STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INLAND EMPIRE PROFESSIONAL EMPLOYEES ASSOCIATION, Charging Party, v. INLAND EMPIRE UTILITIES AGENCY, Respondent.	Case No. LA-CE-1095-M PERB Decision No. 2658-M July 24, 2019

Appearances: City Employee Associates, by Nikita Soukonnikov, Labor Relations Representative for Inland Empire Professional Employees Association; Dorgan Legal Services, by Wanda R. Dorgan, Attorney, for Inland Empire Utilities Agency.

Before Banks, Krantz, and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on cross-exceptions filed by the Inland Empire Professional Employees Association (Association) and the Inland Empire Utilities Agency (Agency) to a proposed decision of a PERB administrative law judge (ALJ).

The key issue in this case is whether the Agency unilaterally changed the scope of collectively-bargained grievance procedures. The parties' Memorandum of Understanding (MOU), at Article 16, sets forth a five-step grievance procedure. The MOU defines a grievance broadly, permitting an employee to file a grievance alleging a violation of an Agency policy, ordinance, or a provision of the MOU. Alleged violations of the Agency's disciplinary policies are explicitly excluded from the grievance procedure. However, the Agency's anti-retaliation policies are not explicitly excluded from the grievance procedure.

The Agency maintains at least two policies prohibiting retaliation, Agency Policies A-21 and A-30. In July 2015, the Association submitted a grievance at Step 2 of the grievance procedure alleging that Agency representatives had violated Agency Policy A-21 by retaliating against the Association's Vice President. However, the Agency refused to permit the Association to advance the grievance through all five steps of the grievance procedure, asserting that the MOU's grievance procedure does not cover alleged violations of Agency Policies A-21 and A-30.

The Association filed an unfair practice charge alleging that the Agency had unilaterally narrowed the scope of the grievance procedure, and PERB's Office of the General Counsel (OGC) issued a complaint. When the matter was assigned to an ALJ, the Agency filed a motion to dismiss the complaint asserting, among other things, that the Association had failed to establish that the Agency had a policy of permitting employees to grieve alleged violations of Agency Policies A-21 and A-30. The ALJ did not complete a full evidentiary hearing but instead issued a proposed decision granting the Agency's motion to dismiss.

The Board has reviewed the proposed decision and the record in light of the Association's exceptions, the Agency's exceptions and response, and relevant law. Based on this review, we find that the plain language of the MOU permits an employee to file grievances alleging violations of Agency Policies A-21 and A-30. Accordingly, the Board reverses the proposed decision, vacates the dismissal of the charge, and remands this case to the ALJ, for the reasons discussed below.

FACTUAL BACKGROUND

The Parties' Memorandum of Understanding

The Agency recognized the Association as the exclusive representative of a unit of professional employees in 2013. In fall 2013, the Agency and the Association negotiated their first MOU. The MOU was effective September 1, 2013 through June 30, 2018.

Article 16 of the MOU sets forth a five-step grievance procedure. Section 16.01 defines a grievance for the purposes of Article 16 as follows:

> Section 16.01. – General
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> A. A grievance is an alleged violation, misinterpretation, inequitable application or non-compliance of Agency ordinances, resolutions, policies, and/or provisions of the Memorandum of Understanding of a non-disciplinary nature. Refer to Article 17, Disciplinary Actions and Appeals Procedures, for disciplinary appeals.

Sections 16.03 through 16.06 of the MOU describe the five-step grievance process. The fifth step culminates in an evidentiary hearing before the Agency's Finance, Legal, and Administrative Committee of the Board of Directors, and a written decision by the Committee.

The Agency's Anti-Retaliation Policies A-21 and A-30

The Agency has adopted various policies to address retaliation and harassment. The two policies at the heart of this case, Agency Policy A-21 and Agency Policy A-30, were both adopted years before the Agency recognized the Association as the exclusive representative of the Professionals Unit.

The Agency adopted the current version of Agency Policy A-21 on July 15, 2005. It is a two-page policy titled "Retaliation Free Workplace," and it prohibits Agency employees from retaliating against other employees for engaging in protected activities. The policy includes provisions setting forth the policy's purpose (Section 1.00), prohibiting and defining

retaliation (Sections 2.00(A)-(C)), referring to Agency Policy A-30 for resolution of retaliation complaints (Section 2.00(E)), and discussing punishment for policy violations (Section 2.00(F)). Agency Policy 21, at Section 2.00(E), provides as follows:

> [a]ny applicant, official, employee or contractor who believes that he/she has been retaliated against in violation of this Policy should immediately report the conduct to the Manager of Human Resources and Support Services or to the Executive Manager of Finance and Administration, pursuant to the Agency's Harassment Complaint procedure (Agency Policy No. A-30) so that the complaint can be resolved fairly and in an expeditious manner.

