STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 39, AFL-CIO, Charging Party, v. COUNTY OF PLACER, Respondent.	Case No. SA-CE-78-M PERB Decision No. 1630-M May 18, 2004

Appearances: Weinberg, Roger and Rosenfeld by Brooke D. Pierman, Attorney, for International Union of Operating Engineers, Local 39, AFL-CIO; Placer County Counsel's Office by Mark W. Rathe, Attorney, for County of Placer.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by International Union of Operating Engineers, Local 39, AFL-CIO (IUOE) and the County of Placer (County), to an administrative law judge's (ALJ) proposed decision (attached). The unfair practice charge was filed against the County by IUOE under the Meyers-Milias-Brown Act (MMBA).[1]

The Board has reviewed the entire record in this matter, including the ALJ's proposed decision, the parties' exceptions and the County's response. The Board finds the ALJ's findings of fact and conclusions of law as to the issue of timeliness to be free of prejudicial error and adopts that portion of the decision only.

Consistent with the discussion below, the Board rejects the remainder of the proposed decision.

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

BACKGROUND

IUOE filed and processed a grievance on December 21, 2001, claiming that a specified group of employees (Senior Child Support Specialists or SCSS) was entitled to working out-of-class pay because they had been performing specified supervisory duties since 1998. The County denied IUOE's claim through the course of the grievance process. On December 27, 2001, the County issued a memo directing that specified supervisory duties would no longer be performed by the SCSS.

IUOE appealed the denial of the grievance to the County Civil Service Commission (Commission) by filing a complaint on March 25, 2002. The County defended its position two-fold stating that the complaint was not signed by the aggrieved employee(s) and the complaint was filed more than sixty days (60) following the alleged violations of the County Civil Service Code. The Commission supported the County's position and declined to take the case.

In response, IUOE located some or all of the aggrieved employees, had them sign the complaint and resubmitted it. The Commission again declined to hear it based on the previously indicated position that the complaint was filed more than sixty (60) days following the alleged violations.

On July 18, 2002, IUOE filed an unfair practice charge with PERB against the County alleging various violations of MMBA. The charge was amended November 8, 2002. The PERB general counsel issued a complaint alleging violations of MMBA sections 3503, 3505 and 3506. Additionally, the complaint issued by the PERB general counsel alleged the County

committed various unfair practice charges as defined in PERB Regulation 32603(a), (b) and (c).[2]

The County answered, denying all charges. The case was heard before an ALJ on August 19, and September 15, 2003.

IUOE took the position that the County had established a practice of consistently and historically interpreting the County Civil Service Rules to permit IUOE to pursue complaints before the Commission even though the aggrieved employees had not signed the complaint and the complaints were filed more than 60 days after the alleged violations. Covering a time period of 1991 to 2002, IUOE cited five examples as a basis for its argument that the 60-day limit was "consistently and historically" ignored.

The County relied on sections of the Civil Service Rules for its position. Section 3.08.340(B) states that "[t]he civil service commission shall dismiss any charge in the complaint when it appears that the complaint was filed more than sixty (60) days after the date of the alleged violation."

Further, the County relied on section 3.08.300(A)(5) indicating that the "name and position of the party who signed the complaint" shall be contained in the complaint.

The ALJ found that the County was in violation of various sections by not accepting the complaint without the signatures of the specific employees bringing the action. He then determined that the County was entitled to enforce the 60-day limitation making the complaint completely untimely.

Following the holding in Marysville Joint Unified School District (1983) PERB Decision No. 314 (Marysville), the ALJ noted that the County has the right to enforce the

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

60-day limitation even if it had never done so in the past. However, despite this holding, the ALJ made a finding that the County violated the MMBA by requiring that complaints be signed by employees.

DISCUSSION

In Marysville, the district and the association entered into a collective bargaining agreement. The agreement was entered into in 1976 and expired June 30, 1978. Section 8.4 provided (in relevant part) that "every certified employee shall be entitled to one duty-free lunch break of no less than 30 minutes each day."

In April of 1978, the parties began negotiations on a successor agreement. They did not address the noon duty issue until after the June 6, 1978, election in which the voters of the State of California passed Proposition 13, causing concern over loss of revenue for the district. There were concerns of extreme financial hardship for the district due to the change in property tax revenue.

Just a few days after that election the district informed the teacher's association that it was considering actions to freeze salaries and increase class size. The parties met to discuss emergency regulations. As part of the adoption of the budget cuts, all noon duty supervisors were laid off and teachers were assigned to noon duty in the next school year.

The district and the association reached a contract agreement on August 25, 1978, that included language giving the teachers a duty-free lunch period. Other issues continued to be discussed without agreement. On October 23, 1978, the association amended a previous unfair practice charge to allege that the assignment of teachers to noon duty, constituted an unlawful unilateral change in employment hours. The case went to formal hearing. The hearing officer found the district action in assigning the lunch duty to teachers to be an unlawful unilateral change of hours and a violation of the duty to negotiate in good faith.

