STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Charging Party, v. CITY & COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-1576-M PERB Decision No. 2712-M May 6, 2020

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele and Benjamin J. Fuchs, Attorneys, for Service Employees International Union, Local 1021; Jonathan Yank, Deputy City Attorney, for City and County of San Francisco.

Before Banks, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Service Employees International Union, Local 1021 (SEIU) from the Office of the General Counsel's dismissal of SEIU's unfair practice charge against the City and County of San Francisco (City). SEIU's charge, as amended, alleged that the City violated the Meyers-Milias-Brown Act (MMBA)[1] by: (1) unilaterally reclassifying certain positions and/or otherwise changing related policies without providing SEIU notice and an opportunity to bargain over the decision or its effects; (2) dealing directly with bargaining unit employees rather than with their

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise specified, all statutory references herein are to the Government Code.

exclusive representative, SEIU; and (3) retaliating against SEIU Chapter President Edlyn Kloefkorn (Kloefkorn) for protected activities. The Office of the General Counsel (OGC) dismissed the amended charge for failure to state a prima facie case. SEIU timely appealed the dismissal of its retaliation allegations.

In resolving an appeal of a dismissal, we review OGC's decision de novo. (*Lake Elsinore Unified School District* (2018) PERB Decision No. 2548, p. 6, fn. 5; *City of San Jose* (2013) PERB Decision No. 2341-M, p. 47.) At this stage of litigation, "the charging party's burden is not to produce evidence, but merely to allege facts that, if proven true in a subsequent hearing, would state a prima facie violation." (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 13, fn. 8.) We assume that charging party's factual allegations are true, and we view them in the light most favorable to the charging party. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 8 (*Cabrillo I*); *Cabrillo Community College District* (2019) PERB Decision No. 2622, p. 4 (*Cabrillo II*).) We do not rely on the respondent's responses if they explicitly or implicitly create a factual conflict with charging party's allegations, even if the respondent's contrary responses are stated more persuasively or appear as if they may be backed up by more supporting evidence, when compared to charging party's allegations. (*Cabrillo I*, *supra*, PERB Decision No. 2453, p. 8; *Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M, p. 13.)

Thus, in this procedural posture we generally do not resolve conflicting allegations, make conclusive factual findings, or judge the merits of the dispute. (*Cabrillo II*, *supra*, PERB Decision No. 2622, pp. 4-5; *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 12.) If there are one or more contested, outcome-

determinative facts (or mixed questions of law and fact), OGC should issue a complaint and generally a formal hearing is needed, absent a stipulated record. (*Salinas Valley Memorial Healthcare System*, *supra*, PERB Decision No. 2298-M, p. 13.) A complaint typically must also issue if there are contested, colorable legal theories. (*County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 12.) Nonetheless, it is appropriate to dismiss an alleged violation without issuing a complaint if the parties' filings disclose undisputed facts sufficient to defeat the claim. (*Cabrillo I*, *supra*, PERB Decision No. 2453, p. 9.)

Mere legal conclusions are insufficient to state a prima facie case. (*Lake Elsinore Unified School District*, *supra*, PERB Decision No. 2548, p. 18.) However, "where a material factual dispute turns on the respondent's state of mind," we take into account that motive is generally within respondent's own knowledge and that there is little opportunity for pre-hearing discovery, and we impose on charging party a relatively low burden to allege facts tending to show the requisite state of mind. (*Ibid*.)

The Board has reviewed the entire record, including the unfair practice charge, the amended charge, the City's position statement, the warning and dismissal letters, SEIU's appeal, and the City's response thereto. Based on this review, we grant SEIU's appeal and remand to OGC to issue a complaint on SEIU's retaliation allegations. SEIU did not appeal the dismissal of its unilateral change and direct dealing claims, and those allegations remain dismissed.

We first recount the facts we presume true at this stage—together with relevant procedural history—and we then explain why we reverse OGC's dismissal of SEIU's retaliation claims.

BACKGROUND

1. As the City moved to reclassify four bargaining unit positions, SEIU sought to meet and confer

The Human Services Agency (HSA) is a City department that provides public benefits and services to individuals, children and families, the elderly, and dependent adults. At all times relevant, Kloefkorn worked in HSA's Workforce Development Division as the Welfare-to-Work Handbook Coordinator. Her position was classified as a 2915 Program Specialist Supervisor (2915 Specialist). She also served at all relevant times as SEIU's Chapter President. In the fall of 2017, Kloefkorn was the most senior of the five 2915 Specialists at HSA. HSA's other four 2915 Specialists worked in the Investigations Division.

On July 10, 2017, the City posted a job announcement for recruitment into the 2917 Program Analyst Classification (2917 Analyst), which is higher paid than the 2915 Specialist Classification. At an unknown time, Kloefkorn and all four of her 2915 Specialist counterparts in HSA sat for the 2917 Analyst examination and qualified for the 2917 Analyst eligibility list.