The current version of Agency Policy A-30 was also adopted by the Agency on July 15, 2005. Agency Policy A-30 is a four-page policy titled "Harassment Prohibition." The policy includes the following sections:

- Section 1.00, setting forth the policy's purpose;
- Sections 2.00(A)-(E), prohibiting and defining harassment;
- Sections 2.00(F)-(M), setting forth a dispute resolution/fact-finding procedure addressing alleged harassment;
- Sections 2.00(N)-(Q), requiring employee harassment training and notification of harassment policies; and
- Section 2.00(R), setting forth penalties for violating the policy.

The language of Agency Policy A-30, at Sections 2.00 (F)-(M), is set forth below in relevant part:

> 2.00 PROCEDURE
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> ¶ . . . ¶
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> F. Whenever possible, employees or other parties who feel that they are experiencing harassment are encouraged, but not required, to inform the harasser that his/her behavior is unwelcome. If this does not resolve the situation, the affected individual should report the alleged harassment, as provided in Section 2.G of this policy.
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> G. Alleged harassment against an employee is to be reported to the employee's immediate supervisor, any Agency Department

> Manager, the Agency's Manager of Human Resources/Support Services, any Executive Manager, or by calling 1-800-384-4277 or logging on to www.ethicspoint.com by either the employee or by an offended party that witnessed the alleged harassment. . . . All allegations of harassment should be filed on a "Complaint of Discrimination/Harassment" form (available on PIPES), verbally or by written correspondence from the employee, applicant or offended party.
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> J. If practical, all investigations of alleged harassment shall be investigated by the Agency's General Counsel within fifteen (15) working days of the receipt of the complaint. . . .
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> ¶ . . . ¶
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> L. The General Counsel, shall, at the conclusion of the investigation, report his/her findings along with any recommendation(s) for remedial action, to the respective Executive Manager and the Chief Executive Officer/General Manager.
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> M. If it is determined that discrimination occurred against an employee, the General Counsel or his/her designated representative will advise the affected employee, in the presence of the employee's supervisor and/or Department Manager, as to the final disposition of the complaint, including any remedial action to be taken, but is not to disclose if any discipline will be imposed. . . . The General Counsel is also to recommend any reasonable measures to protect the complainant from further discrimination and/or retaliation.

Rucker's Grievance and the Agency's Response

Joyce Rucker (Rucker) is Vice President of the Association and also a member of its executive board.

In 2015, Rucker was part of the Association team that was meeting and conferring with the Agency regarding implementation of a classification and compensation study.

On or around July 10, 2015, the Association filed a grievance, at step 2 of the grievance procedure, on behalf of Rucker. The grievance alleged that the Agency was retaliating against

Rucker for her union activity. The grievance stated that the latest incident of Agency retaliation occurred during a June 24, 2015 negotiation meeting. According to the grievance, Rucker requested during the meeting to speak directly with the Agency's General Manager, Joseph Grindstaff (Grindstaff). Rucker wanted to relay to Grindstaff her concerns about the Agency's class and compensation study, including alleged inaccuracies in the study that impacted Rucker's proposed salary. The grievance alleged that during the meeting, an Agency representative engaged in "bullying behavior" toward Rucker. The grievance alleged that the Agency's conduct toward Rucker constituted a violation of Agency Policy A-21, Section 2.00.

Agency representatives denied the grievance at Step 2 and Step 3. After the Step 3 denial, the parties held a grievance meeting in August 2015. Shortly thereafter, Grindstaff sent an e-mail to Rucker asserting that the allegations in the grievance were governed by Agency Policies A-21 and A-30. Grindstaff indicated that he would ask the Agency's General Counsel to retain an independent investigator to address the claims in the grievance. He encouraged Rucker to fill out a complaint form, per Agency Policy A-30, for submission to the Agency's General Counsel. Rucker completed the complaint form, and the Agency's General Counsel contracted with an independent investigator. On March 2, 2016, the Agency's General Counsel wrote to Rucker and notified her that the investigator's report found Rucker's complaint to be unsupported by evidence.