The Board found contrary to the hearing officer that the lunch period language gave teachers a 30-minute lunch. Prior to the fall of 1978, the district had given them more than a 30-minute lunch. The finding by the hearing officer that the plain meaning of the contract was superseded by the parties' past practice was based on an inference unsupported by the record. There was no evidence of bargaining history from which to infer any meaning to be attached to the lunch duty provision.

The Board stated, "The mere fact that an employer has not chosen to enforce its contractual rights in the past does not mean that, ipso facto, it is forever precluded from doing so."

In the case before us, IUOE and the County had a memorandum of understanding (MOU) incorporating the Civil Service Rule of a 60-day limitation on time to file complaints. The ALJ points out that IUOE tried to claim it did not have a copy of that MOU but the union was in fact the party submitting the document into evidence.

Here, just as in Marysville, the union agreed to be bound. In this case, by the 60-day limitation on filing complaints with the Civil Service Commission. Any discussion as to whether the time frame is too short is irrelevant as this is the time frame in the agreement.

IUOE maintained that the 60-day limit had not been enforced on five occasions in the past eleven years. It was its position that this constituted a past practice of not enforcing the time limit.

As the ALJ correctly notes, in Hacienda La Puente Unified School District (1997) PERB Decision No. 1186 (Hacienda) adopting an ALJ proposed decision, the Board set forth the standard for a valid past practice. Under Hacienda, there "must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of

time as a fixed and established practice." It must be "regular and consistent" or "historic and accepted".

It is debatable whether the five examples cited by IUOE give rise to establishing a past practice, although the ALJ determined it does. However, he does acknowledge that the distinction he finds between the facts in Marysville and this case is not enough to distinguish this case. Nevertheless, it is a distinction without a difference.

In Marysville, as the ALJ notes, the teachers enjoyed extra time for lunch hours for a long period of time. Here, the County simply did not enforce a provision of the MOU they had every right to enforce. In both cases, the union membership enjoyed a benefit they did not have to be given. The ALJ determined there was no violation of MMBA sections 3503 and 3505 or PERB Regulation 32603(c). The Board adopts this holding and dismisses the exceptions filed by IUOE.

On the issue of the allegation that the signatures were unnecessary on the complaint he did find violations. However, after thoroughly reviewing the record, the Board finds that IUOE has failed to demonstrate a change in policy or practice on this issue.

The evidence establishes that the complaint was dismissed solely because it was untimely. The Commission was correct in declining to review it. The issue of the requirement of the signatures on the complaint was therefore appropriately not addressed. To comment on this issue or the appropriateness of the Civil Service Commission time frame would be only advisory and PERB does not issue advisory opinions (Long Beach Community College District (2002) PERB Decision No. 1475 as cited in San Marcos Unified School District (2003) PERB Decision No. 1508.)

The Board therefore finds there was no violation of the MMBA and dismisses the complaint.

ORDER

The unfair practice charge in Case No. SA-CE-78-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL 39, AFL-CIO, Charging Party, v. COUNTY OF PLACER, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-78-M PROPOSED DECISION (1/30/04)

Appearances: Weinberg, Roger & Rosenfeld, by Matthew J. Gauger, Attorney, for International Union of Operating Engineers, Stationary Engineers, Local 39, AFL-CIO; Placer County Counsel, by Mark W. Rathe, Attorney, for County of Placer.

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On July 18, 2002, the International Union of Operating Engineers, Stationary Engineers, Local 39, AFL-CIO (Union or IUOE), filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the County of Placer (County). The charge alleged various violations of the Meyers-Milias-Brown Act (MMBA or Act).[1] On November 8, 2002, the Union filed a first amended charge.

On November 22, 2002, PERB's general counsel, after an investigation of the charge, issued a complaint alleging violations of sections 3503, 3505 and 3506.[2] In addition, the

[1] All section references, unless otherwise noted, are to the Government Code. The MMBA is codified at section 3500 et seq.

[2] The MMBA states, in pertinent part:

> [3503] Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies. . . .

complaint alleged that the County committed various unfair practice charges, as defined in PERB Regulation 32603, subsections (a), (b) and (c).[3]

> [3505] The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
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> "Meet and confer in good faith' means that a public agency , or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.
>
> [3506] Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502.

[3] PERB regulations are codified in the California Code of Regulations, title 8, commencing with section 31001. PERB Regulation 32603, in pertinent part, states:

> It shall be an unfair practice for a public agency to do any of the following:
>
> (a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

On May 5, 2003, the County answered the complaint denying all material allegations and propounding various affirmative defenses. Two days of formal hearing were held before the undersigned on August 19 and September 15, 2003.

After the conclusion of the hearing, transcripts were prepared and briefs were filed. The case was submitted for a proposed decision on November 25, 2003.

INTRODUCTION

IUOE filed and processed a grievance claiming that a specified group of employees were entitled to working-out-of-class pay. The County denied the Union's claim through all steps of the grievance procedure. IUOE appealed this denial to the Civil Service Commission (Commission) by filing a complaint. The County advised the Commission that IUOE could not pursue this appeal because (1) no aggrieved employee had signed the complaint, and (2) the alleged violations occurred more than sixty days prior to the day the complaint was filed. The personnel department asserted that both were violations of the County's Civil Service Code. The Commission supported the County's position and declined to hear the case.

