5) allegations regarding denial of promotional opportunity because of inconsistent definitions of "recent" supervisory experience from 2000-2006 and unspecified dates in 2007.

[4] After that time, and until July 2008, Gordon held the position of Union steward.

[5] The first and second amended charges had been filed as of that date, but they were not included in PERB's facsimile transmission because they consist of several hundred pages. Union attorney Peter Horton was advised that if he wished to receive a copy of the amendments by U.S. mail he should notify PERB. He never did so.

Gordon argues that the City is retaliating against employees by refusing to assign a neutral code to time taken off of work due to workers' compensation claims. Currently, the City assigns a "Code 40" to this time off, and Gordon alleges that a Code 40 carries a negative connotation for employee evaluations, and may impair an employee's ability to promote. Further, Gordon alleges that the parties' MOU provides that an employee assigned Code 40 is ineligible for "sick pay buyback."

Gordon believes that the City is retaliating against her for representing employees, and "tacitly instilling fear in its employees and Union Directors by taking extreme action against employees." As an example, Gordon states that "several years ago" a "mild mannered" Union director was fired because the City stated that she might "be a danger." This director later filed a successful lawsuit against the City, but employees were left with the impression that "even Union Directors were not protected from false accusations and being fire[d]." In addition, in 2005, 30 employees were Y-rated into lower-paying positions, despite assurances from the City that such downgrades would not happen. Gordon believes that currently the City manipulates job specifications and entry into the In-House Academy "to such a degree that employees fear making any complaint will end in there [sic] being excluded from promotional opportunities...."

First Amended Charge

1. "Me Too" Clause

On October 19, 2007, acting Union President Sonia Gardner (Gardner) sent a letter to City Manager P. Lamont Ewell (Ewell) stating that the Union had reviewed the City's response to a grievance filed over the above-referenced "me too" provision in the MOU. Gardner informed Ewell that the Union "would not be taking this grievance to the next step in the grievance procedure..." and that the grievance had been resolved with the understanding that cost-of-living adjustments are a mandatory subject of bargaining. Gordon sent an e-mail message to the Union board, requesting that the Union board vote to go to binding arbitration. Gordon reports that this motion was not seconded, and notes that the Union board never voted over the issue. Gordon contends that, due to her position as director, she had a duty as the "exclusive representative" to enforce bargaining unit rights accrued under the contract. Gordon further contends that since the Union board did not vote over whether to proceed to arbitration, that Gardner's decision not to proceed is not binding.

2. Denial of Promotion Opportunity

Gordon alleges that the City is inconsistent in its definition of "recent" supervisory experience. The definition varies from one job posting to another, some requiring that such experience be within the last five years, others requiring it be within the last three years, and others failing altogether to define the time period. The City has consistently determined that experience

gained more than ten years prior to an application for promotion is not considered "recent."[6] Additionally, Gordon alleges that the City includes "supplementals" on promotion applications that ask "redundant and irrelevant questions" purportedly to "eliminate those they don't wish to promote." The City also routinely cancels tests, and requires employees to submit a new application and "supplemental." Gordon believes that the City does this until employees "get tired and no longer apply" for promotions.

Second Amended Charge

The second amended charge consists of several hundred pages of exhibits interspersed with some one-page descriptions of the documents submitted under each exhibit tab (tabs numbered 14-30). It is noted that this voluminous amendment to the charge sometimes contains duplicative documents without any clear narrative to guide the reader. Only allegations involving conduct occurring after June 30, 2007 are discussed substantively in this letter. (See footnote 3, above.)

1. Employees' CalPERS Accounts Grievance

Gordon alleges that memoranda (memos) and requests for public records from Gordon to various City HR employees show that the City "refused to meet and confer," or "respond in writing" to Gordon's requests to discuss employees' CalPERS[7] (retirement) accounts. The second amended charge includes 27 memos and/or records requests from Gordon ranging from 2005 to December 31, 2007 related to retirement accounts.

Memos from Gordon to HR Analyst Martha Zamora (Zamora) dated October 18, 19, and 22, 2007 discuss Gordon's attempts to arrange, and alleged unresponsiveness to such attempts, meetings to discuss the retirement accounts of employees Nigel Edwards and Don Faison. Gordon also noted the City's alleged failure to respond in writing to Gordon's inquiries regarding these employees' retirement accounts. The October 18 memo concluded by stating that, unless meetings were timely arranged, "this can be considered the start of a grievance concerning this matter."

The next series of memos have various dates in December 2007. These memos reiterate the difficulty in setting up meetings and alleged failure of the City to respond in writing and/or to properly credit the retirement accounts of employees for a time period in the early 1990's, but do not reference an ongoing grievance procedure. A memo from Gordon to Zamora dated December 31, 2007 memorializes a meeting on the same date between Gordon, Zamora, and

[6] Gordon provides many specific examples of the City's inconsistent definition of "recent supervisory experience" from 2000, 2002, 2003, 2004, 2006, and unspecified dates in 2007. The litigation between Gordon and the City in 2000, referenced above at footnote 3, also involved this issue.

[7] The acronym stands for: California Public Employees' Retirement System.

Mr. Edwards. It was discussed during the meeting that the City should respond in writing to verify the City's payment to Mr. Edwards' retirement account from 1991 to 1994.

On July 23, 2007, Gordon filed a grievance with the City over the retirement account issue.

