STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KAREN BRUNO, Charging Party, v. COUNTY OF CONTRA COSTA, Respondent.	Case No. SF-CE-670-M PERB Decision No. 2174-M March 25, 2011

Appearances: Karen Bruno, on her own behalf; Christina J. Ro-Connolly, Deputy County Counsel, for County of Contra Costa.

Before Dowdin Calvillo, Chair; McKeag and Miner, Members.

DECISION

MINER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Karen Bruno (Bruno) from a Board agent's partial dismissal of an unfair practice charge. The charge alleged that the County of Contra Costa (County) violated the Meyers-Milias-Brown Act (MMBA)[1] when it laid her off in retaliation for having engaged in protected activity. The Board agent determined that the charge failed to state a prima facie violation of the MMBA with respect to the allegation of retaliatory layoff and therefore dismissed the charge in part.[2]

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

[2] The Office of the General Counsel issued a complaint based upon additional allegations that the County retaliated and discriminated against Bruno when it failed to rehire her and failed to notify her of a vacant position following her layoff. These allegations are not at issue in this appeal.

The Board has reviewed the partial dismissal and the record in light of Bruno's appeal, the County's response, and the relevant law. Based on this review, the Board affirms the partial dismissal of the charge for the reasons discussed below.

BACKGROUND[3]

Bruno was employed by the County as a part-time Public Health Nurse (PHN) at the California Children's Services (CCS) Administration.[4] Bruno's position was in a bargaining unit that was exclusively represented by the Public Employees Union, Local 1 and covered by a memorandum of understanding (MOU). Sometime after the 2006-2007 fiscal year, Bruno became a union steward. Prior to becoming a union steward, Bruno received favorable performance evaluations.

The charge alleges that, after taking on the role of union steward and filing several grievances, Bruno began receiving negative feedback from her supervisor, CCS Nurse Program Manager Elizabeth Faulkner (Faulkner). On August 28, 2008, Bruno filed a grievance alleging that Faulkner had made false statements in a recent performance evaluation. On September 2, 2008, Bruno filed a second grievance against Faulkner alleging that she had engaged in "harassment" in violation of the MOU. On September 23, 2008, Faulkner agreed to settle the August 28, 2008 grievance by rewriting Bruno's performance evaluation and also rescinded a counseling memo that was apparently the basis for the September 2, 2008 grievance.

On October 28, 2008, the County administrator recommended local departmental budget cuts to the County Board of Supervisors.

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[3] Only those allegations relevant to the claim of retaliatory layoff are set forth herein.

[4] While the record does not clearly reveal when Bruno was hired by the County, it appears that she worked for approximately two years prior to her termination.

On October 29, 2008, Bruno received a memo from the County stating that there would be workforce reductions in the coming months. Bruno was initially told by her union representative that she should attend a meeting on November 26, 2008 regarding layoffs, but was later informed that the meeting had been cancelled and there would be no PHNs laid off.

On November 4, 2008, the County hired two new full-time PHNs.

At some point prior to December 3, 2008, the County terminated an interdepartmental contract that resulted in the elimination of three full-time and two part-time PHN positions.[5] The charge alleges that the County then created three new permanent full-time PHN positions by combining one or more existing vacant permanent part-time PHN positions and hired the three full-time PHNs whose positions had been eliminated by the termination of the EHSD contract into those positions. One of the displaced part-time EHSD nurses had more seniority than Bruno and therefore "bumped" Bruno from her position. The other part-time nurse had less seniority than Bruno but was able to return to a position in another class within the County where she had worked previously for a long time.