In response, IUOE located several affected employees, had them sign the complaint, and submitted a new complaint. The Commission continued to refuse to hear the complaint due to the timeliness issue. IUOE contends that the County's action violated the MMBA.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

The County argues that it did not violate the MMBA and that all of its actions were authorized by the parties' 2000-2003 memorandum of understanding (MOU).

FINDINGS OF FACT

Jurisdiction

The parties stipulated, and it is therefore found, that the charging party is an employee organization and the respondent is a public agency within the meaning of section 3501 and 3501.5, respectively.

Background

The Union and the County negotiated a 2000-2003 MOU for the subject employees' unit. The MOU, in section 19.c, provides, inter alia:

> . . . It is intended that all other present resolutions, ordinances, practices and policies shall continue in force and effect during said period, without change.

The parties have consistently interpreted this language to incorporate the County's Civil Service Rules into their MOU. If the Union wishes to effect a change in its terms and condition of employment, it negotiates such change with the County and the modifications are amended into such rules.

Union Allegations

On December 21, 2001, the Union filed a working-out-of-class grievance on behalf of Senior Child Support Specialists (SCSSs). The grievance alleged that these employees had been performing specified supervisory duties since 1998, thereby entitling them to additional salary, commensurate with these added responsibilities.[4] The grievance was signed by

[4] Throughout much of 1999, 2000 and into 2001 the SCSSs were told to be patient, the County was going to examine their job duties with the thought of reclassifying them.

Kathy Widing (Widing), Union business representative, on behalf of the affected employees, and processed through the grievance procedure. The County denied the grievance at all steps.

Throughout the course of 2001 the County reevaluated and revised the SCSSs' duties, stripping away many of their supervisory duties. On December 27, 2001, the County issued a memo which stated specified supervisory duties were no longer to be performed by the SCSSs.

On March 25, 2002, the Union appealed this denial by filing a complaint with the Commission. The complaint alleged that the SCSSs had worked out of class from December 7, 1998 to January 1, 2002. It characterized this work as a continuing violation. It further alleges that the County failed to honor the MOU grievance response timelines, thereby prohibiting the grievants from filing a timely complaint.

On April 5, 2002, the County's personnel department, in a letter to the Commission, argued that the Union's complaint was improper because (1) it was not signed by any "aggrieved person," as required by County Civil Service Rules, and (2) the majority of the complaint was untimely, as Civil Service Rules section 3.08.340B limits the Commission's jurisdiction to the sixty-day period immediately before the complaint was filed.

When the Commission met on April 15, 2002, Widing told the Commission that the SCSSs continued "to perform the full range of supervisory functions." The Commission did not conduct an evidentiary hearing into (1) Widing's allegation the SCSSs were still performing supervisory duties, (2) whether the County's alleged failure to respond at the various grievance levels in a timely manner negatively impacted the grievants' ability to file a timely complaint, and/or (3) the merits of the complaint. Instead it discussed only the question of whether the complaint was "drawn and filed in compliance with" applicable provisions of its rules. The Commission, without conducting any sort of evidentiary hearing, followed the County's advice and denied the complaint.

At that hearing one of the SCSSs, Susan Dunlop (Dunlop), told the Commission members that she "would be happy to sign any document that is before you."

Widing stated that in the past when the Commission denied a complaint on procedural grounds its usual practice was to permit the Union to cure the perceived defect and re-file the complaint. Therefore, Widing obtained the signature of some of the affected workers and filed a new complaint on April 23, 2002. The Commission convened a second hearing on May 13, 2002, but dismissed the "grievance complaint due to the 60-day timeframe."[5]

It is the Union's contention that the County has an established practice of consistently and historically interpreting the County's Civil Service Rules to permit the Union to pursue complaints before the Commission, even though (1) aggrieved employees have not signed the complaint form(s), and (2) the complaints were filed more than sixty days after the alleged violations. The Union contends that the practice requires only that the original grievance be filed within sixty days of the alleged violation(s). The Union presented five separate examples in support of its contentions.

(1) On June 28, 1994, the Union filed a grievance on behalf of a number of applicants for the attorney IV classification. The grievance complained of the County attorney staffing a May 25, 1994, oral examination board with persons intimately connected with his election campaign. After the grievance was denied by the County's personnel department, the Union filed a complaint with the Commission on September 28, 1994. The complaint was not signed by any of the aggrieved employees; it was only signed by IUOE Business Representative Chuck Thiel (Thiel), on their behalf. On December 7, 1994, the Commission heard the complaint and shortly thereafter issued its findings.

[5] This sixty-day limitation will be described in detail, infra.

In its official findings the Commission denied the appeal on the merits, but made no mention of either the absence of an aggrieved person's signature, or the fact that more than sixty days had elapsed between the alleged violations and the filing of the complaint.

