

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MARK SIROKY,

Charging Party,

v.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 39,

Respondent.

Case No. SA-CO-16-M

PERB Decision No. 1618-M

April 16, 2004

Appearance: Mark Siroky, on his own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Mark Siroky (Siroky) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the International Union of Operating Engineers Local 39 (IUOE) violated its duty of fair representation under the Meyers-Milias-Brown Act (MMBA)¹ by failing to represent Siroky in a wage dispute.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters and Siroky's appeal. The Board affirms the dismissal of the charge based on the discussion below.

¹MMBA is codified at Government Code section 3500 et seq.

BACKGROUND

Siroky was formerly employed as a Junior Engineer with the City of Folsom (City).² In 1996, Siroky sought IUOE's assistance in filing several grievances. Siroky does not allege the nature of the grievances except that at least one grievance involved a working out-of-class claim. In 1998, IUOE and the City settled Siroky's grievances at an arbitration hearing. The settlement included the following provisions: (1) Siroky was to submit a voluntary resignation to be effective September 30, 1998; (2) certain evaluations and reprimands were to be removed from Siroky's personnel file and maintained separately; (3) in response to inquiries about Siroky's employment, the City would limit its response to the dates of Siroky's employment; (4) Siroky would dismiss a separate action in superior court; (5) Siroky would provide a general waiver and release of liability; and (6) the City would pay Siroky \$5000 in satisfaction of his working out-of-class grievance.³

Siroky alleges that shortly after the arbitration, the City prepared a written settlement agreement. According to Siroky, the City's written settlement substantially changed the terms agreed to at the arbitration. However, Siroky does not provide any specific factual allegations regarding this point.

The charge then alleges that IUOE refused to represent Siroky in October 1998. At that point Siroky hired a private attorney to press his claims, but apparently was unsuccessful in resolving the dispute to his satisfaction. In February 1999, Siroky claims he terminated his relationship with his private attorney because of a lack of funds. Siroky then wrote to IUOE requesting its assistance again.

²See City of Folsom (2003) PERB Decision No. 1531-M.

³These provisions are generalized summaries based on the transcript attached to the charge.

According to the charge, IUOE agreed to assist Siroky. In March 1999, IUOE's attorney drafted an agreement which it presented to the City. Despite IUOE's efforts, the City would not sign the agreement. On or about December 15, 1999, Siroky received a letter from Paul Hillesheim (Hillesheim), the IUOE business representative handling his case. The letter stated, "Enclosed please find correspondence from our attorney, which is self explanatory, and an executed agreement for your use." Attached was a letter addressed to Hillesheim dated December 15, 1999, from Daniel Boone (Boone), IUOE's attorney.

In the letter, Boone summarized his efforts on behalf of Siroky and advised Hillesheim as to IUOE's legal obligations. In particular, Boone noted that he had demanded certain changes to the initial proposed settlement agreement. The City had agreed to those changes. Boone then attempted to obtain Siroky's signature on the modified agreement. However, Siroky would not sign the modified agreement. Other than alleging that the modified agreement departed "substantially" from the terms set forth in the arbitration, the charge does not indicate why Siroky would not sign the modified agreement.

According to the letter, Boone then attempted to convince the City to agree to Siroky's desired version. The City refused. At that point, Boone urged Siroky to sign the modified agreement. According to Boone, it was his legal opinion that the modified agreement did not differ substantially from Siroky's desired version and that, in any event, Siroky would suffer no prejudice. Boone further stated that if Siroky continued to refuse to sign, Siroky's only further option would be to file an action in superior court. However, Boone opined that such an action would be unsuccessful. Accordingly, Boone informed Hillesheim that IUOE had no legal obligation to file a court action and that IUOE's legal obligations would be fulfilled by presenting the modified agreement for Siroky's signature. Boone then ended his letter to

Hillesheim with the following paragraph:

The Union and its representatives have pursued the grievances on behalf of Mr. Siroky with diligence and determination. The Union is not required to take any further action, once having submitted the signed Settlement Agreement to Mr. Siroky for his signature. No further action is required by the Collective Bargaining Agreement or by the Union's duty of fair representation.

The charge then alleges that on March 30, 2000, Siroky contacted IUOE to correct misstatements in the December 1999 letter and to request further representation. The charge does not allege what those misstatements were. On May 26, 2000, Siroky was sent a letter from Perry Bonnilla, IUOE's director of public employees. That letter states, in relevant part:

The final decision of the Union was communicated to you in a cover letter dated December 20, 1999, from Business Representative Paul Hillesheim, which enclosed a December 15, 1999, letter to Mr. Hillesheim from W. Daniel Boone, the attorney who represented the Local Union in this matter. That correspondence communicated clearly and unequivocally that the Union had decided, based on legal advice, that no further action by the Union on your behalf was appropriate or necessary. That decision has not changed.