On August 6, 2007, the City responded to this grievance (and others, as discussed below). HR Director Karen Bancroft (Bancroft) states that, in accordance with the City's policy for records retention, the City maintains payroll records for seven years, and notes that an employee must work at least 1,000 hours in a fiscal year to be eligible for enrollment in PERS. Bancroft states in part:

> We will therefore conduct an audit of the City's payroll records (which will only cover the past 7 years) to determine if we inadvertently failed to enroll an employee in PERS who worked 1,000 or more hours in a fiscal year....The City's audit will only consider actual payroll records unless the employee can produce paycheck stubs that reflect the number of hours he/she worked in each pay period. If we identify any employees who should have been enrolled in PERS, we will take whatever actions are required by PERS to enroll the employees in PERS as of the date required by PERS.
>
> The audit will only go back 7 years, which is the number of years for which the City is required to retain payroll records. If there is an employee who would not be covered by this audit and the employee believes he/she should have been enrolled in PERS, the employee will need to produce documentation showing his/her rate of pay and the number of actual hours worked during a fiscal year. If that documentation shows that the employee did work more than 1,000, or more hours during a fiscal year and was not enrolled in PERS, the City will take whatever actions are required by PERS to enroll the employee in PERS as of the date required by PERS.

Also by letter dated August 6, 2007, Gordon requested that the City advance the grievance to the final level of review (i.e., review by the City Manager (Ewell)). Gordon objects to the seven-year time period for the City's audit of payroll records and asks that prior records not be destroyed by the City (citing to a particular provision of the Government Code). Gordon also states that employees should not bear the brunt of the City's error and suggested that W2s and affidavits should also be taken into account for determining PERS eligibility. Gordon points out that Bancroft did not address the City's responsibility (again citing to the Government Code) to individually respond to employees' inquiries in writing regarding their retirement accounts.

2. Workers' Compensation/Code 40 Grievance

A memo dated December 13, 2007 from Gordon to Bancroft, HR Assistant Director Jill Jones (Jones), and HR staff person Pandy Chamberlin (Chamberlin), states that Gordon recently discovered that employees' insurance coverage is either terminated, or employees must pay the premium, if employees are out of work more than 60 days on workers' compensation leave. Gordon claims that Chamberlin told her that was "not always" the policy, and that it had been changed approximately one year prior due to a "court decision." Gordon requests in the memo that the City furnish her the name of the court decision being relied upon. Gordon reports that the City never provided the name of the court decision, and argues that the issue of insurance coverage during workers' compensation leave is clearly a "negotiation issue."

On July 20, 2007, Gordon filed a grievance with the City over the use of "Code 40" for employees out on workers' compensation leave. According to Gordon, under the terms of the MOU between the Union and the City, designating an absence as "Code 40" precludes an employee from being able to "buy back" sick leave credits. Gordon asserted in the grievance that a neutral code should be assigned to such time off for employees absent for work for more than 60 days due to a work injury.

The City (via Bancroft) responded to this grievance by letter dated August 6, 2007. Bancroft states in this letter:

> We have corrected the sick leave buy back for any employee who used Code 40 as a result of being out on workers' compensation leave but met the other criteria to be eligible to receive a cash-out of sick leave at the end of FY [Fiscal Year] 2006-2007.

3. Compensation Study Grievance

Gordon initiated a grievance on November 7, 2007 regarding four job classifications and the City's alleged failure to properly conduct a compensation study. In sum, Gordon alleges that the City failed to follow the guidelines in the MOU—i.e., requiring comparison between City salaries and that of surrounding cities—when it performed various compensation studies. The City responded by letter dated December 12, 2007 that the grievance was untimely as any changes to classifications based on study results were implemented in June 2007, and as such the grievance was filed well beyond the 30-day timeframe for grievance filing under the MOU. By letter dated December 18, 2007, Gordon protested the City's determination of untimeliness and asserted that the reason the grievance was filed more than 30 days from the alleged violation is because the City refused to supply requested information, specifically, an agreement separate from the MOU between the Union and the City that governed classification and/or compensation studies. Gordon noted that since June 2007 she had made many information requests for this particular document that had not been answered by the City. Gordon stated that she would submit the grievance to the City Manager's office.

On December 20, 2007, Gordon submitted clarification of the November 7 grievance, specifically regarding the job classification of Sanitation Equipment Operator Humberto Nario. Gordon argued that Mr. Nario's portion of the grievance should be considered timely because he could not have known until he received a City memo dated October 4, 2007 that there was an issue with regard to his compensation study.[8] On January 17, 2008, Ewell responded to the grievance, without raising the issue of untimeliness. Ewell's response was that at all times the City followed the terms of the parties' MOU in conducting classification and compensation studies, including regarding Mr. Nario's study, and it was determined that Mr. Nario was not entitled to a pay adjustment.

4. Information Requests[9]

On June 30, 2007, Gordon first requested that the City provide her with the above-discussed agreement between the Union and the City governing compensation and classification studies. This agreement was referenced by Bancroft in a May 31, 2007 response to an apparently earlier-filed classification grievance initiated by Gordon sometime prior to the date of Bancroft's May 31 response. After failing to receive the requested information from the City, Gordon reasserted the request through a Public Records Act[10] request on August 7, 2007. In addition to requesting the agreement relied upon by the City, Gordon requested that the City furnish the survey cities relied upon for the Union's compensation studies, as well as the survey cities relied upon in other City bargaining units. The City again did not respond, as memorialized by letters from Gordon to the City dated September 2, October 1, and October 4, 2007.

5. Out-of-Class Pay Grievance

A series of letters dated February 12, 2007, March 14, 2007, July 17, 2007, August 12 and 22, 2007, and September 11 and 26, 2007, discuss the City's alleged promises to pay out-of-class pay to three employees, namely, Sergio Lopez, Ricardo Pickwood, and Troy Todd. Some of these letters memorialize various meetings held regarding this subject between Gordon and City representatives. The issue is first characterized as a grievance regarding out-of-class pay for Mr. Lopez and Mr. Todd by letter dated November 18, 2007 from Gordon to Solid Waste Manager Celeste Peele (Peele).[11] Gordon memorialized a grievance meeting held on November 29, 2007 between Gordon and Peele by letter to Peele dated December 3, 2007. In this letter Gordon reiterates the City's position that Mr. Todd is not eligible for out-of-class

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[8] It is not entirely clear from the current record, but it appears that Gordon believes the City failed to perform a proper compensation study with regard to Mr. Nario's classification.