(2) On October 26, 1995, the Union filed a grievance on behalf of three GAIN Vocational Specialists, Nancy Bergstrom (Bergstrom), Suzanne McCabe (McCabe), and Mavis Westcott (Westcott). It contended that Bergstrom had been working out-of-class since February 1990, and that McCabe and Westcott had been working out-of-class since May 1992. Subsequent to the grievance being denied by the County's personnel department, a complaint, signed only by Thiel, was filed with the Commission on March 11, 1996. On April 8, 1996, the Commission convened to hear the matter.

On the subject of this complaint, the Commission (1) received a letter from Nancy Nittler (Nittler), then a senior personnel analyst and presently the County's personnel manager, and (2) face-to-face advice from Jim Gray (Gray), then the County's personnel manager and assigned advisor to the Commission. Both of these County employees agreed that there were two questions before the Commission.

The first question was whether the "complaint was drawn and filed in compliance with the requirements of [Civil Service Rules] section 14.1404 and 14.1406(a)."[6] On April 11, 1996, the Union was notified that the Commission determined that the subject complaint met all procedural requirements.

The second question was whether or not "the allegations of the complaint warrant further inquiry by the Commission." On April 11, 1996, the Commission decided that the complaint did not warrant further inquiry.

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[6] Subsequent to the finalization of the 2000-2003 MOU, the Civil Service Rules were renumbered. To avoid confusion, the new numbers will be used throughout this decision. These sections, without modification, were renumbered 3.08.300 and 3.08.310, respectively.

The Commission did not mention the fact that more than sixty days had elapsed between the alleged violations and the date the complaint was filed. However, this may have been because it decided the matter at the preliminary hearing stage and did not issue formal findings, as it did in the attorney IV case (see No. 1, supra).

(3) On November 26, 1991, the Union filed an out-of-class grievance on behalf of Barbara Jones (Jones). There was no evidence submitted as to when the complaint was filed, but it had to have been subsequent to the filing of the grievance. There was also no evidence as to who signed the grievance or the complaint. The Commission heard the case on June 30, 1992, sustained the grievance, and granted Jones 10 percent back pay from April 1991 to January 20, 1992.

(4) The Union filed an out-of-class grievance on behalf of museum employees on April 30, 2001. The grievance form was signed only by Thiel on behalf of museum employees. The County granted the grievance and gave four years of back pay to the affected employees. There was no evidence proffered that a complaint was filed.

(5) The Union initiated an informal grievance over out-of-class pay for snow removal workers early in 2002. Although a written grievance form was never submitted, the matter was brought to the County by Thiel, who complained that the County had failed to properly pay the subject employees for the past snow removal year, November 3, 2001 to April 19, 2002. In April, the County acknowledged the error and granted back pay for all of the affected employees. Neither a written grievance nor a complaint was filed in this case.

IUOE contends that to the extent that the County has altered its historic interpretation of its own Civil Service Rules, it has unilaterally modified a term and condition of employment.

County's Defense

The County relies on section 3.08.300 of its Civil Service Rules to support its position on the signature issue. Section 3.08.300, initiation of proceedings, is as follows:

> A. Such proceedings shall be commenced by a complaint which is signed by any aggrieved person. The complaint shall be entitled "In Re" (the name of the department in which the alleged violations occurred), and shall be directed to the Placer County civil service commission. It shall contain the following:
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> 1. The name of the department in which the alleged violation or violations occurred.
>
> 2. The name of the person responsible for the alleged violation or violations.
>
> 3. The section or sections of the civil service ordinance and/or the civil service rules which have allegedly been violated.
>
> 4. The factual basis upon which each of the alleged violations rest, including the dates thereof.
>
> 5. The name and position of the party who signed the complaint.
>
> 6. The date of the complaint. [Emphasis added.]

In support of its position regarding the sixty-day limitation issue, the County cites section 3.08.340B of its Civil Service Rules, which is as follows:

> B. Limitation of Action. The civil service commission shall dismiss any charge in the complaint when it appears that the complaint was filed more than sixty (60) days after the date of the alleged violation. . . . [Emphasis added.[7]]

[7] The Union also contends that when a working-out-of-class grievance is properly filed and approved, the County has consistently interpreted its rules to permit payment to the employee(s) for the entire time the violation continued, and not to limit any back pay award to only sixty days prior to the date the complaint was filed. In fact, much of the Commissioners' discussion centered around the issue of the alleged inequity of granting employees years of working-out-of-class salary payments. The Commissioners were of the opinion that the sixty-day provision was designed to prevent this result.

Additional Applicable Civil Service Rules

Rule 3.08.290 describes the four steps of the parties' grievance procedure. Under step 1 (immediate supervisor), the employer has three working days to reply to the grievant. Under step 2 (second level supervisor), the employer has five working days to investigate and render a written decision. Under step 3 (department head), the employer has ten working days to render a written decision. Under step 4, the employer shall, within three working days of issuance of the department head's written response, request the State Department of Mediation and Conciliation Services to attempt to mediate the grievance. If this mediation process fails to resolve the issue, the grievant may then submit a formal complaint to the Commission.