DISCUSSION

Duty of Fair Representation

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213 [42 Cal.Rptr.2d 389] (*Hussey*).) In *Hussey*, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union's power."

In International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M (IAM (Attard)), the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions in such cases, including Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332 and American Federation of State, County and Municipal Employees, Local 2620 (Moore) (1988) PERB Decision No. 683-S, are consistent with the approach of both Hussey and federal precedent (Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369]).

Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (IAM (Attard).) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (United Teachers – Los Angeles (Wylar) (1993) PERB Decision No. 970.)

Applying these standards, the Board finds that Siroky has not established a prima facie case. Specifically, Boone's letter sets forth the actions taken by IUOE on behalf of Siroky. These actions included attempts at getting the City to sign Siroky's desired version of the settlement agreement. However, IUOE was unsuccessful. Boone then provides his legal opinion that Siroky should sign the modified agreement which IUOE and the City had both approved. Boone specifically provided his legal opinion that the modified agreement was substantially similar to Siroky's desired version and that Siroky would suffer no prejudice by signing it. These facts, submitted by Siroky in his charge, establish a rational basis for IUOE's decision not to further represent him. Siroky also does not explain why he would not sign the

modified version. Siroky also alleges no facts demonstrating why IUOE's decision was without rational basis or devoid of honest judgment. Accordingly, Siroky has failed to state a prima facie case and his charge must be dismissed.

ORDER

The unfair practice charge in Case No. SA-CO-16-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8386
Fax: (916) 327-6377



June 26, 2003

Mark Siroky

Re: Mark Siroky v. IUOE Local 39
Unfair Practice Charge No. SA-CO-16-M
DISMISSAL LETTER

Dear Mr. Siroky:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 28, 2003. Mark Siroky alleges that the IUOE Local 39 violated the Meyers-Milias-Brown Act (MMBA)¹ by failing to represent him.

I indicated to you in my attached letter dated June 11, 2003, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to June 18, 2003, the charge would be dismissed.

You were granted an extension of time and filed an amended charge on June 24, 2003. In the amended charge you argue that the December 1999 letter from the Union did not clearly inform you that the Union would not represent you in the grievance dispute with your former employer, the City of Folsom. However, as stated in my letter of June 11:

In December 1999, you received a letter from the IUOE which communicated its position that you should sign an attached settlement agreement with the employer. The letter was dated December 20, 1999 and was from Paul Hillesheim². It included an attached letter from the union's attorney which described the reasons the union believed the attached agreement appropriate and recommended acceptance by Hillesheim and yourself. The attorney's letter states in part,

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² Hillesheim's letter merely states "Enclosed please find correspondence from our attorney, which is self explanatory, and an executed agreement for your use."

The Union and its representatives have pursued the grievances on behalf of Mr. Siroky with diligence and determination. The Union is not required to take any further action, once having submitted the signed Settlement Agreement to Mr. Siroky for his signature. No further action is required by the Collective Bargaining Agreement or by the Union's duty of fair representation.

Your charge states that with this letter, "The Union attorney claimed there was no basis for me to make such a demand, the demand was unmeritorious and therefore the Union was relieved of its obligation to represent me." You allege that the union's attorney misstated issues and drew an inappropriate conclusion regarding a demand which you had regarding settlement of the dispute.

In December 1999, Hillesheim sent you a letter which with one sentence clearly endorsed the attached letter from the Union's attorney. That letter stated "The Union is not required to take any further action" and "No further action is required by the Collective Bargaining Agreement or by the Union's duty of fair representation."

As discussed in my letter of June 11, the limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.)³ The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

In your amended charge, you contend that the Union could have more clearly stated their position with a statement such as "Mr. Siroky, the Union will not represent you." However, the issue is not whether the Union could have stated its position differently or more clearly. The Board has determined that the statute of limitations begins to run on the date the employee, acting with reasonable diligence, knew or should have known that further assistance from the union was unlikely. Los Angeles County Education Association, CTA/NEA (Burton) (1999) PERB Decision No. 1358 The letter and attachment of December 1999 meet this standard.

³ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

The amended charge also states that the December 1999 letter from the Union referred only to a "form of settlement" issue. You state that in April and May 2000⁴ you asked for representation on a wage issue. You also state that the December 1999 letter should not be read so broadly as to deny further representation on the wage issue which was addressed in the recommended settlement or any issue other than "form of settlement".