[9] As previously discussed above at footnote 2, facts regarding requests for information after June 30, 2007 are provided for background only.

[10] California's Public Records Act is codified at Government Code section 6250 et seq.

[11] Mr. Pickwood is not referenced in the grievance.

pay because the duties he was performing were consistent with his job description. On December 14, 2007, attorney Ken Yuwiler on behalf of the Union sent two separate letters regarding Mr. Lopez and Mr. Todd to Craig Perkins (Perkins), Director of the City's Environmental and Public Works Management Department. These letters noted a lack of response to the grievance at the prior level and requested advancement to the next level of the grievance procedure. On January 30, 2008, attorney Yuwiler sent two letters to Bancroft, noting his earlier letters to Perkins and lack of response thereto, and requesting to advance the grievance to Bancroft's level and set up a meeting.

On February 9, 2008, Gordon amended the grievance by letter to Bancroft, adding additional factual support for the reasons that out-of-class pay is owed to the two employees. Gordon noted the earlier letters from attorney Yuwiler and the City's failure to set up a grievance meeting over the issue.

The second amended charge does not provide any other information regarding the processing of this grievance.

6. Letter to the City Council

On October 22, 2007, Gordon sent a letter to the City Council advocating for the City not to contract out solid waste services. The next day, Bancroft attached Gordon's letter to an e-mail message to Vickie Reese, acting Union vice president, to inform Ms. Reese that Gordon "makes it appear that she is representing [the Union] on this matter." Ms. Reese responded to Bancroft's e-mail message stating in part: "Please let it be known that Patricia Gordon does not represent the [Union] Board. Any official correspondence or verbal communication should come from Mona Gandara, myself as Acting Vice President, or Sonja Gardner as Acting President."

7. Required Notice of Requests for Release Time[12]

On August 12, 2007, Gordon sent a letter to the City's Superintendent of Parks and Recreation Joe McGrath (McGrath) regarding differing accounts from various City management employees of the allowed amount of release time for Union business and required notice that must be given beforehand. Gordon stated that originally McGrath had said that only four hours per month could be taken off for Union business, to which Gordon had replied that the Union could not be unreasonably denied time off for representing its members. In this letter, Gordon states that on August 9, 2007, she was informed by supervisor John Roth (Roth), acting under McGrath's direction, that Gordon would be required to give five-day notice before she could take time off for Union business. Gordon responded that the need for particular meetings is not always known that far in advance, and then stated:

[12] Information regarding this allegation is provided for background only. (See footnote 2, above.)

> I am concerned that this effort to curb my taking time off for [Union] business follows closely to my elevating two grievances to the City Manager (PERS & Comp study), challenging a disciplinary action to the Personnel Board, grieving a written reprimand for an employee in our department and delivering a memo describing my displeasure over the Union's handling of issues to Mona Gandera who is the [Union] President and also a person who I believe has a personal relationship with you.

Gordon's letter to McGrath then notes that the same day [August 9] at approximately 2:00 p.m., Roth informed her that McGrath had reconsidered his position on notice and that one-day notice was reasonable and acceptable. Gordon noted that she appreciated the reconsideration, but that in certain instances she may have to take time off without a day's notice, and that any denial of such under MOU terms is required to be in writing and with a reason supplied.

8. Number of Union Representatives Allowed to Attend Employee Discipline Meetings

On November 7, 2007, Gordon wrote a letter to HR employee Grace Quitzon (Quitzon) to memorialize their telephone conversation the day before. Gordon verified that the date of a meeting between Bancroft, Assistant HR Director Donna Peters (Peters), and the Union was scheduled for November 15, 2007 to discuss the written reprimand of employee Greg Macias. Gordon restated her understanding that the City's position was that only one Union representative could attend the meeting. Gordon noted that she had been present at a grievance meeting where two Union representatives had been allowed to attend, and asked that Quitzon check with Peters regarding this request as she wanted Union past president Jeri Wingo to accompany her to the November 15 meeting. Quitzon checked with Peters who said that per the MOU, two Union representatives could attend, but only one would be eligible for release time.

On November 13, 2007, Gordon sent another letter to Quitzon confirming that per Peters' instructions, Gordon and Ms. Wingo would attend the scheduled November 15 meeting on the Union's behalf, but that Gordon would be attending on her own time.

Third Amended Charge

The third amended charge consists of 14 pages of narrative that references the exhibits regarding the grievances and other allegations that were included in the second amended charge. Only to the extent that the third amended charge adds factual detail and/or argument regarding the issues discussed above, or raises new allegations of unfair practices, are such subjects summarized in this letter.

1. Employees' CalPERS Accounts Grievance

Regarding this allegation, Gordon notes that Bancroft responded to the grievance in writing, but states that she refused to arrange a meeting over the issue as Gordon requested.

2. Workers' Compensation/Code 40 Grievance

Regarding this allegation, Gordon adds that employee Mike Macanov was "recently" off work on workers' compensation leave for more than 60 days and received a letter from HR stating that he would need to pay $600.00 to continue his medical coverage. Gordon states that the medical premium for a single person is $360.00 and the dental premium is $7.00. Gordon alleges that the City's higher quote in this instance "may be seen as a coercive tactic to 'financially force' employees to come back to work prematurely, prior to being well. This is a bargaining issue."