These time lines clearly show that the employer has unilateral control of at least twenty-one working days. These days are in addition to the time allocated to the utilization of the Mediation and Conciliation Service, i.e., time to (1) obtain a response to the request for assistance, (2) schedule a mutually agreeable meeting time(s), (3) mediate the issues, and (4) obtain resolution from the mediator. Using an average of twenty-two working days in a month, the evidence clearly shows that it is almost impossible for the employees to meet the sixty-day limitation set forth in Civil Service Rule 3.08.340 B. In fact, if the Commission limits its remedies to no more than sixty days prior to the complaint filing date, there is no possibility of any employee who works-out-of-class ever receiving a complete remedy.

This opinion is of questionable merit, as a reading of 3.08.340B supports a conclusion that its only scope is whether the Commission has jurisdiction over a specified complaint. It does not limit the scope of its eventual remedy, when and if a violation is determined to exist.

However, as SCSSs' complaint never resulted in an award, this issue is not in contention in this case. Therefore, no finding on this issue will be made.

Section 3.08.510 sets forth the rules governing employees' rights with regard to obtaining working-out-of-class compensation. Section 3.08.510, in pertinent part, is as follows:

> 3.08.510 Work-out-of-class pay.
>
> C. Procedure
>
> 6. The personnel department shall hear any contention that an employee is actually working out of class.
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> In the event of an adverse decision by the personnel department, the employee concerned and/or his or her employee representative shall have the right to appeal such decision to the civil service commission. . . . [Emphasis added.]

Amendments to 2000-2003 MOU

Section 3.08.320 of the Civil Service Rules was amended at the parties' 2000-2003 MOU negotiations. The amendment modified the procedural requirements for a properly filed complaint to include the sixty-day limitation provision, as follows:

> Whether or not the complaint is drawn and filed in compliance with the requirements of Sections 3.08.300 **and** 3.08.310(A) and 3.08.340(B)of this rule.[8]

Prior to this amendment the Commission was under an obligation to make an initial determination as to whether (1) the complaint was in proper form, i.e. (a) was it dated and signed by an aggrieved person, and (b) did it list the persons involved, and (2) it adequately described the factual basis for each allegation, and (3) the proper number of copies were distributed to the appropriate offices.

This amendment added a third enumerated item to the initial determination of the Commission. The effect of the amendment requires the Commission, before it deliberates the

[8] The deleted language is shown in **bold**; the new language in underline. (See p. 9, supra, for Civil Service Rules section 3.08.340B.)

merits of the complaint, to make an initial determination as to whether the employee is alleging a violation that occurred more than sixty days prior to the complaint filing date. Prior to this amendment, the sixty-day limitation was a part of the Civil Service Rules, but any decision with regard to whether it applied was a part of the Commission's substantive deliberations, not its initial determination.

The charging party contends that this amendment was surreptitiously inserted into the 2000-2003 MOU amendments. The evidence does not support this contention. The evidence clearly shows that the change was an integral part of a thirty-seven page document (nine page cover document with twenty-eight pages of attachments) received by IUOE from the County at the end of the 2000-2003 MOU negotiations. There is no doubt this document was received by IUOE as it was the party that submitted it into evidence.

As a practical matter these amendments have little effect on the eventual disposition of this case.

ISSUE

1. When the County refused to process a complaint before the Commission because it was not signed by an aggrieved person, did it unilaterally modify a term and condition of employment, thereby violating section 3505 and PERB Regulation 32603(c)?

2. When the County refused to process a complaint before the Commission because it was not signed by an aggrieved person, did it deny protected rights to the Union, thereby violating section 3503 and PERB Regulation 32603(b)?

3. When the County refused to process a complaint before the Commission because it was not signed by an aggrieved person, did it discriminate against its employees

because of their exercise of rights under section 3502,[9] thereby violating section 3506 and PERB Regulation 32603(a)?

4. When the County refused to process a complaint before the Commission because it was untimely, did it unilaterally modify terms and conditions of employment, thereby violating section 3505 and PERB Regulation 32603(c)?

5. When the County refused to process a complaint before the Commission because it was untimely , did it deny protected rights to the Union, thereby violating section 3503 and PERB Regulation 32603(b)?

6. When the County refused to process a complaint before the Commission because it was untimely, did it discriminate against its employees because of their exercise of rights under section 3502, thereby violating section 3506 and PERB Regulation 32603(a)?

CONCLUSIONS OF LAW

ISSUE NO. 1. When the County refused to process a complaint before the Commission because it was not signed by an aggrieved person, did it unilaterally modify terms and conditions of employment, thereby violating section 3505 and PERB Regulation 32603(c)?