In March and April 2016, the Agency and the Association engaged in e-mail correspondence regarding the state of the grievance. The Association's labor relations representative, Nikita Soukonnikov (Soukonnikov), asserted that the Association continued to expect a response to the grievance. Agency Human Resources Director, Sharmeen Bhojani (Bhojani), responded that Grindstaff had previously made clear that Rucker's retaliation claims

were governed by Agency Policies A-21 and A-30, and there would be no additional response to the grievance. Soukonnikov asserted that Agency Policies A-21 and A-30 did not provide the exclusive means for resolving retaliation disputes and that the MOU provides an additional procedure for resolving such disputes. Soukonnikov asked Bohjani whether the Agency's position was that an employee could never grieve a violation of Policy A-21. On April 14, 2016, Bhojani responded that the procedures set forth in Agency Policies A-21 and A-30 were the exclusive means to resolve employee complaints of retaliation like those brought by Rucker.

PROCEDURAL HISTORY

The Association filed an unfair practice charge on May 23, 2016. The charge asserted that the Agency had unilaterally changed its policy of permitting employees to file grievances regarding alleged violations of Agency Policies A-21 and A-30. PERB's OGC issued a complaint. The parties did not resolve the charge during an informal settlement conference, and PERB transferred the charge to its Division of Administrative Law.

On August 31, 2017, the Agency filed a motion to dismiss on several grounds, including that the Association had failed to establish that the Agency had a policy of permitting employees to grieve alleged violations of Agency Policies A-21 and A-30. The ALJ did not immediately rule on the motion, and instead commenced an evidentiary hearing. After the Association rested its case-in-chief, but before the Agency presented its case, the Agency renewed its motion to dismiss. The ALJ took the motion to dismiss under submission, and adjourned the hearing, subject to his ruling on the pending motion. On January 31, 2018, the ALJ issued a proposed decision granting the Agency's motion to dismiss the complaint and underlying charge.

The ALJ found the Association failed to establish that the Agency changed an existing policy. The ALJ observed that an existing policy could be established by either past practice or a written policy,[1] but that the Association was not able to establish either. The ALJ acknowledged that the MOU, at Article 16.01, allows a grievant to grieve a violation of an Agency policy. However, the ALJ found that the existence of dispute resolution/factfinding procedures in Agency Policies A-21 and A-30 created a "patent ambiguity" with MOU Article 16.01. Accordingly, the ALJ determined that the Association had not established that the Agency had a written policy of permitting employees to grieve violations of Agency Policies A-21 and A-30.

Because the ALJ granted the motion to dismiss after the Association presented its case-in-chief, he did not complete a full evidentiary hearing. The ALJ did not make a determination regarding whether the Association established the other elements of a unilateral change allegation, or whether the Agency had established any affirmative defense.

The Association filed exceptions. The Association asserted that the ALJ wrongly concluded that the Agency did not have a written policy permitting employees to grieve alleged violations of Agency Policies A-21 and A-30. The Agency filed an exception and a response to the Association's exceptions urging the Board to adopt the ALJ's proposed decision.

The Agency's responses to the Association's exceptions assert, in part, that: (1) the MOU's management rights clause waived the Association's ability to grieve violations of

[1] Citing *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 6, the ALJ acknowledged that an employer also may be held liable for an unlawful unilateral change for newly created, implemented, or enforced policies. However, the ALJ did not analyze whether the Agency's actions amounted to such a policy change because the Association only asserted a change in past practice or written policy.

Agency Policies A-21 and A-30;[2] (2) the parties' bargaining history supports the Agency's interpretation of the MOU's grievance policy; and (3) the ALJ correctly found that Agency Policies A-21 and A-30 provide the exclusive means of addressing any alleged violations of Agency Policies A-21 and A-30.[3]

DISCUSSION

An unlawful unilateral change is a per se violation of the Agency's duty to bargain in good faith. (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 22.) This is because such conduct has an inherently destabilizing and detrimental effect upon the parties' bargaining relationship. (*San Mateo County Community College District* (1979) PERB Decision No. 94, pp. 14-15.) To state a prima facie violation, an exclusive representative must establish that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*County of Kern* (2018) PERB Decision No. 2615-M, pp. 8-9; *County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 13, citing *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262.)

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[2] The MOU at page 1, paragraph A contains a management rights clause that states the following: "There are no provisions in this MOU that shall be deemed to limit or curtail the Agency in any way in the exercise of the rights, powers and authority which the Agency had prior to entering into this MOU unless and only to the extent that the provisions of this MOU specifically curtail or limit such rights, powers and authority."