On or about October 23, 2017, HSA posted four openings for 2917 Analysts in its Investigations Division. SEIU and Kloefkorn came to understand that HSA intended to reclassify the four Investigations Division 2915 Specialists by promoting them into the new 2917 Analyst positions. On October 24, 2017, Kloefkorn e-mailed HSA Labor Relations Manager Sharee Nisha (Nisha), HSA Director of Human Resources Luenna Kim (Kim), and HSA Deputy Director of Finance Daniel Kaplan (Kaplan) to advise them that SEIU had received HSA's notice that it intended to

reclassify the 2915 Specialist positions in its Investigations Division.[2] Kloefkorn, on behalf of SEIU, requested that the City meet and confer over the reclassification decision and its effects on unit members. On October 25, 2017, Labor Relations Analyst Jared Harris (Harris) replied to Kloefkorn, stating that "[HSA] is in the process of reviewing and gathering information on the 2915 [Specialist] classification in Investigations," and that HSA was not agreeing to meet and confer at that point.

On November 7, 2017, Kloefkorn e-mailed Nisha with SEIU's second request to meet and confer over HSA's decision to reclassify the 2915 Specialist positions. Kloefkorn stated that there were only five 2915 Specialists in HSA, four of whom were in the Investigations Division, and she was the only 2915 Specialist who was not in the Investigations Division. Kloefkorn noted that she was scheduled for a worker's compensation-related surgery on November 17, 2017, and she requested that HSA agree to postpone all actions concerning the reclassification until she would be able to meet and confer. Kloefkorn closed by writing that "employees have protect[ed] rights regarding their class," and she included the section of the City's civil service rules that she believed to be applicable (section 109).

On November 21, 2017, SEIU Field Representative Thomas Vitale (Vitale) e-mailed Kim and Nisha with a request for information regarding HSA's reclassification of 2915 Specialist positions to 2917 Analyst positions. Among other requests, Vitale asked that HSA: (1) explain whether it intended to eliminate the 2915 Specialist classification or take any other action with respect to that classification; (2) provide the

[2] SEIU and the City variably refer to the conversion of the 2915 Specialist positions to 2917 Analyst positions as either a "reclassification" or a "reassignment." For the purpose of consistency, we refer to the decision as a "reclassification."

names of employees who had applied for the 2917 Analyst positions and which employees were successful; (3) provide the job analysis the City was using "to support the change to the 2917 class"; and (4) identify the date the reclassification had occurred or would take effect.

On November 29, 2017, Kloefkorn e-mailed HSA Office of Civil Rights Analyst Kathleen Tran (Tran) to inform her that her surgery had been delayed. Tran responded on the same day and asked Kloefkorn for new tentative dates for her disability leave and a completed federal Family Medical Leave Act (FMLA) form from her doctor.

On November 30, 2017, Kloefkorn e-mailed Tran to express her concern that she might miss the interviews for the 2917 Analyst positions if they occurred during her disability leave, because her request for a reasonable accommodation to interview had gone unanswered. Kloefkorn noted that she would be the only 2915 Specialist left in the City after the reclassification, leaving her vulnerable to layoff and affecting her ability to promote. In Kloefkorn's view, HSA was pushing her to provide dates for her disability leave so that it could complete the reclassification while she was absent. Kloefkorn renewed her request for a reasonable accommodation to interview for one of the 2917 Analyst positions during her disability leave, and asked how she could be provided an interactive meeting to discuss her impending disability leave.

On December 11, 2017, Harris e-mailed Kloefkorn to state that HSA would not agree to meet and confer regarding its reclassification decision. However, HSA was willing to meet with Kloefkorn and her union representative to discuss her concerns regarding the reclassification. Harris provided available dates and times.

That same day, Harris replied to Vitale's request for information. Harris stated that "[HSA] has no intent to take any classification action involving the classification 2915 Program Specialist Supervisor position." With respect to HSA's intent as it pertained to current 2915 Specialists, Harris responded that "[HSA] has no intent to make changes." Harris refused to provide the relevant job analysis, stating that "[e]xam information, including job analysis, is kept highly confidential to maintain the integrity of the exam materials." He did not provide an answer to Vitale's questions about the date the reclassification occurred or was set to occur. Harris stated that there were "No Respondents" for any of the four posted 2917 Analyst positions.

Harris also e-mailed Kloefkorn on December 11, 2017, denying SEIU's October 24 and November 7, 2017 requests to meet and confer over the impacts of the reclassification.

On December 12, 2017, Vitale e-mailed Nisha and Kim, stating that SEIU maintained its demand to meet and confer over the impacts of the reclassification. Nisha replied that Harris had already offered on behalf of HSA to meet on either December 14 or 15, 2017.

Later that day, SEIU Chief Strategist and Steward Sin Yee Poon (Poon) e-mailed Harris, Nisha, and Kim. Poon recounted SEIU's multiple requests to meet and confer over the reclassification. She included with her e-mail an HSA organizational chart showing the four incumbent 2915 Specialists in the Investigations Division, specified by name, as being promoted to 2917 Analyst positions. As discussed further below, SEIU alleges that the early timing of this chart demonstrates

that the City went into the promotion process with a bias as to the probable outcome and thereby did not give Kloefkorn fair consideration.

