STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	Case No. LA-CE-5-M Request for Reconsideration PERB Decision No. 1577-M PERB Decision No. 1577a-M March 18, 2004

Appearances: Tosdal, Smith, Steiner & Wax by Eric M. Hart, Attorney, for Service Employees International Union; Liebert, Cassidy & Whitmore by Steven M. Berliner and Bruce A. Barsook, Attorneys, for County of Riverside.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration by the County of Riverside (County) of the Board's decision in County of Riverside (2003) PERB Decision No. 1577-M (County of Riverside). In County of Riverside, the Board found that the County unilaterally changed the grievance process regarding promotions without first providing the Service Employees International Union (SEIU) with notice and an opportunity to bargain.

After review of the record, including the County's request for reconsideration and SEIU's response, the Board denies the County's request for the reasons expressed below.

DISCUSSION

SEIU argues that the request for reconsideration was untimely filed citing the 20-day period provided in PERB Regulation 32410[1]. However, under PERB Regulation 32130[2], the period of time begins to run the day after the act or occurrence referred to, if the last day falls on a Sunday, the date is extended to the next business day, and a five-day extension of time applies to any document served by mail. The 20-day period ended on January 20, 2004, but the request was filed with PERB on Monday, January 26, 2004. Under PERB Regulation 32130, with the five-day extension and the allowance for Sunday, we find that the request was timely filed.

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

[2]PERB Regulation 32130 provides:

> (a) In computing any period of time under these regulations, except under Section 32776(c), (d), (e) and (f), the period of time begins to run the day after the act or occurrence referred to.
>
> (b) Except for filings required during a 'window period' as defined in Section 33020, 40130, 51026, 61010 or 71026, whenever the last date to file a document falls on Saturday, Sunday, or a holiday, as defined in Government Code Sections 6700 and 6701, or PERB offices are closed, the time period for filing shall be extended to and include the next regular PERB business day. The extension of time provided herein shall be applied subsequent to the application of any other extension of time provided by these regulations or by other applicable law.
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> (c) A five day extension of time shall apply to any filing made in response to documents served by mail if the place of address is within the State of California, ten days if the place of address is outside the State of California but within the United States, and twenty days if the place of address is outside the United States.

Requests for reconsideration are governed by PERB Regulation 32410, which provides, in pertinent part:

> (a) Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. An original and five copies of the request for reconsideration shall be filed with the Board itself in the headquarters office and shall state with specificity the grounds claimed and, where applicable, shall specify the page of the record relied on. Service and proof of service of the request pursuant to Section 32140 are required. The grounds for requesting reconsideration are limited to claims that: (1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case. [Emphasis added.]

The County first argues that the Board's decision was based upon a prejudicial error of fact in that the administrative law judge (ALJ) and Board based their determination on a past practice or policy of grieving the issue of promotions, which did not exist. In its response, SEIU frames the issue the same way. However, both parties misconstrue the import of the Board's decision. The Board found in County of Riverside that the County was contractually bound under the memorandum of understanding (MOU) to process grievances over promotions, not that the County changed a past practice based upon a 1994 arbitration. MOU Article VI, Section 5 describes the bases for the County to promote employees: "merit and ability." The Board found that SEIU had not waived its right to grieve promotions because neither Article VI, Section 5 nor the MOU's grievance procedure in Article XIII, Section 2(B),

either expressly or by implication "clearly and unmistakably" excludes promotions. The County does not dispute this in its request for reconsideration. The Board's finding that the County processed such a grievance through arbitration in 1994 further supported the Board's finding that promotions are grievable under the MOU, but contrary to the County's assertion, was not the basis for the Board's determination of unilateral change. We therefore reject the County's argument that the Board committed a prejudicial error of fact.

The County next contends that newly discovered evidence renders the case moot. The evidence involves Carmela MacArthur's (MacArthur) retirement on May 2, 2003. This evidence was discovered after the County filed its exceptions to the ALJ's proposed decision on September 16, 2002 but before the Board issued its decision on December 31, 2003.[3] This is the first time that either party has raised this issue. The information was available well before the Board's decision was issued and was submitted eight months after MacArthur's retirement, or per the declaration of Freeman, three months after the County's discovery of her retirement in September 2003 when SEIU filed its petition for withdrawal. Neither the County nor SEIU provided an explanation for the petition for withdrawal. There was no indication from the County that it supported SEIU's request. We disagree therefore with the County that the evidence was not previously available or was submitted within a reasonable time of its discovery. Therefore, the County did not meet the first and third requirements for newly discovered evidence under PERB Regulation 32410.