[3] The Agency also argues that its handling of the Rucker grievance is not evidence that violations of Agency Policies A-21 and A-30 are grievable. Whether the Agency initially acquiesced to processing the Rucker grievance is not material to this decision. Accordingly, this argument need not be addressed. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.)

The Board has identified three general categories of unilateral changes: (1) changes to the parties' written agreement; (2) changes to an established past practice; and (3) newly created, implemented, or enforced policies. (*Pasadena Area Community College District*, *supra*, PERB Decision No. 2444, p. 12, fn. 6.)

The ALJ granted the Agency's motion to dismiss on the basis that the Association had failed to establish a change to the parties' written agreement or a change to an established past practice. The Association did not except to the ALJ's determination regarding past practice, and did not file an exception asserting that the ALJ improperly failed to analyze whether the Agency's actions amounted to a newly created, implemented, or enforced policy. (See fn. 1, *ante*.)

Accordingly, our focus in this decision is whether the Association established that the Agency had a written policy, set forth in the parties' MOU, at Section 16 authorizing the filing of grievances alleging violations of Agency Policies A-21 and A-30.

PERB interprets collective bargaining agreements according to their plain meaning if the language is clear. (*San Francisco County Superior Court & Region 2 Court Interpreter Employment Relations Committee* (2018) PERB Decision No. 2609-I, p. 7; *Trustees of the California State University* (1996) PERB Decision No. 1174-H, p. 6.) If the language is ambiguous, the Board may consider extrinsic evidence, such as bargaining history, where available. (*Los Angeles Unified School District* (1984) PERB Decision No. 407, p. 5.)

PERB has previously held that narrowing the scope of an MOU's grievance procedures is an unlawful unilateral change. (*County of Riverside* (2003) PERB Decision No. 1577-M.) In *County of Riverside*, an employer rejected a grievance challenging its decision not to promote an employee. (*Id.* at p. 2.) The employer asserted that the MOU between the

employer and the union did not cover such grievances. (*Ibid.*) The parties' MOU defined a grievance as:

> [A] written request or complaint . . . initiated by an employee, arising out of a dispute by an employee or group of employees concerning the application or interpretation of the specific terms and conditions set forth in this Memorandum of Understanding, Ordinance, rule, regulation, or policy concerning wages, hours, and other terms and conditions of employment. All other matters are excluded from the grievance procedure including, but not limited to: [list of exclusions].

(*Id*., adopting proposed decision at p. 3.) The employer argued that the MOU section covering promotions, which set forth a process for awarding promotions, should be interpreted to exclude issues regarding promotions from the grievance procedure. (*Id.* at p. 3.) The Board rejected this argument, finding that to show promotions were excluded from the grievance procedure, the employer was required to demonstrate either that the MOU explicitly excluded such grievances or that the union waived its right to file such grievances. (*Id.* at pp. 5-7.)

Like the MOU at issue in *County of Riverside*, *supra*, PERB Decision No. 1577-M, the parties' MOU defines grievances broadly. The MOU, at Section 16.01, defines a grievance as an "alleged violation, misinterpretation, inequitable application or non-compliance of Agency ordinances, resolutions, policies, and/or provisions of the Memorandum of Understanding of a non-disciplinary nature." The plain language suggests that an alleged violation of any non-disciplinary agency policy is grievable, including Agency Policies A-21 and A-30.

The MOU does not contain any language precluding an employee from grieving alleged violations of Agency Policies A-21 and A-30. Section 16.01 explicitly excludes disciplinary issues from the grievance procedures. However, it does not explicitly exclude Agency Policies A-21 and A-30 or policies related to retaliation. The parties could have specifically excluded from the grievance procedure any agency policy that included its own resolution process. For

example, in *County of Riverside, supra*, PERB Decision No. 1577-M, adopting proposed decision at p. 3, the parties' MOU excluded from the grievance procedure "[m]atters reviewable under some other County administrative procedure." The parties here could have chosen to include such language narrowing the scope of the grievance procedure, but they did not.

The MOU permits grievances regarding an alleged violation of any non-disciplinary Agency Policy, and there is no exception for Agency Policies A-21 and A-30. Accordingly, based on the plain language of the MOU, we hold that the Agency maintained a policy of permitting employees to grieve alleged violations of Agency Policies A-21 and A-30.