Poon also contended: "It is very clear that it is HSA's intent to 'turn' the four (4) 2915 [Specialist] positions in Investigations into 2917 [Analyst] positions (with the incumbents attached), without a formal reclassification process." Poon alleged that this action was "highly unusual" and "inappropriate" and "would result in leaving [Kloefkorn] as the only incumbent 2915 [Specialist] left in the City." Hence, if the City subsequently decided to eliminate Kloefkorn's position, Kloefkorn would be summarily laid off with no one to displace. According to Poon, the four 2915 Specialist incumbents in Investigations had informed SEIU that "[m]anagement had (covertly) prompted them to take the 2917 [Analyst] test (through several cycles) in anticipation of this move to change their positions. Ms. Kloefkorn is also on the eligible list but was not prompted by Management nor given any advance information about the pending changes to the 2915 [Specialist] positions in Investigations." (Underlining in original.) Poon also noted that HSA had been pressing Kloefkorn to complete an FMLA form calling for her disability leave dates, even though worker's compensation leave did not require FMLA protection. Poon reiterated SEIU's request for a meet and confer.

On December 15, 2017, an HSA representative e-mailed Vitale to confirm "the 2915 [Specialist] Request for Information meeting" set for December 19, 2017, at 10:00 a.m. That same day, Nisha e-mailed Vitale to explain that HSA was agreeing to "meet and clarify the issues surrounding the classification 2915 Program Specialist Supervisor. The Agency do[es] not agree to meet and confer at this time but [we] are

happy to meet to clarify [the] issues that [the] Union wishes to bargain." Later that day, Kloefkorn sent Nisha's e-mail to a number of recipients, all of whom appear to be internal to SEIU. According to Kloefkorn, HSA had already conducted interviews for the 2917 Analyst positions and offered the four positions to the 2915 Specialists working in the Investigations Division.

On December 19, 2017, Harris e-mailed Vitale and Kloefkorn. Harris stated that earlier that day HSA management had waited from 10:00 a.m. until approximately 10:20 a.m. at the agreed upon location, but that no one from SEIU had appeared. Harris further stated that HSA was still willing to "meet and clarify any impact issues from the reclassification." Kloefkorn replied by e-mail on the same day. Kloefkorn's e-mail maintained SEIU's demand to meet and confer rather than merely meet and clarify, asked whether the City now agreed to meet and confer, and insisted that the City maintain the status quo until after it had met and conferred with SEIU. Based on the information SEIU submitted with its charge, it appears that neither Kloefkorn nor SEIU received a response to Kloefkorn's December 19 e-mail.

The City ultimately completed the hiring process by mid-January, choosing the four 2915 Specialists in its Investigations Division over Kloefkorn. The City asserts it did so because Kloefkorn interviewed poorly. We do not assume the City's contention to be true at this stage, because it conflicts with multiple factual allegations SEIU has made, creating a factual dispute regarding the City's motives. We discuss the nature of that factual dispute *post* at pages 21-27.

2. OGC's warning letter

OGC issued SEIU a warning letter stating that the above facts, as set forth in SEIU's initial charge, failed to establish a prima facie case of any MMBA violation. The warning letter indicated that SEIU had failed to identify any existing policy that the City allegedly changed when it reclassified the 2915 Specialist positions as 2917 Analyst positions. Accordingly, OGC found that the charge failed to state a prima facie unilateral change claim. OGC rejected SEIU's direct dealing allegation for similar reasons, finding that SEIU did not sufficiently specify a rule or policy that the City attempted to waive or modify through its discussion with Investigations Division employees.

As to SEIU's retaliation claim, the warning letter found that SEIU had alleged two protected activities: (1) Kloefkorn's service as SEIU Chapter President; and (2) Kloefkorn's efforts to meet and confer on behalf of SEIU between late October and December 2017. The letter also found SEIU had alleged that the City took adverse action in deciding not to grant Kloefkorn a promotion to one of the 2917 Analyst positions.

However, OGC found the allegations were insufficient to support a nexus between the adverse action and either form of protected activity. As to the first protected activity, OGC explained that SEIU's charge did not cite "any specific instance when Kloefkorn exercised her duties as Chapter President." OGC opined that it therefore did not know whether the City's adverse action was temporally proximate to one or more times Kloefkorn exercised her duties, and, as a result,

SEIU's charge was insufficient to state a prima facie retaliation case based upon this first form of protected activity.

As to the second protected activity, OGC found that SEIU had alleged close temporal proximity between Kloefkorn's attempts to compel the City to meet and confer over the reclassification decision and the City's later decision not to select Kloefkorn to fill one of the new 2917 Analyst positions. However, OGC did not find that SEIU sufficiently pleaded any other nexus elements. Although OGC noted that there were allegations of "suspicious" City conduct—such as pushing the staffing decisions through as promotions rather than as reclassifications, and encouraging all of the incumbent 2915 Specialists other than Kloefkorn to apply—OGC found these allegations insufficient because much of the suspicious City conduct predated Kloefkorn's efforts to meet and confer. OGC therefore found insufficient allegations tending to show that Kloefkorn's efforts substantially motivated the City's actions.