Applicable Law

In determining whether a party has violated section 3505 and PERB Regulation 32603(c), PERB utilizes either the "per se" or "totality of conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District) (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. These criteria are: (1) the employer implemented

[9] Section 3502, in pertinent part, is as follows:

> . . . public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . .

a change in policy concerning a matter within the scope of representation, (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations, and (3) the change was not merely an isolated breach of the contract, but amounted to a change of policy in that it has a generalized effect or impact upon the employees' terms and conditions of employment. (Vernon Fire Fighters v. City of Vernon) (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Association v. City of Stockton (1984) 161 Cal.App.3d 813 [207 Cal.Rptr. 876]; Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant).)

Analysis

The first issue to be examined is whether the subject is within the MMBA's scope of representation, which is found in section 3504. This section, in pertinent part, is as follows:

> The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, . . .

The parties' grievance procedure is the process by which employment conditions are evaluated, analyzed and reconciled. Therefore, it is clear that this procedure falls within this definition. The fact that the subject grievance concerns wages, an enumerated item, adds weight to this conclusion.

In South Bay Union School District v. Public Employment Relations Board (1991) 228 Cal.App.3d 502 [279 Cal.Rptr.135] (South Bay), the court interpreted a statutory provision[10] similar to section 3503 (see fn. 2, p. 1, supra). It held that an exclusive representative has a

[10] The subject provision is part of the Educational Employment Relations Act (EERA), which is found in Title I, Division 4, Chapter 10.7 (commencing with section 3540).

"nonnegotiable direct right of grievance filing." It supported its reasoning with a quote from Chula Vista City School District (1990) PERB Decision No. 834:

> . . . For contract violations to be grievable and arbitrable only by the initiation of an individual employee runs counter to the EERA's statutory system of collective action. In a system of collective bargaining, the ability to challenge contractual . . . violations must lie with the party that negotiated the contract, i.e., the exclusive representative.

In addition, the County's own Civil Service Rules, in section 3.08.510 (see p. 11, supra) allow an employee representative the right to appeal an adverse County personnel department's decision to the Commission.

The Commission is not an independent agency, it is merely the appeal arm of the County's grievance procedure. The two entities are collectively the public agency within the meaning of section 3501.5.

Based on the authority and reasoning set forth in South Bay, it is determined that the Commission's insistence upon an "aggrieved person's" signature to render a complaint operative is contrary to the law, and therefore null and void. As this provision of the Civil Service Rules is not entitled to any legal effect, the Commission's reliance upon it to support its denial of a complaint is deemed an attempt to unilaterally modify the status quo. Therefore, such insistence constitutes a violation of section 3505 and PERB Regulation 32603(c).

ISSUE NO. 2. When the County refused to process a complaint before the Commission because it was not signed by an aggrieved person, did it deny the Union protected rights, thereby violating section 3505 and PERB Regulation 32603(b)?

Applicable Law

The test for whether a respondent has interfered with the rights of an employee organization under the MMBA does not require that unlawful motive be established, only that at least a slight harm to employee organizational rights result from the conduct.

Section 3503 (see fn. 2, p. 1, supra) grants employee organizations the right to represent their members in their employment relations with public agencies. (Glendale City Employees Assn., Inc. v. City of Glendale (1975) 15 Cal.3d 328 [124 Cal.Rptr. 513].) If the harm is slight and the employer offers justification based on operational necessity, the competing interests are balanced. If the harm is inherently destructive, the employer's conduct will be excused only on proof it was occasioned by circumstances beyond the respondent's control and no alternative course of action was available. (Carlsbad Unified School District (1979) PERB Decision No. 89.)[11]

Analysis

There is no doubt that the Commission's attempt to deprive the Union of the right to sign a complaint harms its ability to fulfill its duties under the MMBA, i.e., enforce the parties' MOU. It also harms the Union to the extent that it diminishes its role as an employee spokesperson and causes it to lose stature, and therefore, effectiveness in the view of its members. In addition, it deprives the Union of its legitimate role as a buffer between management and its employees. This "buffer" role is necessary to prevent the employer from singling out those employees willing to insist upon receiving the full quantum of rights accorded them by the MOU. Under either the "slight harm" or the "inherently destructive" standard, the employer's actions are not excused.

Therefore, it is concluded that when the Commission refused to process the subject complaint due to the absence of an aggrieved person's signature, it harmed the Union, thereby

[11] 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 [116 Cal.Rptr. 507].)

denying a protected right, i.e., the right to represent its members in their employment relations with their employer.

ISSUE NO. 3. When the County refused to process a complaint before the Commission because it was not signed by an aggrieved person, did it discriminate against its employees "because of their exercise of rights under section 3502," thereby violating section 3506 and PERB Regulation 32603(a)?

Applicable Law

The courts, in their interpretation of the MMBA, have set forth the elements necessary to prove a case of employer interference with employee rights, as follows:

> . . . All [a charging party] must prove to establish an inference violation of section 3506 is: (1) That employees were engaged in protected activity, (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of these activities, and (3) that employer's conduct was not justified by legitimate business reasons. . . .
> (Public Employees Association v. Board of Supervisors (1985) 167 Cal.App.3d 797, 807 [213 Cal.Rptr. 491].)