Because the plain, unambiguous meaning of the MOU permits grievances alleging violations of Agency Policies A-21 and A-30, little to no weight should be given to contextual evidence, including bargaining history, or the language of Agency Policies A-21 and A-30. (*Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, pp. 19-21 [Board affords little to no weight to extrinsic evidence, such as bargaining history, where the plain language of an MOU is clear].)

Even if we accorded the language in Agency Policies A-21 and A-30 the same weight as the MOU provision, it would not change our holding. Where there is an arguable conflict in the language of two different provisions of an MOU, then the Board, where it can, harmonizes the language of both provisions, with the goal of giving a "reasonable, lawful and effective meaning to all the [MOU's] terms." (*King City Joint Union High School District* (2005) PERB Decision No. 1777, p. 6; see also *City of Riverside* (2009) PERB Decision No. 2027-M, p. 10.) Reading the terms of Agency Policies A-21 and A-30 together with MOU Article 16, we

disagree with the ALJ's conclusion that the dispute resolution/fact-finding procedure in Agency Policy A-30, Sections 2.00(F)-(M), creates a "patent ambiguity."

It does not follow that the existence of a dispute resolution procedure in Agency Policy A-30, Sections 2.00(G)-(M), precludes an employee from utilizing an additional dispute resolution procedure. There is no language in Agency Policy A-30 stating the resolution procedure set forth in Sections 2.00(F)-(M) is the *exclusive* resolution procedure for alleged violations of Agency Policies A-21 and A-30. The absence of such language is significant. (*McDonald v. Stockton Met. Transit Dist.* (1973) 36 Cal.App.3d 436, 442 ["When a contract describes a remedy for breach without an express or implied limitation making that remedy exclusive, the injured party may seek any other remedy provided by law."].)

The resolution procedures in Agency Policy A-30, Sections 2.00(F)-(M), do not conflict with the definition of a grievance set forth in MOU Article 16. These two policies may be harmonized as follows: It is permissible to allege violations of Agency Policies A-21 and A-30 by pursuing the complaint procedure set forth in Agency Policy A-30, Sections 2.00(F)-(M), and/or by filing a grievance pursuant to MOU Article 16.

The Agency asserts that the Association waived its right to grieve alleged violations of Agency Policies A-21 and A-30 because the MOU contains a management rights clause. The MOU's management rights clause provides: "There are no provisions in this MOU that shall be deemed to limit or curtail the Agency in any way in the exercise of the rights, powers and authority which the Agency had prior to entering into this MOU unless and only to the extent that the provisions of this MOU specifically curtail or limit such rights, powers and authority."

To be effective, an alleged waiver of statutory bargaining rights must be specific, clear, and unmistakable. (*County of Monterey* (2018) PERB Decision No. 2579-M, p. 24.) The

MOU's management rights clause does not unmistakably waive the Association's right to grieve alleged violations of Agency Policies A-21 and A-30. Moreover, the MOU's management rights clause reserves management's rights except where the MOU specifically curtails such rights. As noted above, Article 16 sets forth the scope of the MOU's grievance policy. Therefore, the Agency's power to limit the scope of the grievance policy has been specifically curtailed by the provisions of the MOU. The MOU permits the Association to grieve alleged violations of Agency Policies A-21 and A-30.

We express no view on any party obtaining "two bites of the apple," i.e. two chances to receive a favorable outcome regarding the same complaint. Rather, we interpret the MOU language and find it to have a broad definition of allegations that may be grieved, and no exclusion for alleged violations of Agency Policies A-21 and A-30. Accordingly, the Association has established that the Agency had an existing policy of permitting an employee to file a grievance alleging a violation of Agency Policies A-21 and A-30.

ORDER

We find the MOU permits the Association to grieve a violation of Agency Policy A-21 and Agency Policy A-30. Therefore, for purposes of proving an unlawful unilateral change, the Association has met its burden to establish an existing written policy of permitting an employee to file a grievance alleging a violation of Agency Policies A-21 and A-30.

Because this case reached us after the ALJ granted a motion to dismiss, it is appropriate to remand the matter to the Division of Administrative Law to determine whether the Association can establish the other essential elements of a unilateral change allegation, and if so, whether the Agency can establish an affirmative defense.

The dismissal of the complaint and unfair practice charge in Case No. LA-CE-1095-M is hereby REVERSED and the matter is REMANDED to the Public Employment Relations Board, Division of Administrative Law, for further proceedings in accordance with this decision. Such further proceedings may include an additional informal settlement conference at the discretion of the Division of Administrative Law.

Members Banks and Krantz joined in this Decision.