Gordon also adds that employees Tony Haas and Dave Morales, upon interviewing with the City for crew leader positions, were informed that the Code 40 entries in their employment histories negatively impacted their ability for promotion. Gordon notes that the City's response to this grievance does not promise that a neutral code —i.e., not Code 40—would be assigned to employees on workers' compensation leave for more than 60 days, and states that the City is still using this code.

3. Compensation Study Grievance

Gordon notes that sometime in 2006-2007 the City introduced a single form for employees to request classification or compensation studies. Gordon believes that the City did this with the intent of being able to "mistakenly" perform incorrect studies (i.e., a classification study in circumstances where the employee actually sought a compensation study) to avoid having to pay equity adjustments. Gordon also alleges that the City simply invented an imaginary agreement between the Union and the City pertaining to compensation studies to avoid having to provide information regarding which comparison or survey cities were used to support the results of the City's compensation studies. Gordon also alleges that the City routinely relies on higher paying cities—i.e., Newport Beach, Irvine, and Beverly Hills—to use as comparison cities for management positions, but ceased using those cities, purportedly at Bancroft's request, as comparison cities for rank-and-file positions.

4. Out-of-Class Pay Grievance

Regarding this allegation, Gordon notes that the City repeatedly promised to pay certain employees for out-of-class assignments, and then failed to do so. Gordon states in relevant part:

> I feel the employees[,] rights have been interfered with by supervisors[,] constant assurances that the employees would be paid....It seems the issue was resolved until Human Resources became involved. Supervision in Solid Waste know who does what. They promised to pay these individuals and went back on their decision at the direction of Human Resources and/or felt the union would not expend the money to pursue this issue to binding arbitration.

5. Letter to the City Council

Gordon alleges that Bancroft forwarded to the Union her letter to the City Council arguing against contracting out Solid Waste services to elicit a "prearranged" response from the Union that Gordon does not represent the Union board of directors. Gordon states in part:

> The reply from the union makes no sense. Of course the unions [sic] position would be against outsourcing jobs, so why would they reply "Patricia Gordon does not represent MEA." I believe Ms. Bancroft has intimidated (carrot/stick) the union, psychologically or otherwise, into making this statement.

Gordon also alleges that this statement from the Union can be taken out of context to imply that she does not represent the Union on any matter.

6. Required Notice of Requests for Release Time[13]

Regarding this allegation, Gordon notes that the changes initiated by McGrath [on August 9, 2007] regarding the amount of notice required for Gordon to take time off for Union business were imposed after Gordon had held a Union leadership position for one year and eight months. Before this time, Gordon's supervisor, Roth, had allowed her release time with as little as a one-hour notice.

7. General Pattern of Interference

Gordon alleges that the City's general pattern of refusing to meet with her regarding grievances and failing to follow through on promises establishes a pattern of interference, stating in part:

> The employees look to their union for justice and protection. They find their union, MEA, is unable to defend them against the most illogical charges and not able to enforce their Contract....This proves to the employees involved, as well as other employees, [that] the union can not [sic] help them and they become fearful of retaliation by management, so [they] stop confronting them over contract issues...The City knows the union has no lawyer on staff and will not pursue these issues. This is financial union "busting".

[13] As previously stated, information regarding this allegation is provided for background only.

Fourth Amended Charge[14]

The fourth amended charge adds several additional exhibits consisting of memos to management personnel and e-mail messages, as well some additional factual information regarding the allegations discussed in the second and third amended charges.

1. Out-of-Class Pay Grievance

On May 7, 2008, Gordon sent a letter to Bancroft again requesting to meet over the out-of-class pay grievance regarding Mr. Lopez and Mr. Todd.

On June 4, 2008, Peters sent a letter to Gordon responding to Gordon's May 7 letter and noting the February 9 amendment to the grievance. Peters states that Mr. Lopez's higher class pay request was audited by the City and that he was paid in February 2008 for hours performing higher class duties between May 2005 and September 2007. Peters states that no further pay is owed to Mr. Lopez. Regarding Mr. Todd, Peters states that the City determined that he is not owed any higher class pay because he was not found to be working out-of-class. Peters states that, notwithstanding any potential miscommunication from department supervisors to the employees, particularly to Mr. Todd, the final decision of City management prevails.

On June 16, 2008 and July 19, 2008,[15] Gordon sent letters to Bancroft disputing the amount of out-of-class pay issued to Mr. Lopez, arguing that he was entitled to more than he received, and disputing the conclusion reached as to Mr. Todd. Gordon also states that it is unfair for the City to issue written responses to grievances without scheduling in-person meetings as the employees are deprived of their right to present evidence to dispute the City's findings.

On September 9, 2008, Union attorney Peter Horton met with Bancroft regarding the out-of-class pay grievance. Gordon reports that there was a telephone message about the meeting left at her home by attorney Horton's office that morning, but she did not discover this until she returned home from work that evening. Gordon states that no one from the City or the Union attempted to contact her at her work location that day to inform her of the meeting. Gordon

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[14] A motion to add Gordon as a separate charging party to the charge was filed with PERB on October 31, 2008. Gordon states in part: "I am concerned that the...union will withdraw these charges without resolution." PERB's case-caption was amended at that time to name Gordon as a separate charging party. Prior to the issuance of a complaint by PERB, the addition of a charging party amounts to an amendment of the charge. (See PERB Regulation 32621; *California Union of Safety Employees (Trevisanut, et al.)* (1993) PERB Decision No. 1029-S.) Gordon's October 31, 2008 motion could, therefore, be considered the "fourth" amended charge, and therefore the filing on December 3, 2008 the "fifth" amended charge. However, for ease of discussion and because Gordon labeled the filing on December 3 the fourth amended charge, that designation will apply to the December 3 filing.