On December 4, 2008, Bruno attended a meeting at which Health Services Division Personnel Officer Shelley Pighin (Pighin) and Health Services Personnel Analyst

[5] The charging documents refer to a contract between "EHSD" and the Department of Public Health. According to the County, "On or about November 12, 2008, Joe Valentine, Director of Employment and Human Services (hereinafter, "EHSD") notified Dr. William Walker, Director of Health Services, that due to a serious budgetary situation, five Public Health Nurses from the Health Services Department that supported EHSD's In-Home Supportive Services, Adult Protective Services, and the Multipurpose Senior Services Program had to be eliminated." In evaluating whether an unfair practice charge states a prima facie case, PERB is not required to ignore facts provided by the respondent and consider only the facts provided by the charging party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

Teji O'Malley (O'Malley) were present.[6] At that meeting, Bruno was informed that she would be bumped by the more senior part-time PHN and that, because there were no vacant PHN positions within the County, she would be laid off. Bruno requested to temporarily fill in for a part-time PHN who was out on maternity leave, but O'Malley denied her request. O'Malley also informed Bruno that the County would not create any new part-time positions and would be eliminating upcoming vacant part-time positions in the future because they are more costly than full-time positions, and that she could only be recalled to a part-time position.

The County laid Bruno off and terminated her employment on December 31, 2008. The charge alleges that the layoff was authorized by Pighin, who signed the layoff notice. Bruno was the only PHN who lost her job as a result of the layoffs. The full-time PHNs hired on November 4, 2008 were not subject to layoff. Bruno asserts that the County avoided her inquiries and failed to provide her with assistance in obtaining another position.

On December 5, 2008, O'Malley denied Bruno's request for a meet-and-confer meeting.

DISCUSSION

New Allegations and Evidence

PERB Regulation 32635[7] governs PERB's review of a Board agent's dismissal of an unfair practice charge. Pursuant to Section 32635(a), the appeal must: "(1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken; (2) Identify the page or part of the dismissal to which each appeal is taken; and (3) State the grounds for each issue

[6] While the charge indicates that this was a meeting held for part-time PHNs, it does not specify who else was present at the meeting.

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

stated." In addition, PERB Regulation 32635(b) prohibits a charging party from submitting new allegations and new supporting evidence on appeal absent good cause.[8] (See, e.g., *Fremont Unified School District* (2003) PERB Decision No. 1571; *Lodi Unified School District* (2002) PERB Decision No. 1486; *Peralta Community College District* (2001) PERB Decision No. 1418; *Regents of the University of California* (1998) PERB Decision No. 1271-H.) The purpose of this regulation "is to require the charging party to present its allegations and supporting evidence to the Board agent in the first instance, so that the Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case." (*South San Francisco Unified School District* (1990) PERB Decision No. 830.)

The appeal contains the following new allegations that were not raised before the Board agent: (1) on December 10, 2008, Bruno requested to be considered for vacant full-time PHN positions, but Faulkner denied her request; (2) the County failed to follow the layoff procedures set forth in the MOU; and (3) Faulkner further retaliated against Bruno by increasing her workload. In addition, the appeal includes several documents that were not submitted to the Board agent, including communications she had with the County during December 2008, and communications with Faulkner dated September 2008. Bruno has provided no showing as to why these allegations and evidence could not have been submitted previously to the Board agent. (*State of California (Department of Forestry & Fire Protection)* (2004) PERB Decision No. 1619-S.) In the absence of such a showing, and because the new allegations and evidence predate the dismissal letter and therefore were known to Bruno, we do not find good cause to consider them. (*Solano County Fair*

[8] PERB Regulation 32635(b) states: "(b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence."

Association (2009) PERB Decision No. 2035-M; *Los Angeles County Office of Education* (2005) PERB Decision No. 1743.)

Grounds for Appeal

As indicated above, PERB Regulation 32635(a) requires the charging party to: (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken; (2) Identify the page or part of the dismissal to which each appeal is taken; and (3) State the grounds for each issue stated. The appeal asserts: "Please consider my appeal for layoff by displacement as retaliatory due to my Union protected activities." It does not, however, identify the specific issues to which the appeal is taken or the page or part of the Board agents dismissal appealed, nor does it state the grounds for appeal. Therefore, the appeal fails to comply with the requirements set forth in PERB Regulation 32635(a).