Analysis

The evidence clearly shows that the employees engaged in protected activity when they (1) caused the initial grievance to be filed, and (2) appealed the grievance denial to the Commission. The evidence also shows that the Commission's denial of the complaint due to an improper insistence upon an aggrieved person's signature(s), interfered with the employees' right to litigate their working-out-of-class claim.

Lastly, the only justification cited by the employer in support of its action is that the "employee signature" requirement is in its Civil Service Rules, and therefore, it should be controlling. This "business reason" is not justified by a sufficiently legitimate business reason. Even this argument is in conflict with Civil Service Rules section 3.08.510C(6) which provides that in the event of a denial of an out-of-class grievance "the employee and/or his or her employee representative shall have the right to appeal such decision to the civil service

commission." (Emphasis added.) In addition, the Commission staff, in the vocational assistant complaint (see No. 2, p. 7, supra), made an affirmative finding that "[T]he complaint was drawn and filed in compliance with the requirements of" section 3.08.300 (the rule that includes the "aggrieved employee" signature requirement).

Therefore, it is determined that when the Commission refused to process the subject complaint due to the absence of an "aggrieved person's" signature, it interfered with employees' exercise of rights granted by the MMBA, thereby violating section 3506 and PERB Regulation 32603(a).

ISSUE NO. 4. When the County refused to process a complaint before the Commission because it was untimely, did it unilaterally modify terms and conditions of employment, thereby violating section 3505 and PERB Regulation 32603(c)?

The recitation of the applicable law, as set forth in Issue No. 1, supra, is controlling in this issue, as well. Therefore, it is incorporated herein, as if set forth in its entirety.

Analysis

The evidence clearly shows, as more fully set forth in Issue No. 1, supra, that the Commission's denial of a complaint due to the sixty-day limitation is a matter within the scope of representation.

Union's Argument

The Union admits that the sixty-day limitation has long been in the Civil Service Rules, but it contends that for the past eleven years the County has failed to require compliance with this provision, thereby establishing a practice which renders the sixty-day requirement unenforceable.

In Hacienda La Puente Unified School District (1997) PERB Decision No. 1186, adopting an administrative law judge's decision, the Board set forth the standard for a valid past practice. Under this standard, it

> . . . must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. [Citation.] The Board has . . . described a valid past practice as one that is "regular and consistent" or "historic and accepted." . . .

The charging party cites the five examples set forth supra in support of its contention that the County's actions constitute an enforceable past practice. These examples covered cases from 1991 to 2002. In two of these cases, the evidence was quite clear that the County processed complaints that dealt with events that occurred more than sixty days prior to the date of the complaint submission, i.e., the 1994 attorney IV test complaint and the 1995 vocational assistant complaint. In one of the other examples, Jones (1991), the Commission accepted and issued findings on a case in which a grievance was filed seven months prior to the date it heard the case. Given the grievance procedure timelines (see p. 10, supra), which set forth an approximate one-month grievance procedure chronology, plus whatever time is spent with the Mediation and Conciliation representative, it is logical to infer that the complaint was filed more than sixty days after the alleged violation. The absence of any rebuttal on the part of the respondent on this chronological issue, adds weight to this inference.

In the subject case, due to the examples given and the absence of any evidence describing Commission cases in which the sixty-day limitation was enforced, it is clear that the practice was both unequivocal, clearly enunciated, and acted upon. With regard to whether the practice was "readily ascertainable over a reasonable period of time as a fixed and established practice," even though there were only three relevant instances cited over an eleven year period, there were no rebuttal cases proffered by the County. Under all of the circumstances, it is quite clear that the Commission had a practice of permitting complaints to be processed

when the alleged violations occurred more than sixty days prior to the date the complaint was filed.

Respondent's Argument

The respondent contends that Marysville Joint Unified School District (1983) PERB Decision No. 314 (Marysville) precludes a finding of a violation.

In Marysville, the teachers signed a MOU which guaranteed them "one duty-free lunch break of no less than thirty minutes each day." From 1970 to 1978, the district employed classified employees to perform noontime student supervision. During this time the teachers received a 50-55 minute duty-free lunch period that paralleled the length of the students' lunch period.

In 1978, due to the passage of Proposition 13, the district experienced severe budget restrictions. In response, it laid off the classified noontime supervisors and directed the teachers to assume their duties, thereby shortening the teachers' lunch periods to thirty minutes. The teachers filed an unfair labor practice charge, alleging a unilateral modification of terms and conditions of employment. The Board found for the district, stating:

> . . . The mere fact that an employer has not chosen to enforce its contractual rights in the past does not mean that, ipso facto, it is forever precluded from doing so. . . .

Marysville, however, is distinct in one relevant aspect from the instant case. In Marysville the teachers merely enjoyed a gratuitous boon for a number of years. Therefore, when the district decided it could no longer afford this largesse, Marysville holds that it had every right to do so.