3. SEIU's amended charge

After receiving the warning letter, SEIU filed an amended unfair practice charge (amended charge), alleging a number of additional protected activities in which Kloefkorn engaged, both as SEIU Chapter President and otherwise, between May 2016 and the date of the amended charge. SEIU also alleged new adverse actions occurring after the filing of the initial charge. We proceed to recount these additional facts, which at this stage of litigation we must assume are true.

On May 3, 2016, Kloefkorn e-mailed HSA management to express concerns about health and safety issues relating to concrete drilling and attendant dust exposure that occurred during the workday at the HSA office. HSA addressed

Kloefkorn's complaint in a May 24, 2016 letter to the California Department of Industrial Relations' Division of Occupational Safety and Health (OSHA), stating that it had responded to Kloefkorn's concerns with a variety of remedial measures.

On or around October 19, 2016, Kloefkorn filed a complaint with OSHA wherein she reported various hazardous conditions at the HSA office. That same day, Kloefkorn e-mailed HSA management representatives to demand that HSA cease and desist all renovation on the second floor of the HSA office building due to potential asbestos exposure. Kloefkorn stated that SEIU was putting HSA on notice that employees had been exposed to a harmful amount of dust and noise pollution. She stated that employees were working under "disruptive and hazardous" conditions and demanded a "safe and healthy work environment" for HSA employees. Following an investigation, OSHA issued two citations to the City "for not ensuring compliance with safe and healthful work practices."

On January 3, 2017, a representative from HSA Employee and Labor Relations e-mailed Kloefkorn to confirm that HSA had approved release time for her and other individuals to attend a one-day bargaining team training at SEIU's offices.

On February 3, 2017, Kloefkorn e-mailed Kim and other HSA representatives to request to meet and confer regarding health and safety issues affecting HSA employees. Kloefkorn detailed her efforts to call the City's Health and Safety unit regarding the HSA office's high temperature and limited air flow. In addition, she outlined other employee complaints, including unhealthy and unsafe cubicles, concerns about equipment, concerns about the security of property, and low employee

morale, as well as employees' fear of retaliation for speaking out about health and safety issues.

On July 11, 2017, Kloefkorn e-mailed Kaplan and other HSA representatives to "document an account of blatant harassment and discrimination that [she] discovered during [her] investigation of a member complaint" affecting two SEIU members.

On or around September 8, 2017, Kloefkorn submitted a request for information to HSA regarding the installation of glass partitions in the cubicles at the HSA office building. Nisha provided responses on September 19, 2017.

From September 13, 2017 through September 18, 2017, Kloefkorn sent several e-mails to Nisha and other HSA management representatives to request to meet and confer over health and safety concerns related to the City's plan to move bargaining unit staff to a different office building.

On June 19, 2019, HSA issued Kloefkorn a Notice of Intent to Suspend from Permanent Position and Skelly Notification (Notice of Intent to Suspend), which stated that HSA intended to suspend her for 10 days. The proposed discipline was based in part upon Kloefkorn's alleged failure to demonstrate improvement following her placement on a second Performance Improvement Plan (PIP) on March 1, 2019. HSA placed Kloefkorn on the second PIP, which covered a period from March 1, 2019 through May 31, 2019, after her purported failure to meet the goals of her first PIP.[3]

[3] HSA issued the first PIP to Kloefkorn on September 25, 2018, which covered a period from October 3, 2018 through February 27, 2019. On September 28, 2018, HSA issued a written warning to Kloefkorn for allegedly engaging in inappropriate workplace conduct and refusing to comply with directives. On October 2, 2018, HSA issued Kloefkorn a letter setting forth expectations regarding work assignments and communication. Immediately prior to issuing the second PIP, HSA issued Kloefkorn a

The second PIP covered a timeframe during which Kloefkorn was involved in citywide collective bargaining for a successor contract between SEIU and the City.

4. OGC's dismissal

On September 23, 2019, OGC dismissed the amended charge. In dismissing the unilateral change and direct dealing claims, OGC concluded that the amended charge, "like the initial one, does not include any specific allegations about which existing civil service rules the City might have violated when it was recruiting to fill the 2917 Analyst positions." OGC then found that "this same paucity of information prevents the charge from stating a prima facie case that the City's failure to hire Kloefkorn [into a 2917 Analyst position] was retaliation. Neither the initial nor the amended charge shows that the City's conduct in recruiting for the 2917 Analyst [positions] departed from standard procedures." Although OGC impliedly found that the amended charge alleged the City took adverse action at a time that was subsequent and proximate to most or all of Kloefkorn's protected activities, OGC expressly found that "the charge does not demonstrate an additional nexus factor." With respect to HSA's later adverse actions against Kloefkorn for alleged performance issues, OGC similarly found that SEIU alleged close temporal proximity between Kloefkorn's protected activity and the adverse actions. However, OGC again found that "no additional nexus factor has been pleaded."

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second written warning on February 27, 2019, for allegedly failing to improve job performance.