[15] Gordon notes that the Union removed her from a steward position in July 2008.

states that attorney Horton later told her that Bancroft tried to contact her at the time of the meeting but was unable to reach her. Gordon states that she was never personally contacted, and that her supervisor, Roth, never informed her that HR tried to reach her that day.

Additionally, Gordon argues that although attorney Horton stated he would set up another meeting with HR and request certain computer records from the City to support the grievance, he never did. Gordon also alleges that attorney Horton maintains that he contacted both grievants on September 23, 2008 while they were working, but that Mr. Lopez denies that he was ever contacted.

On September 11, 2008, Gordon wrote a letter to Bancroft protesting her exclusion from the grievance meeting. Gordon states in part:

> It is my personal opinion that you were purposely trying to exclude me from this meeting, and I am saddened to say that [the Union] was obviously cooperating, otherwise you would have simply contacted my supervisor John Roth and asked me to attend. I am stationed at Hotkiss Park on 4th Street, 2 minutes away.

For the reasons to follow, the above allegations fail to state a prima facie violation of the MMBA.

Discussion

I. Burden of the Charging Party

PERB Regulation 32615(a)(5) 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." A 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 (*UTLA*).)[16] Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

A 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

[16] 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.)

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.)

It must be noted that the voluminous charge and exhibits in this case are neither clear nor concise, as required under the regulation cited above. Nevertheless, the entire charge, as amended, has been reviewed. As previously discussed, all allegations of unfair practices occurring prior to June 30, 2007 fall outside the six-month period within which a charging party must file an unfair practice charge with PERB and therefore must be dismissed. (*City of Santa Barbara, supra*, PERB Decision No. 1628-M.) (See footnote 3, above.) Additionally, any allegations that do not provide specific dates of conduct alleged to violate the Act cannot be evaluated for timeliness and must be dismissed. Allegations involving conduct on or after June 30, 2007 will be discussed below.

II. Allegations in Original and First Amended Charge[17]

1. "Me Too" Clause

Gordon alleges that the City failed to follow the terms of the MOU when a salary increase that was granted to another City bargaining unit was not awarded to the Union; however, evidence in the charge demonstrates that on October 19, 2007, the Union settled a grievance regarding this issue with the City. Although Gordon, at the time a Union officer, urged the Union board to vote to proceed to arbitration, the Union board declined to take a vote. Gordon states that the lack of a vote on the issue renders the decision not to pursue the grievance invalid, and that her status as a Union director also makes her the "exclusive representative," and requires that she pursue employees' rights under the MOU.

The Union, as Co-Charging Party in this matter, cannot be found to be alleging a violation by the City's conduct in this regard because acting Union president Gardner clearly informed the City that the Union declined to proceed to the next step of the grievance procedure (arbitration), and that the matter was settled with the understanding that cost-of-living adjustments are a mandatory bargaining subject. Such statements form a "clear and unmistakable" waiver of the Union's right to bargain over the subject and/or pursue the grievance any further. (*State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2130-S.) Internal union matters, such as whether a vote was conducted by the Union board as requested by Gordon, generally do not fall within PERB's power of review.

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[17] The allegation regarding the City's use of "Code 40" for employees on leave due to work injuries is first raised in the original charge; however, because that allegation is more fully addressed in the second and third amended charges, it will be discussed in a later section of this letter.

(See e.g., *Coalition of University Employees (Higgins)* (2006) PERB Decision No. 1855-H; *Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106.) Additionally, such an argument has no bearing on this unfair practice charge, because the City, as Respondent in this case, cannot be found liable for the acts of an employee organization. (See *Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S.) This leaves only Gordon, as an individual, pursuing this allegation.

The Board has held that individuals do not have standing to pursue violations of the rights of an employee organization, which, in this case, includes the right to determine the extent to which grievances will be pursued, if at all. (*State of California (Department of Corrections)* (1993) PERB Decision No. 972-S.) Moreover, the Board has found that a union, by virtue of its status as an exclusive representative, can settle a grievance and bind employees to the outcome, even if employees are unhappy with the result. (*County of Riverside* (2009) PERB Decision No. 2065-M, citing *Oakland Unified School District* (2004) PERB Decision No. 1645.) Gordon's argument that her position as a Union officer confers upon her an equal status as the exclusive representative is unsupported in the law. In order for a union officer to act in his or her "official" capacity, the officer must have actual or apparent authority to bind the employee organization. (*Los Angeles Community College District* (1982) PERB Decision No. 252.) That is not the case here, as the Union clearly disagreed with Gordon's position. Again, internal union matters, including internal disagreement among union officials, is generally not within PERB's power of review (*SEIU Local 1000, CSEA (Burnett)* (2007) PERB Decision No. 1914-S) and is inapplicable to a charge against the City (*Union of American Physicians & Dentists (Menaster)*, *supra*, PERB Decision No. 1918-S). Accordingly, this allegation is without merit and must be dismissed.

2. Denial of Promotional Opportunities

This allegation involves the City's application of the term "recent supervisory experience" and has been an ongoing issue between Gordon and the City since at least 2000. This issue was also the subject of a civil lawsuit between Gordon and the City, as discussed at footnote 3. As previously stated, the bulk of this allegation is clearly untimely, as it involves conduct from 2000-2006. Gordon also provides some examples of inconsistent application of the above-stated term as well as allegedly unfair testing procedures for promotional positions from unspecified dates in 2007. Without specific dates of alleged unlawful conduct regarding this issue in 2007, it cannot be determined whether the allegations are timely, and therefore they must be dismissed on this basis. (*City of Santa Barbara*, *supra*, PERB Decision No. 1628-M.)

However, even if timely allegations were provided, Gordon, as an individual, has no standing to pursue either the bargaining rights of the Union regarding this matter (*Alum Rock Union Elementary School District* (2005) PERB Decision No. 1748), or assert a violation of the rights of other employees (*California Nurses Association (O'Malley)* (2004) PERB Decision No. 1607-H).