In this case, IUOE and the employees reasonably relied on the County's long-standing failure to insist upon compliance with the MOU's sixty-day limitation. There is no evidence in the record that the Commission, in the past eleven years, has ever invoked this limitation to

deny a complaint. Had it been clear that the County was going to begin enforcing this limitation, IUOE would have, in all probability, handled the grievance/complaint in a different manner; one that would have been reflective of this change in policy.

However, due to the very broad sweep of Marysville, this distinction between the two cases is insufficient to overcome this precedent. It simply cannot be overlooked that the Union agreed to the sixty-day limitation in the MOU. Therefore, it is determined that when the Commission dismissed the complaint based on the belief that it violated the sixty-day limitation, it did not violate section 3505 or PERB Regulation 32603(c).

ISSUE NO. 5. When the County refused to process a complaint before the Commission because it was untimely, did it deny protected rights to the Union, thereby violating section 3503 and PERB Regulation 32603(b)?

The recitation of the applicable law, as set forth in Issue No. 2, supra, is controlling in this issue as well. Therefore, it is incorporated herein, as if set forth in its entirety.

As found supra, the County had a right to enforce the MOU's sixty-day limitation. Therefore, its actions cannot be held to have improperly denied protected rights to the Union.

ISSUE NO. 6. When the County refused to process a complaint before the Commission because it was untimely, did it discriminate against its employees because of their exercise of rights under section 3502, thereby violating section 3506 and PERB Regulation 32603(a)?

The recitation of the applicable law, as set forth in Issue No. 3, supra, is controlling in this issue as well. Therefore, it is incorporated herein, as if set forth in its entirety.

The evidence clearly shows, as more fully set forth in Issue No. 3, supra, that the sixty-day limitation in the complaint procedure is a matter within the scope of representation.

As found supra, the County had a right to enforce the MOU's sixty-day limitation. Therefore, its actions cannot be held to have improperly interfered with employee rights guaranteed by the MMBA.

SUMMARY

Based on the transcript, exhibits and parties' briefs, there is ample evidence to support conclusions that the County violated MMBA sections 3503, 3505 and 3506, as well as PERB Regulation 32603(a), (b) and (c), when it refused to process a IUOE complaint on behalf of specified Child Support Services employees, due to the lack of an aggrieved person's signature on the appeal complaint. However, the allegations that the respondent's refusal to hear the complaint due to the MOU's sixty-day limitation is found to be without sufficient merit and must be dismissed.

Even though the respondent improperly dismissed the complaint due to the signature issue, the evidence is clear that the complaint would have been dismissed, due to the sixty-day limitation issue. Therefore, the respondent will not be required to reinstate and deliberate the complaint.

REMEDY

Section 3509 grants to PERB all of the powers and duties described in section 3541.3. Subdivision (i) of section 3541.3 grants PERB the following:

> To investigate unfair practice charges or alleged violations of this chapter, and take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

In order to remedy the unfair practice of the County and prevent it from benefiting from its unfair labor practices and to effectuate the purposes of the Act, it is appropriate to order the County to cease and desist from (1) unilaterally modifying a term and condition of employment, (2) discriminating against its employees due to their protected activities, and (3) denying IUOE rights guaranteed to it by the MMBA.

It is also appropriate that the County be required to post a copy of the notice attached hereto as an Appendix, incorporating the terms of this Order at all County sites where notices are customarily placed for employees. The notice should be subscribed by an authorized agent of the County, indicating that it will comply with the terms therein. The notice shall not be reduced in size, defaced, altered, or covered by any other material. Posting such a notice will provide employees with notice the County has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the Act that employees be informed of the resolution of the controversy and will announce the County's readiness to comply with the ordered remedy. (See Placerville Union School District (1978) PERB Decision No. 69.) In Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr. 584], the California District Court of Appeals approved a similar posting requirement. (See also National Labor Relations Board v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].)

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the County of Placer (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505 and 3506, as well as Public Employment Relations Board (PERB or Board) Regulation 32603, subsections (a), (b) and (c). (PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.) Therefore, it is hereby ORDERED that the County, and its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer in good faith with the International Union of Operating Engineers, Stationary Engineers, Local 39, AFL-CIO (IUOE), over the subject of the signatures that are necessary to submit valid complaints to the Civil Service Commission.

2. Denying to IUOE rights guaranteed to it by the MMBA.

3. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise restraining or coercing the Senior Child Support Specialists, the real parties in interest, in the grievance filed by IUOE on December 21, 2001, because of their exercise of rights guaranteed by the MMBA.

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

1. Within ten (10) workdays of service of a final decision in this matter, post at all County sites where notices are customarily placed for employees, copies of the notice attached hereto as an Appendix. This notice must be subscribed by an authorized agent of the County, indicating that it will comply with the terms therein. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced, or covered by any other material.

2. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of the PERB in accordance with his instructions. Continue to report, in writing to the regional director

thereafter as directed. All reports to the regional director shall be concurrently served on the charging party herein.

It is further Ordered that all other aspects of the charge and complaint are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

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

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.) 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 California Code of Regulations, title 8, section 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. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served

on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Allen R. Link
Administrative Law Judge