Moreover, the appeal fails to address the Board agent's conclusion that the charge failed to state a prima facie case of retaliatory layoff because the charge failed to allege facts demonstrating that the decision to lay Bruno off was motivated by her protected activity. Instead, the appeal argues only that Faulkner failed to offer Bruno vacant positions both before and after her layoff. Therefore, the Board need not consider her initial claim that the decision to lay her off was made in retaliation for her protected activities. (*IBEW Local 1245 (Neronha)* (2008) PERB Decision No. 1950-M; *County of Solano (Human Resources Department)* (2004) PERB Decision No. 1598-M.) Nonetheless, even if we were to do so, we would affirm the Board agent's partial dismissal for the reasons set forth below.

Retaliatory Layoff

MMBA section 3506 prohibits public agencies from discriminating or retaliating against employees for having exercised their right to engage in protected activity. PERB

Regulation 32603(a) similarly makes it an unfair practice for a public agency to discriminate or retaliate against an employee for having engaged in protected activity.

To demonstrate that an employer discriminated or retaliated against an employee in violation of MMBA section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights guaranteed by the MMBA; (2) the employer had knowledge of the employee's 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*); *County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M.) 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:

> 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; fn. 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 (*North Sacramento*)), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's

disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons (*Oakland Unified School District* (2003) PERB Decision No. 1529); (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*; *Novato*.)

Protected Activity

PERB has long held that the filing of a grievance is protected activity. (*Trustees of the California State University* (2008) PERB Decision No. 1970-H; *Los Angeles Unified School District* (2005) PERB Decision No. 1787.) The County does not dispute that Bruno engaged in protected activity under the MMBA when she filed grievances against her supervisor, Faulkner. Therefore, the first prong of the *Novato* test is satisfied.

Adverse Action

The elimination of a position and layoff of an employee holding that position is an adverse action. (*Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778.) Therefore, the third prong of the *Novato* test is satisfied.

Employer Knowledge and Nexus

As indicated above, to establish a prima facie case of discrimination, the charging party must provide sufficient facts that, if proven at a hearing, would establish that the employer took that adverse action because of the employee's protected activity. In this case, Bruno has provided no direct evidence that the decision to eliminate her position and lay her off was based upon her protected activity of filing grievances against her supervisor. Instead, she asserted to the Board agent that a number of factors, when considered together, demonstrated that the County's decision was part of a "strategically orchestrated" plan to terminate her employment. These factors included: the termination of the interdepartmental contract between EHSD and the public health department, thereby displacing three full-time and two part-time PHNs; the County administrator's recommendation of local departmental budget cuts to the County Board of Supervisors; the rescheduling of a meeting to discuss layoffs from November 26, 2008 to December 4, 2008; the hiring of two more full-time PHNs; the elimination of all the part-time PHN jobs; and the denial of Bruno's request to fill in temporarily for a part-time PHN on maternity leave.

The charge failed to establish that the person or persons responsible for terminating the EHSD contract and recommending budget cuts had any knowledge of Bruno's protected activities in filing grievances against her supervisor or acting as a union steward. While it is conceivable that Pighin and O'Malley, as employees in the personnel department, had knowledge of Bruno's protected activities, the charge failed to allege facts demonstrating any of the "nexus" factors identified above and therefore failed to alleged any facts that would support a finding that the decision to hire two full-time PHNs, the elimination of all part-time position, or the denial of Bruno's request to fill in temporarily for another employee were

motivated by Bruno's protected activity.[9] Accordingly, the charge fails to establish a prima facie case that Bruno was laid off in retaliation for her protected activities.[10]

CONCLUSION

Bruno has failed to establish a prima facie case of retaliatory layoff. Accordingly, the charge is dismissed in part.

ORDER

The unfair practice charge in Case No. SF-CE-670-M is hereby DISMISSED IN PART WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.

[9] As indicated above, the Board does not consider Bruno's assertion for the first time on appeal that the County failed to follow the layoff procedures set forth in the MOU.

[10] With regard to Bruno's claim that Faulkner failed to offer her vacant positions, the charge fails to identify any vacant part-time PHN position that was available prior to her layoff on December 31, 2008. A complaint has been issued with respect to her allegations that the County failed to rehire her and failed to notify her about a vacant position after she was laid off.