5. SEIU's appeal

On appeal, SEIU argues that its retaliation allegations were sufficient to establish a prima facie case. In the alternative, SEIU argues that OGC was required to send SEIU a second warning letter before dismissing the amended charge. The City contends that OGC properly dismissed SEIU's amended charge.

In our below discussion, we find that the amended charge included sufficient factual allegations to warrant a complaint on SEIU's retaliation claims. As a result, we need not determine whether OGC was required to issue SEIU a second warning letter based upon OGC's determination that SEIU's new allegations contained deficiencies.

DISCUSSION

Absent evidence that a respondent took action that was facially or inherently discriminatory, a charging party has the burden to establish a prima facie case of retaliation by proving, via a preponderance of the evidence, that: (1) one or more employees engaged in activity protected by a labor relations statute that PERB enforces; (2) the respondent had knowledge of such protected activity; (3) the respondent took adverse action against one or more employees; and (4) the respondent took the adverse action "because of" the protected activity, which PERB interprets to mean that the protected activity was a substantial or motivating cause of the adverse action. If the charging party meets its burden to establish each of these factors, certain fact patterns nonetheless allow a respondent the opportunity to prove, by a preponderance of the evidence, that it would have taken the same action even absent protected activity. This affirmative defense is most typically available when, even though the charging party has established that protected activity was a

substantial or motivating cause of the adverse action, the evidence also reveals a non-discriminatory motivation for the same decision. In such "mixed motive" or "dual motive" cases, the question becomes whether the adverse action would not have occurred "but for" the protected activity. (*NLRB v. Transportation Management Corporation* (1983) 462 U.S. 393, 395-402; *McPherson v. PERB* (1987) 189 Cal.App.3d 293, 304; *Martori Brothers Distributors v. Agricultural Labor Relations Bd*. (1981) 29 Cal.3d 721, 729-730; *San Diego Unified School District* (2019) PERB Decision No. 2634, pp. 12-13; *Omnitrans* (2010) PERB Decision No. 2121-M, pp. 9-10; *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 22; *Palo Verde Unified School District* (1988) PERB Decision No. 689, pp. 7-8; *Novato Unified School District* (1982) PERB Decision No. 210, pp. 5-6; *Wright Line* (1980) 251 NLRB 1083, 1086-1089.)

At the present stage of litigation, the critical disputes before us involve SEIU's allegations of protected activity, adverse action, and nexus between the adverse actions and the protected activity. While nothing prevents the City from contesting every element of SEIU's case (including employer knowledge) at a later stage, we find no reason to disturb OGC's apparent implicit finding that SEIU has alleged sufficient facts tending to show employer knowledge. Moreover, while the eventual litigation in this matter may center, in part, on whether the City can establish an affirmative defense, our below discussion of nexus will also demonstrate why there are disputed material facts relating to the City's affirmative defense.

A. Protected Activity

Under *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, an employee's role as a union officer constitutes protected activity irrespective of whether the employee exercises specific duties in that role. (*Id.* at pp. 27-29.) Thus, there is no categorical requirement that a union's retaliation charge on behalf of a union officer necessarily allege specific duties the officer exercised. (*Ibid*.) Such a requirement would contravene our holding that there is "no purpose" in "arbitrarily 'raising the bar' for employees to show their 'protected activity' by requiring that they allege that they have engaged in 'something more' than holding union office." (*Id*. at p. 29.)

In addition to alleging protected activity, a charging party must separately allege the other elements of a prima facie retaliation case: employer knowledge, adverse action, and nexus. (*Santa Clara Valley Water District*, *supra*, PERB Decision No. 2349-M, p. 28.) Particularly when a case reaches the formal hearing stage, a charging party seeking to prove employer knowledge and nexus may be well-advised to introduce evidence of specific times a union officer exercised his or her role, though such evidence may not be needed if the charging party presents other strong evidence and the respondent is not able to present a persuasive non-discriminatory explanation for having taken adverse action. For instance, facts regarding the temporal relationship between the employer's action and the employee's term of union office may be relevant and probative, and further details regarding the officer's exercise of official duties may provide additional probative value. In any event, temporal proximity or lack thereof is rarely the sole determinant of nexus. (See, e.g., *City of Santa Monica* (2020) PERB Decision No. 2635a-M, pp. 45-47 [judicial appeal pending on other grounds].)

The instant case is still at the prehearing stage, where we do not attempt to judge which party will ultimately have the greater weight of evidence. (See *ante* at p. 2.) Even more so at this stage than at a formal hearing, there is no absolute rule requiring that a charging party always detail the specific actions a union officer took. Doing so may nonetheless be a smart pleading practice in some cases. In fact, as discussed below, SEIU included such detail in its amended charge in this case.