The County argues that MacArthur's retirement in May 2003 is relevant to the issues to be reconsidered and impacts the decision and order, thus rendering the case moot. In Amador

[3]This newly discovered evidence is supported by the declaration of Debrah Freeman (Freeman), employee relations manager for the County. Freeman states that she first learned of MacArthur's retirement from SEIU in September 2003 when SEIU filed its request to withdraw the case.

Valley Joint Union High School District (1978) PERB Decision No. 74 (Amador Valley), the Board defined mootness:

> A case in controversy becomes moot when the essential nature of the complaint is lost because of some superceding act or acts of the parties. Mere discontinuance of wrongful conduct does not ordinarily end the underlying controversy. There must be evidence that the party acting wrongfully has lost its power to renew its conduct. [Fns. omitted.]

For example, in Amador Valley, the Board noted an example of an employee denied the right to take an examination. The underlying issue was the right to take the examination, which was not mooted by the employee having taken and failed the exam. (Amador Valley, at p. 6, citing Terry v. Civil Service Comm. (1952) 108 Cal. App. 2d 861.) The Board framed the inquiry as follows:

> If any material question remains to be answered, the case is not moot and an appeal will not be dismissed.

The facts in this case parallel the circumstances in California School Employees Association and its Shasta College Chapter #381 (Parisot) (1983) PERB Decision No. 280a (Parisot 2), in which the association barred Kenneth L. Parisot, Jr. (Parisot) from membership and from holding office. The Board in California School Employees Association and its Shasta College Chapter #381 (Parisot) (1983) PERB Decision No. 280 found that the association's conduct stated a prima facie case of unreasonable discipline and ordered issuance of a complaint. In Parisot 2, the association requested reconsideration on the basis that PERB had certified a unit modification which designated Parisot a supervisor. Under the association's constitution, supervisors were precluded from membership and so it was impossible for PERB to fashion a remedy if Parisot's complaint was upheld. In Parisot 2, the Board found that the central issue in the case was whether the dismissal was lawful, not whether Parisot had a present right to continue his membership. The fact that "because of the

'changed conditions, the relief originally sought cannot be granted' does not lead to a contrary result." (Parisot 2, at p. 4, citing Amador Valley.) The Board further opined that remedies other than reinstatement could be found appropriate.

In this case, the central issue is SEIU's right to grieve over promotions, not whether MacArthur can currently pursue her own grievance. We therefore find that under Amador Valley and Parisot 2, this case is not moot. Since the parties do not dispute MacArthur's retirement, the order will be modified to delete the specific reference to processing MacArthur's grievance.

ORDER

The County of Riverside's request for reconsideration of the Board's decision in County of Riverside (2003) PERB Decision No. 1577-M is hereby DENIED. The remainder of the Order in PERB Decision No. 1577-M is modified as follows:

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the County of Riverside (County) violated the Meyers-Milias-Brown Act (MMBA)[4], Government Code sections 3503, 3505 and 3506 and PERB Regulation 32603(a), (b) and (c) by unilaterally changing its grievance policy regarding the grievability of promotions without providing the Service Employees International Union (SEIU) with prior notice and the opportunity to bargain.

Pursuant to MMBA section 3509(a), it is hereby ORDERED that the County, its governing board and its representatives shall:

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

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with SEIU regarding a change in policy affecting matters within the scope of representation;

2. Unilaterally changing its grievance policy regarding the grievability of promotions, without giving SEIU prior notice and opportunity to bargain;

3. Failing and refusing to process grievances regarding promotions, pursuant to the parties' agreed-upon grievance procedures.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Within ten (10) workdays after service of a final decision in this matter, process all other grievances filed by SEIU regarding promotions, pursuant to the parties' agreed-upon grievance procedures;

2. Post copies of the Notice to Employees attached hereto as an Appendix, signed by an authorized agent of the County, at all work locations where notices to employees are customarily posted. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material;

3. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on SEIU.

It is further ordered that the proposed decision in the unfair practice charge in Case No. LA-CE-5-M is hereby AFFIRMED.

Chairman Duncan and Member Neima joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-5-M, Service Employees International Union v. County of Riverside, in which all parties had the right to participate, it has been found that the County of Riverside violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505 and 3506 and PERB Regulation 32603(a), (b) and (c) by unilaterally changing its grievance policy regarding the grievability of promotions without providing the Service Employees International Union (SEIU) with prior notice and the opportunity to bargain.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with SEIU regarding a change in policy affecting matters within the scope of representation;

2. Unilaterally changing its grievance policy regarding the grievability of promotions, without giving SEIU prior notice and opportunity to bargain;

3. Failing and refusing to process grievances regarding promotions, pursuant to the parties' agreed-upon grievance procedures.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Process all other grievances filed by SEIU regarding promotions, pursuant to the parties' agreed-upon grievance procedures.

Dated: _____ COUNTY OF RIVERSIDE

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.