Regarding any potential violation of the Union's rights regarding this issue, there is no information that the Union made any demand to bargain over any alleged change in policy,

that a grievance was filed, or any allegation that would suggest a violation of the Union's rights under the MMBA. Absent an independent violation of the MMBA, PERB is without authority to enforce collective bargaining agreements between the parties. (*Los Angeles Unified School District* (1984) PERB Decision No. 448.) Accordingly, this allegation does not state a prima facie case and must be dismissed.

3. Retaliation Against Gordon for Her Representation of Employees

Gordon alleges in the original charge that the City is retaliating against her for representing employees and filing grievances on their behalf. To demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 3506 and PERB Regulation 32603(a), a 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*); *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; 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 (*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.)

There is no question that Gordon engaged in protected activity by filing numerous grievances with the City over various issues and that the City was aware of this protected conduct. However, the charge, as amended, is devoid of facts to show that the City took any action against Gordon that would negatively impact her employment.[18] Thus, there are no grounds to support a charge that the City retaliated against Gordon and this allegation, as written, must therefore be dismissed.

4. Allegation that the City is "Tacitly Instilling Fear In Employees"

This allegation can best be described as stating that the City's conduct has interfered with employees' rights arising under the MMBA. The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities; and (3) that employer's conduct was not justified by legitimate business reasons.

(*Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807.)

As previously discussed, Gordon, as an individual, lacks standing to assert violations of the rights of other employees. (*California Nurses Association (O'Malley)*, *supra*, PERB Decision No. 1607-H.) The Union, however, may assert such a charge. (See, e.g., *Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M.) The facts presented to support this allegation do not demonstrate a prima facie interference violation. The charge provides anecdotal evidence regarding a former Union director having been fired several years

[18] In the absence of facts sufficient to establish the requisite "adverse action" element, the "nexus" element is not further analyzed herein. Any amended charge seeking to correct the "adverse action" deficiency should also address the "nexus" element per the factors described above.

ago and the City having "Y-rated" several employees in 2005 despite assurances to the contrary. The logical inference regarding this allegation is that employees were left with the impression that the City could act with impunity. In addition to failing to provide *timely* allegations (i.e., within the six-month period preceding the filing of the charge) of City conduct that allegedly interfered with employees' rights, there is no specific evidence that any employees[19] were engaged in protected activity. Thus, this allegation does not meet the above-described test and must be dismissed. (*Board of Supervisors of Tulare County*, *supra*, 167 Cal.App.3d 797, 807.)

III. Allegations in Second, Third, and Fourth Amended Charge

1. Grievances

At the outset, it must be noted that allegations regarding the City's handling of the various grievances described in the charge appear to be two-fold, namely: (1) dissatisfaction with the City's ultimate response to the grievances; and (2) Gordon's objections that the City did not schedule in-person meetings with Gordon to discuss the grievance before issuing a written determination. As to the latter allegation, PERB has no authority to remedy a breach of a contractual grievance procedure—e.g., failure to follow exactly the procedural steps outlined for grievance processing in a collective bargaining agreement—unless the breach also constitutes an unfair practice. (*Los Angeles Unified School District* (2009) PERB Decision No. 2073.) A unilateral change in an established policy, such as that set forth in a collective bargaining agreement, may demonstrate a violation of the statutory duty to bargain in good faith. However, this duty is only owed between an employee organization and the employer. (*Bay Area Air Quality Management District* (2006) PERB Decision No. 1807-M.) For this reason, PERB has long held that an individual employee lacks standing to allege a unilateral change violation. (*Oxnard School District (Gorcey and Tripp)* (1988) PERB Decision No. 667.) Thus, an individual employee lacks standing to allege that a breach of a contractual grievance procedures amounts to a unilateral change. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 2073; *Bay Area Air Quality Management District*, *supra*, PERB Decision No. 1807-M.) Accordingly, Gordon, as an individual, lacks standing to allege that the City violated the MOU by failing to adhere to the terms of the grievance procedure. Nor can she, as an individual, assert the rights of other bargaining unit employees who may be affected by or are the subject of a grievance. (*California Nurses Association (O'Malley)*, *supra*, PERB Decision No. 1607-H.)

Allegations that the Union may pursue as unfair practices regarding the various grievances in the charge are discussed below.

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[19] No employees were actually named in the original or first amended charges as having their rights allegedly interfered with by the City. Thus, this allegation also suffers from a lack of specificity and may also be dismissed on this basis. (*United Teachers-Los Angeles (Ragsdale)*, *supra*, PERB Decision No. 944.)

A. Employees' CalPERS Accounts

The City issued a written response to this grievance on August 6, 2007, outlining the steps it would take to audit payroll records for a seven-year period to correct any errors found in the City's potential failure to properly enroll employees in the public retirement system, and also describing steps employees could take to provide evidence that they should have been enrolled if their situation was not encompassed by the seven-year review. Also on this date, Gordon requested that the grievance be advanced to the City Manager level (Ewell). There is no information in the charge whether Ewell subsequently issued a separate response, nor is the MOU section addressing the grievance procedure provided in or attached to the charge.