The amended charge primarily alleged instances in which Kloefkorn sought to address working conditions at the HSA office. Employee speech is protected if it is "related to matters of legitimate concern to the employees as employees so as to come within the right to participate in the activities of the employee organization for the purpose of representation on matters of employer-employee relations." (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586, p. 15 (*Chula Vista*), quoting *Rancho Santiago Community College District* (1986) PERB Decision No. 602, p. 12.) Thus, "an individual employee's criticism of management or working conditions is protected when its purpose is to advance other employees' interests or when it is a logical extension of group activity." (*Id.*, quoting *Trustees of the California State University* (2017) PERB Decision No. 2522-H, p. 16.) As one example, an employee is protected in reporting safety concerns to his or her employer or to a third party. (*Menlo Park Fire Protection District* (2008) PERB Decision No. 1983-M, p. 6; *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246, pp. 17-19.)

As detailed *ante* at pages 11-14, SEIU thus alleged that Kloefkorn engaged in protected activity not only by serving as Chapter President, but also by the following activities: e-mailing HSA management on May 3, 2016 to raise health and safety

concerns relating to concrete drilling and dust exposure at the HSA office; complaining to OSHA in October 2016 regarding hazardous office conditions; e-mailing HSA management in October 2016 to demand that HSA cease and desist all renovation on the second floor of the HSA office building due to potential asbestos exposure; e-mailing Kim and other HSA management on February 3, 2017, requesting to meet and confer regarding health and safety issues affecting HSA employees, including environmental and ergonomic concerns; e-mailing Kaplan and other HSA management on July 11, 2017 to document an account of discrimination and harassment affecting two SEIU members; requesting information, on September 8, 2017, regarding the installation of glass partitions in the cubicles at the HSA office; e-mailing Nisha and other HSA representatives in September 2017 to reiterate SEIU's request to meet and confer over health and safety concerns related to the City's plan to move SEIU-represented staff to a different office building; requesting and receiving release time for bargaining training; seeking SEIU's assistance for the 2917 Analyst recruitment process; seeking to meet and confer and otherwise engage with the City regarding the 2917 Analyst reclassification and its effects; and participating in successor contract negotiations between SEIU and the City.

B. Adverse Action

PERB uses an objective test to determine whether an employer's action is adverse. (*Chula Vista*, *supra*, PERB Decision No. 2586, pp. 24-25.) "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." (*Id*. at

p. 25, quoting *Newark Unified School District* (1991) PERB Decision No. 864, pp 11-12.) OGC correctly found that SEIU alleged the City took adverse actions against Kloefkorn by not reclassifying her to one of the 2917 Analyst positions in December 2017 and by issuing her the Notice of Intent to Suspend in June 2019.

We find that SEIU also alleged several additional adverse actions related to hiring into the 2917 Analyst classification: (1) failing to encourage Kloefkorn to take the promotional exam while encouraging HSA's other 2915 Specialist incumbents; (2) failing to notify Kloefkorn how she could be accommodated to interview for a 2917 Analyst position during a disability period; and (3) delaying meeting with Kloefkorn and declining to provide timely and accurate information concerning the recruitment. A reasonable person in Kloekforn's circumstances would view such alleged actions as adverse to her employment for multiple reasons, including because they impeded Kloefkorn's efforts to progress in her career and suggested any effort on Kloefkorn's part to apply for a 2917 Analyst position would be disfavored.

Moreover, we conclude that the February 27, 2019 written warning and related March 1, 2019 PIP were adverse actions as well. (*City of Long Beach* (2008) PERB Decision No. 1977-M, p. 13; *City of Davis* (2016) PERB Decision No. 2494-M, p. 42.)[4]

[4] At the formal hearing, one or both parties may wish to introduce evidence pertaining to the City's actions in the fall of 2018, when the City issued Kloefkorn the first PIP, as well as a related written warning and letter of instruction. Those actions likely bear on the ultimate determination of employer motive. (*State of California (California Correctional Health Care Services)* (2019) PERB Decision No. 2637-S, p. 17 [events occurring before the six-month statute of limitations, or otherwise outside the "four corners" of the charge, are relevant in assessing a respondent's motive].) However, we do not consider whether the complaint should allege those earlier adverse actions to constitute MMBA violations, because they appear to have occurred more than six months prior to the amended charge. If SEIU seeks to amend the

C. Nexus

While PERB considers all relevant facts and circumstances in assessing an employer's motivation, we have identified the following factors as being the most common means of establishing a discriminatory motive, intent, or purpose: (1) timing of the employer's adverse action in relation to the employee's protected conduct; (2) disparate treatment; (3) departure from established procedures or standards; (4) an inadequate investigation; (5) a punishment that is disproportionate based on the relevant circumstances; (6) failure to offer a contemporaneous justification, or offering exaggerated, questionable, inconsistent, contradictory, vague, or ambiguous reasons; (7) employer animosity towards union activists; and (8) any other facts that might demonstrate the employer's unlawful motive. (See, e.g., *City of Santa Monica*, *supra*, PERB Decision No. 2635a-M, p. 42; *City of Sacramento* (2019) PERB Decision No. 2642-M, p. 21.)

We find that SEIU's amended charge alleged not only temporal proximity as OGC found in its dismissal letter, but also other viable nexus facts, and that there remains a significant, unresolved factual dispute as to the City's motive or motives. Although OGC does not (and should not) list out nexus factors in a complaint, we briefly summarize the additional nexus allegations that lead us to disagree with OGC's determination.