However, the December 1999 letter is a recommendation that you sign a settlement agreement that would settle all claims including the outstanding wage issue. The Union's attorney states that the Union has pursued "the grievances" and on those grievances "The Union is not required to take any further action." Thus, the letter refers to the grievance issues, including the wage issue, and not merely the "form of settlement" when it addresses further representation.

You next state that because you did not learn of PERB's jurisdiction over the MMBA until January 2002, the statute of limitations should begin to run at that time. However, the Board has held that a charging party's belated discovery of the legal significance of an alleged violation does not excuse an otherwise untimely filing. UCLA Labor Relations Division (1989) PERB Decision No. 735-H

Last, you assert that the statute of limitations should not begin to run until July 1, 2001 the date upon which PERB assumed jurisdiction over the MMBA. I am aware of no statutory authority or case precedent which would support this exception to the statutory limitations period.

Based on the facts and reasons contained herein and in my June 11 letter, I must dismiss this charge.

Right to Appeal

Pursuant to PERB Regulations,⁵ you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

⁴ Your charge states "2001" but your attached letter to the Union is dated May 11, 2000.

⁵ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON

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June 26, 2003
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General Counsel

By
Bernard McMonigle
Regional Attorney

Attachment

cc: W. Daniel Boone

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8386
Fax: (916) 327-6377



June 11, 2003

Mark Siroky

Re: Mark Siroky v. IUOE Local 39
Unfair Practice Charge No. SA-CO-16-M
WARNING LETTER

Dear Mr. Siroky:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 28, 2003. Mark Siroky alleges that the IUOE Local 39 violated the Meyers-Milias-Brown Act (MMBA)¹ by failing to represent him.

Your charge alleges that the IUOE has failed to represent you in a wage dispute with the City of Folsom. In January 2002, a superior court ruled that PERB has jurisdiction over such claims and dismissed your action against the union in that forum.

Your charge states that in October 1998 "the union refused to represent me in collection of wages from the City." You used a private attorney in the matter but terminated that relationship in February 1999. In March 1999, the union's attorney drafted an agreement which the employer would not sign.

In December 1999, you received a letter from the IUOE which communicated its position that you should sign an attached settlement agreement with the employer. The letter was dated December 20, 1999 and was from Paul Hillesheim². It included an attached letter from the union's attorney which described the reasons the union believed the attached agreement appropriate and recommended acceptance by Hillesheim and yourself. The attorney's letter states in part,

The Union and its representatives have pursued the grievances on behalf of Mr. Siroky with diligence and determination. The Union is not required to take any further action, once having submitted the signed Settlement Agreement to Mr. Siroky for his signature. No further action is required by the Collective

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² Hillesheim's letter merely states "Enclosed please find correspondence from our attorney, which is self explanatory, and an executed agreement for your use."

Bargaining Agreement or by the Union's duty of fair representation.

Your charge states that with this letter, "The Union attorney claimed there was no basis for me to make such a demand, the demand was unmeritorious and therefore the Union was relieved of its obligation to represent me." You allege that the union's attorney misstated issues and drew an inappropriate conclusion regarding a demand which you had regarding settlement of the dispute.

Your charge states that on March 30, 2000 you contacted the union, corrected the attorney's statement, and requested representation in the dispute. On May 26, 2000, you were sent a letter from Perry Bonnilla, the union's director of public employees³. That letter states in relevant part,

The final decision of the Union was communicated to you in a cover letter dated December 20, 1999, from Business Representative Paul Hillesheim, which enclosed a December 15, 1999, letter to Mr. Hillesheim from W. Daniel Boone, the attorney who represented the Local Union in this matter. That correspondence communicated clearly and unequivocally that the Union had decided, based on legal advice, that no further action by the Union on your behalf was appropriate or necessary. That decision has not changed.

Code of Civil Procedure section 338 prohibits PERB from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than three years prior to the filing of the charge. The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.)⁴ The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

In your charge you allege that the IUOE improperly refused to represent you. The denial of representation was communicated to you in December of 1999, more than three years prior to your filing the unfair practice charge on May 29, 2003. A union's later affirmation of the original refusal to represent does not change the date of the alleged violation. Los Angeles County Education Association, CTA/NEA (Burton) (1999) PERB Decision No. 1358 Accordingly, this charge must be dismissed.

³ Your charge states "On May 30, 2000 the Union capriciously rejected my request for representation..." I assume that you are referring to receipt of the May 26 letter.

⁴ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

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June 11, 2003

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For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before June 18, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Bernard McMonigle
Regional Attorney

BMC:b