To sustain an allegation of an unlawful unilateral change, it must be demonstrated that: (1) the employer breached or altered the parties' written agreement or past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members); and (4) the change in policy concerns a matter within scope of representation. (*Trustees of the California State University* (2006) PERB Decision No. 1876-H; *Grant Joint Union High School District* (1982) PERB Decision No. 196.) Since the MOU grievance procedure is not provided in or with the charge, it cannot be determined whether any policy was changed by Ewell's failure to provide a separate response. (*City of Commerce* (2008) PERB Decision No. 1937-M [where charging party references a grievance procedure but does not establish what the terms or past practices of this procedure are, it does not provide sufficient facts to show that the employer breached or altered the parties' written agreement or established past practice].) Even assuming arguendo, that such conduct did deviate from the MOU, there is insufficient evidence that such would amount to anything other than an isolated breach of the contract. (*Ibid.* [a single isolated breach of a contract's grievance procedure does not state a prima facie case for a unilateral change because it fails to establish that the violation has a generalized effect or continuing impact on unit members].) Thus, there is insufficient evidence of a unilateral change to the grievance procedure in violation of the MMBA.

Additionally, although the MMBA provides exclusive representatives the right to <u>file</u> grievances (*Omnitrans* (2009) PERB Decision No. 2010-M), nothing contained in the MMBA guarantees a particular desired outcome. (*County of Riverside* (2009) PERB Decision No. 2065-M.) Dissatisfaction with an employer's response to a grievance does not demonstrate a violation of the MMBA. (*Ibid.*) As previously stated, PERB has no authority to remedy contractual disputes absent an independent violation of the MMBA. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 2073; see also *Regents of the University of California* (2010) PERB Decision No. 2105-H.) The record shows that the City answered this grievance. The fact that the Union, or Gordon, was unhappy with the outcome does not show that the City engaged in unlawful conduct. Accordingly, this allegation does not state a prima facie case and must be dismissed.

B. Workers' Compensation/Code 40

The City responded to this grievance on August 6, 2007, stating that it had corrected the sick leave buy-back for any employee assigned Code 40 while on workers' compensation leave for the fiscal year in question. Gordon alleges that this subject matter is a "negotiation issue" and that the City continues to use the Code 40 designation. However, there is no information in the charge that this grievance was appealed and/or sought to be advanced to the next level of processing. Additionally, Gordon alleges that the City's use of this code can be viewed as retaliatory and/or coercive against employees because it may impair their ability to promote, citing as examples employees Haas and Morales who were informed of such, and also that employee Macanov was quoted allegedly incorrect premiums to continue his medical coverage after having been on worker's compensation leave for an extended period.

i. "Negotiation Issue"/Unilateral Change Issue

The City responded to this grievance. Again, mere dissatisfaction with that response does not demonstrate a violation of the MMBA. (*County of Riverside*, *supra*, PERB Decision No. 2065-M.) There are no facts to demonstrate that the City's response constituted a change in grievance policy or practice, or even that the Union sought additional review. (*City of Commerce*, *supra*, PERB Decision No. 1937-M.) Despite Gordon's characterization that this matter is a "negotiation issue," there are no facts to demonstrate that the Union demanded to bargain over this subject. The duty to bargain arises on demand. If no bargaining demand is made, then no violation is shown by a failure to bargain. (*Stanislaus County Department of Education* (1985) PERB Decision No. 556 [determinative factor is whether desire to bargain is made known].) For theses reasons, this allegation does not support a finding that the City violated its duty to bargain in good faith.

ii. Retaliation/Interference by City's Use of Code 40

As stated above, in order to demonstrate an employer's unlawful retaliation, it must be shown 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 <u>because of</u> the exercise of those rights. (*Novato*, *supra*, PERB Decision No. 210.) In order to demonstrate unlawful interference with protected conduct, it must be shown: (1) that employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain, or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons. (*Board of Supervisors of Tulare County*, *supra*, 167 Cal.App.3d 797, 807.) Neither of the above-stated tests are met under these circumstances because there are no facts in the charge to demonstrate that employees Haas, Macanov, or Morales exercised any protected rights under the Act. Thus, retaliation and or/interference by the City is not demonstrated and this allegation must be dismissed.

C. Compensation Study

The City (by Bancroft) first responded in December 2007 that the grievance disputing the City's compensation study regarding four job classifications was denied due to untimeliness. Gordon protested the City's determination, explained that the City's unresponsiveness to information requests caused any issue regarding timeliness, and sought advancement of the grievance to the next level of processing. In January 2008, City Manager Ewell responded substantively to the grievance without addressing the issue of untimeliness and found that the City had adhered to the terms of agreement between the Union and the City at all times during its compensation and/or classification studies, and further that no adjustments in pay were found to be warranted. Gordon protested the City's determination and makes various allegations in the charge that the City intentionally performs incorrect studies to avoid making equity-pay adjustments, invented a side agreement regarding this issue to avoid following the terms of the MOU, and only uses higher-paying comparison cities to adjust management pay rates, but refuses to do so for rank-and-file positions.

The City responded to this grievance at two levels and there is no allegation in the charge that the City deviated from the established grievance procedure in this instance. Any dispute over methodology used for compensation studies is a contractual issue and not one properly decided by PERB in this case. (*County of Riverside*, *supra*, PERB Decision No. 2065-M; *Los Angeles Unified School District*, *supra*, PERB Decision No. 448.) The particular provisions of the MOU regarding compensation studies were not included in or with the charge, and therefore it cannot be determined whether there was any change in policy regarding such. (*City of Commerce*, *supra*, PERB Decision No. 1937-M.) As discussed above, disagreement with the employer's conclusion regarding a grievance does not demonstrate that the employer acted unlawfully. (*County of Riverside*, *supra*, PERB Decision No. 2065-M.) Accordingly, this allegation fails to state a prima facie case and must be dismissed.