OGC focused primarily on whether SEIU had sufficiently identified which civil service rule the City allegedly violated. Although we believe OGC's focus on this

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complaint to reflect those events as alleged MMBA violations, the Board agent will need to assess the matter at that point, including any allegations supporting a recognized exception to the statute of limitations.

factor to the exclusion of others was error—in that there were numerous other, clearer nexus facts alleged, as discussed below—it is appropriate to begin by assessing whether SEIU was sufficiently clear in alleging that the City deviated from its own civil service rules.[5]

PERB has relatively few formal pleading rules, though PERB Regulation 32615, subdivision (a)(5) requires that a charging party should provide a clear and concise statement of the facts alleged to constitute an unfair practice.[6] OGC need not scour charges looking for obscure deviations from policy that a charging party fails to point out, but PERB Regulation 32620, subdivision (b)(1) requires OGC to assist the charging party in stating the information that Regulation 32615 requires.[7]

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[5] We assess the alleged deviation only as a nexus factor, since SEIU did not file any appeal regarding its unilateral change or direct dealing claims.

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

[7] These standards apply irrespective of parties' legal sophistication or whether they are represented by counsel. PERB's efforts to provide equal access to justice to all are evident, for instance, in our decision in *National Union of Healthcare Workers* (2012) PERB Decision No. 2249-M. There, we noted that while it is useful to explain to a charging party that the goal of an unfair practice charge should be to specify the "who, what, when, where and how" of the charge, that formulation is not a "litmus test" or "hurdle over which every charging party must leap at the risk of dismissal." (*Id.* at p. 15.) Sound public policy reasons support PERB's preference for hearing cases on their merits, notwithstanding technical non-compliance with matters of form. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 7, citing *United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 916.) "We are sensitive to the fact that PERB is not a court, but an administrative agency, and that the formalities of practice and procedure in the judicial system are not always appropriate for fulfilment of PERB's mission, which includes assisting parties and representatives who are laypersons." (*County of San Luis Obispo* (2015) PERB Decision No. 2427-M, p. 28.)

Here, the record does not reflect to what extent, if at all, there was any communication between OGC and the parties during the investigation, other than the warning letter. That letter and the subsequent dismissal suggest that OGC focused on an e-mail from Kloefkorn to the City, in which Kloefkorn pasted section 109 of the civil service rules without identifying which subsections SEIU believed the City had violated. In a different exhibit, however, SEIU identified specific subsections it claimed the City violated. For instance, SEIU pointed to Rule 109.10, entitled "Effects of Classification Changes on the Status of Incumbents," and particularly to subsection 109.10.17. SEIU claims this subsection provides that in a reclassification, the City will grant all remaining employees in the same former class and department the right to positions in a new class as vacancies occur, according to seniority. In the same exhibit to its charge in which it pointed out subsection 109.10.17, SEIU asserted that the City deviated from its "normal" process. In contrast, the City has claimed throughout that it acted in a typical and lawful manner when it posted four new positions, conducted interviews, and ultimately chose to promote the four Investigations Division 2915 Specialists as superior candidates. A formal hearing is needed to resolve this dispute, absent settlement.

In addition, SEIU alleged numerous other nexus factors creating a non-frivolous dispute as to the City's motives. First, whereas the City has asserted that it promoted four employees over Kloefkorn because Kloefkorn interviewed poorly, SEIU has alleged facts directly contradicting this claim. For instance, as noted above, SEIU has provided an HSA organizational chart showing the four incumbent 2915 Specialists, specified by name, as being promoted to 2917 Analyst positions, which allegedly

shows the City went into the promotion process with a bias as to the probable outcome and thereby did not give Kloefkorn fair consideration. While we cannot predict precisely what explanations or evidence the City will marshal in response to this allegation, it presents a stark credibility issue that can only be resolved at a formal hearing.

SEIU also made colorable disparate treatment allegations. HSA allegedly designed and implemented the 2917 Analyst recruitment to prioritize all 2915 Specialists except Kloefkorn. For instance, the City allegedly gave the other 2915 Specialists advance information about the recruitment and encouraged them to take the promotional exam. While the City may ultimately rebut this allegation or admit it while introducing evidence of a non-discriminatory reason for its disparate treatment, we cannot ignore that this allegation constitutes a quintessential claim of discrimination and raises a material factual dispute as to whether HSA singled out Kloefkorn.

Another relevant nexus allegation is the apparently undisputed fact that Kloefkorn was the senior-most employee in the 2915 Specialist Classification. HSA thus converted Kloefkorn from the 2915 Specialist with the greatest protection against layoff to the most vulnerable 2915 Specialist. This had the effect of making her more susceptible to layoff, though the City disputes that fact played any part in its motivation.

SEIU further contends that Kloefkorn's greater experience helps to establish that she was not the least qualified of the five 2915 Specialists in HSA, and that absent any unlawful considerations she merited being chosen over at least one of the

less experienced employees chosen for the four open positions. It will take a hearing, and possibly credibility determinations, to resolve whether this is the case or whether the City chose not to promote Kloefkorn for other reasons, such as her allegedly poor interview. Among other issues, the parties may contest evidentiary items such as the above-referenced organizational chart allegedly showing pre-interview bias, as well as any evidence regarding the relative skills, experience, references, or interview performances of the interviewees. The weight of the overall record will ultimately determine the import of these and other factors.

SEIU also alleged that HSA departed from its norms when it asked Kloefkorn to return a completed FMLA form even though none was needed for a work-incurred injury. Again, we express no opinion as to the merits of that allegation or whether it is persuasive evidence of motive; we find only that it is a colorable allegation creating a dispute of fact. Similarly, the City pushing Kloefkorn for her disability leave dates could show the City's desire to know her leave period so as to schedule interviews during that time, as SEIU alleges, but we decline to speculate what facts may be proven at the formal hearing.

SEIU also alleged that the City evidenced discriminatory motivation when it offered Kloefkorn and SEIU vague, incomplete, and/or inaccurate responses to their queries about the reclassification. These responses include, but are not limited to, HSA's statement that there were "No Respondents" for the 2917 Analyst positions, even though HSA was conducting interviews for the 2917 Analyst positions and allegedly knew who the applicants were by the date of its answer.

Moreover, in response to SEIU's inquiry regarding the job analysis that HSA used to support the reclassification, the City allegedly claimed "confidentiality" without further explanation. In light of the fact that the City asserts it requested funds for the 2917 Analyst positions in its 2015-2016 budget proposal and apparently had explained its reasoning for the reclassification, HSA's alleged blanket assertion of confidentiality is a further circumstantial nexus allegation.

SEIU noted two additional nexus allegations: (1) HSA's alleged failure to respond to Kloefkorn's November 30, 2017 request for assurances as to how she could be accommodated to interview for a 2917 Analyst position during her disability leave (including how she could obtain an interactive meeting regarding her impending disability leave); and (2) HSA's alleged refusals to respond in a timely and/or adequate manner to Kloefkorn's requests to meet and confer over the reclassification and/or its effects. For all of the foregoing reasons, while HSA contends that Kloefkorn "was permitted to participate in the merit-based hiring process for the 2917 position" and was treated fairly and appropriately throughout that process, SEIU has alleged more than enough facts to warrant a formal hearing.

Finally, we address whether a complaint should also issue as to the City taking adverse action against Kloefkorn via a second written warning, the second PIP, and the Notice of Intent to Suspend. OGC found that SEIU did not make factual allegations tending to show any nexus factors other than timing. However, SEIU's allegations regarding HSA's unusual, discriminatory, or otherwise suspicious conduct surrounding the 2917 Analyst reclassification, as detailed above, constitute an adequate factual basis to state a prima facie case that HSA may have been

substantially motivated by unlawful animus in its later adverse actions against Kloefkorn. (*State of California (California Correctional Health Care Services)*, *supra*, PERB Decision No. 2637-S, p. 17 [earlier events are relevant in assessing a respondent's motive]; *County of Santa Clara* (2019) PERB Decision No. 2629-M, adopting proposed decision at p. 30 ["Context is always relevant in determining motive."].)

As discussed above, we do not prejudge which nexus factors SEIU may primarily rely on at the formal hearing, which rationales or arguments the City may make in countering SEIU's case or in affirmatively asserting that it would have taken exactly the same actions even absent protected activity, or which party will ultimately introduce a more persuasive set of overall evidence. Rather, at the present stage, we find only that there is a material dispute of fact regarding HSA's motives vis-à-vis Kloefkorn.[8]

ORDER

The claims in Case No. SF-CE-1576-M are hereby DISMISSED WITH PREJUDICE solely to the extent they allege that the City (i) unilaterally reclassified certain positions and/or changed existing policy without providing SEIU notice and an

[8] In its appeal of the dismissal, SEIU alleged additional nexus evidence that it did not include in its initial or amended charge: the contents of an alleged September 21, 2017 e-mail from HSA Executive Director Trent Rohrer and an alleged September 10, 2018 communication from HSA Handbook and Training Manager Gabriel Jones. Because a charging party may not present on appeal new charge allegations (PERB Reg. 32635, subd. (b)), we rely only on SEIU's factual allegations in its amended charge. However, as we noted above, in issuing a complaint, OGC does not list out the nexus factors or evidence tending to show nexus, and SEIU remains free to introduce all relevant and admissible evidence of nexus at the formal hearing.

opportunity to bargain over the decision or its effects, and (ii) bypassed SEIU to deal directly with bargaining unit employees.

OGC's dismissal of the remaining claims in Case No. SF-CE-1576-M—concerning the City's alleged retaliation against Kloefkorn for her protected activities—is hereby REVERSED. We REMAND the matter to OGC to issue a complaint alleging that Kloefkorn engaged in the protected activities noted *ante* at pages 18-19, the City took the adverse actions noted *ante* at pages 19-20, and the protected activities were a substantial or motivating cause for the adverse actions.

Members Banks and Paulson joined in this Decision.