D. Out-of-Class-Pay

A grievance meeting was held regarding the issue of out-of-class pay for Mr. Todd and Mr. Lopez on November 29, 2007 where Gordon was informed that the City believed that Mr. Todd was not working out-of-class and thus was not entitled to any additional compensation. In December 2007 and January 2008, a Union attorney wrote letters to City management requesting that the grievance be advanced to higher levels for processing and requesting a meeting over the issue. In February 2008, Gordon amended the grievance to provide additional argument. In June 2008, the City responded by letter noting that Mr. Lopez's position was audited and he was paid for working out-of-class for a little more than two years and that no further money was owed to him. The City found that Mr. Todd was not working out-of-class. In June and July 2008, Gordon protested the City's findings and the lack of in-person meetings. On September 9, 2008, the City and Union attorney Horton met over the issue, and Gordon did not learn of this meeting until after it happened. Gordon objects to having been excluded from the meeting.

The record shows that this grievance was answered by the City and that the City met with the Union over the issue. Whether the exact steps of the grievance procedure were followed cannot be determined from the charge and any deviation from such cannot be remedied by PERB absent an independent violation of the MMBA. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 2073.) Gordon's displeasure at not being included as a participant in the September 2008 meeting does not show that the City violated the MMBA. (*County of San Diego* (2009) PERB Decision No. 2005-M [because the MMBA does not grant an individual employee the right to attend labor/management meetings, employer did not interfere with employee's rights by barring employee from labor/management meetings].) Gordon has no legal basis to dictate or object to the Union's chosen representatives. (*Chaffey Joint Union High School District* (1982) PERB Decision No. 202.) Mere disagreement with the City's conclusion regarding this grievance, as previously stated, does not demonstrate a violation of the MMBA. (*County of Riverside*, *supra*, PERB Decision No. 2065-M.)

Additionally, there is an allegation in the third amended charge that because employees' supervisors repeatedly assured them that they would be compensated for working out-of-class, and then HR negated the determination of the supervisors, that this conduct tended to interfere with the employees' protected rights. In addition to the fact that the record clearly shows that Mr. Lopez was paid for working out-of-class, it is not clear how assurances that payments would be made followed by delays of payment, or changed City positions, would tend to discourage employees from seeking out-of-class pay or from filing grievances. This conduct by the City does not rise to the level of interference with employees' rights under the MMBA.

For these reasons, the allegations regarding the out-of-class pay grievance do not state a prima facie case and must be dismissed.

2. Miscellaneous Interference Allegations

A. Letter to the City Council

Gordon alleges that Bancroft in some manner "intimidated" the Union into making the statement that Gordon does not represent the Union after Bancroft forwarded to the Union Gordon's letter to the City Council advocating against contracting out. There is insufficient evidence in the charge that Bancroft took any action or made any statements to the Union that intimidated or coerced the Union to say what it did. Pleading or raising a bare allegation without sufficient supporting facts is insufficient for the purposes of stating a prima facie case. (*Regents of the University of California* (2010) PERB Decision No. 2109-H.) Furthermore, there no grounds to find that Bancroft's action of supplying *the Union* with Gordon's letter would tend to discourage or interfere with Gordon's exercise of protected activity. Therefore, this allegation does not state a prima facie case and must be dismissed.

B. Number of Union Representatives Allowed to Attend Employee Discipline Meetings

The City, citing to the MOU,[20] stated that although more than one Union representative could attend meetings to discuss employee discipline, only one would be granted release time to do so. The City's conduct does not interfere with the Union's right to represent its members under these circumstances. MMBA section 3505.3 requires public agencies to allow a reasonable number of union representatives a reasonable amount of release time for when an employee organization and an employer are "formally" meeting and conferring. This reference to formal meeting and conferring in the MMBA pertains to parties bargaining over matters within the scope of representation, such as when negotiating a contract. (See e.g., *County of Santa Clara* (2010) PERB Decision No. 2120-M.) PERB has found that an employer's rule limiting employees to one representative for grievance and administrative review proceedings does not interfere with employees' protected rights. (*The Regents of the University of California (Berkeley)* (1983) PERB Decision No. 308-H.) In this case, the City did not actually prohibit more than one Union representative from attending an employee discipline meeting; it simply stated it would not pay more than one employee for doing so. This conduct does not abridge the Union's right to represent its members, or an employee's right to union representation, and thus no interference violation is demonstrated.

The right to represent members rests in the exclusive representative, and thus Gordon, as an individual, lacks standing to assert a violation of that right. (*Alameda County Medical Center* (2004) PERB Decision No. 1620-M.) For these reasons, this allegation does not state a prima facie case and must be dismissed.

C. General Pattern of Interference

Gordon alleges that the City's recalcitrance in setting up grievance meetings with her and failing to follow through on promises creates an impression in the employees' minds that the Union is powerless to enforce the contract and/or help represent them in their employment concerns, and so this discourages employees from exercising their protected rights. The record shows that, although not always to Gordon's liking, meetings between the City and the Union regarding various grievances have occurred and grievances have been addressed/resolved by the City. As stated above, Gordon has no basis to object to whom the Union chooses to send to meetings to represent the Union's interests (*Chaffey Joint Union High School District*, *supra*, PERB Decision No. 202), and the City does not violate the MMBA by failing to meet specifically with her (*County of San Diego*, *supra*, PERB Decision No. 2005-M).

It is clear from the information in the charge that Gordon takes issue with many of the decisions the Union makes; however, this unfair practice charge was filed against the City. The City cannot be held liable for the conduct of the exclusive representative. (See *Union of American Physicians & Dentists (Menaster)*, *supra*, PERB Decision No. 1918-S.)

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[20] No part of the MOU was included with the charge.

In sum, there is no basis to conclude that the City has engaged in a pattern of conduct that would tend to discourage employees from exercising rights under the MMBA, and thus this allegation must be dismissed.

Conclusion

For all of the reasons discussed herein, the above-discussed allegations, as presently written, do 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 Fifth 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 November 9 2010, PERB will dismiss the above-stated allegations from the charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Valerie Pike Racho
Regional Attorney

cc: Martha Santana, SMMEA President