

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



RAYMOND LOWERY,

Charging Party,

v.

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 790,

Respondent.

Case No. SF-CO-44-M

PERB Decision No. 1666-M

July 27, 2004

Appearances: Roger Lowery for Raymond Lowery; Weinberg, Roger & Rosenfeld by Vincent A. Harrington, Attorney, for Service Employees International Union Local 790.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on appeal by Raymond Lowery (Lowery) from a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Service Employees International Union Local 790 (SEIU) violated the Meyers-Milias-Brown Act (MMBA)¹ by breaching its duty of fair representation.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charges, the warning and dismissal letters, Lowery's appeal and SEIU's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

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

ORDER

The unfair practice charge in Case No. SF-CO-44-M is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027



April 5, 2004

Roger Lowery

Re: Raymond Lowery v. SEIU Local 790
Unfair Practice Charge No. SF-CO-44-M; First Amended Charge
DISMISSAL LETTER

Dear Mr. Lowery:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 24, 2004. Raymond Lowery alleges that SEIU Local 790 violated the Meyers-Milias-Brown Act (MMBA)¹ by breaching its duty of fair representation.

I indicated to you in my attached letter dated March 25, 2004, 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 April 1, 2004, the charge would be dismissed.

On March 29, 2004, you filed a first amended charge. The amended charge adds the following information.

As noted in my March 25, 2004, letter, Mr. Lowery was employed by the City of San Ramon as a Maintenance Worker, a position which required possession of a valid California Driver's license. On May 25, 2002, Mr. Lowery received a citation for driving under the influence of alcohol. As a result of this citation, Mr. Lowery's license was suspended for a time unspecified in the charge. On December 2, 2002, the City terminated Mr. Lowery for not possessing a valid driver's license.

On February 13, 2003, Local 790 rejected Mr. Lowery's request for representation for his termination hearing. In so holding, Local 790 provided Mr. Lowery with a detailed response, explaining their belief that the grievance lacked merit as Mr. Lowery did not possess the minimum qualifications for employment.

Charging Party contends that four other employees have been allowed to keep their employment with the City despite having suspended driver's licenses. Charging Party does not

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.

provide the names or job descriptions for any of these employees. Moreover, Charging Party does not demonstrate that Local 790 represented any of these employees at a termination hearing.

Charging Party also states that Local 790 should have taken into account the fact that Mr. Lowery became legally drunk while at a supervisor's house, and that such a fact should mitigate Mr. Lowery's failure to possess the minimum job requirements. The charge fails to provide any facts demonstrating that Mr. Lowery's supervisor forced Mr. Lowery to consume the alcohol.

Finally, Charging Party contends Local 790 failed to represent Mr. Lowery during an Unemployment Compensation Board hearing, in which Mr. Lowery ultimately prevailed.

Based on the above stated information and information provided in the original charge, the charge still fails to state a prima facie violation of the MMBA, for the reasons provided below.

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].) 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, 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. (International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M.) 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 (Wyler) (1993) PERB Decision No. 970.)

Herein, Local 790 reviewed the facts provided to them and reviewed the likelihood of success in this matter. After reviewing such information, Local 790 decided to deny representation at the fact finding level, asserting that success was unlikely given Charging Party's failure to meet the minimum job qualifications. No information presented herein demonstrates the union

acted arbitrarily or devoid of honest judgment. As a union may refuse to pursue a grievance if it makes a reasonable determination that the grievance lacks merit, the charge fails to state a prima facie case. (United Teachers of Los Angeles (2001) PERB Decision No. 1453.) While Charging Party may not agree with the union's decision, such disagreement does not constitute bad faith on the union's part. The Union need only adequately explain its decision and act in good faith. As the charge fails to present any facts demonstrating the union acted in bad faith, the charge must be dismissed.

Charging Party additionally contends Local 790 failed to represent him during an unemployment hearing. However, a union is not obligated to represent its members in forums outside of those provided for in the collective bargaining agreement. (Oxford Federation of Teachers (2001) PERB Decision No. 1494.) As an unemployment hearing is a non-contractual administrative proceeding, Local 790's refusal to represent Mr. Lowery does not violate the MMBA.

Right to Appeal

Pursuant to PERB Regulations,² 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. (Regulations 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 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).)

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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
General Counsel

By _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: SEIU Local 790; Vincent Harrington

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027



March 25, 2004

Roger Lowery

Re: Raymond Lowery v. SEIU Local 790
Unfair Practice Charge No. SF-CO-44-M
WARNING LETTER

Dear Mr. Lowery:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 24, 2004. Raymond Lowery alleges that SEIU Local 790 violated the Meyers-Miliias-Brown Act (MMBA)¹ by breaching its duty of fair representation.

Investigation of the charge revealed the following. Roger Lowery was employed by the City of San Ramon as a Maintenance Worker. As such, he was exclusively represented by SEIU Local 790. Local 790 and the City are parties to a collective bargaining agreement that provides the following regarding disciplinary action:

17.5: An employee shall have the right of appeal from any disciplinary action taken under this article. Such appeal must be filed in writing with the Department Head with a copy to Employee Services within ten (10) calendar days after receipt of written notice of such disciplinary action. . . . The Department Head will respond within ten (10) days of receipt of the appeal. If the employee is not satisfied with the Department Head's review, the employee may appeal to the City Manager.

Such appeal must be filed in writing with the City Manager with a copy to Employee Services and the Department Head within ten (10) calendar days of receipt of the Department Head's response. . . . The City Manager will respond within ten (10) calendar days of receipt of the appeal.

If the employee is not satisfied with the City Manger's review, the employee may appeal the matter to the City Council. The appeal shall be made in writing to Employee Services within

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.

fourteen (14) calendar days of receipt of the City Manger's decision. The City Council shall assign the appeal to an impartial fact finder who shall be selected by mutual agreement between the City and the Union.

The fees and expenses of the fact finder and of a court reporter shall be shared equally by the Union and the City. Each party, however, shall bear the cost of its own representation.

As noted above, Charging Party was employed as a Maintenance Worker. The job description for this position states that incumbents will perform a variety of maintenance and repair duties, which may include maintaining parks, lighting, traffic signals and street drainage. One of the required qualifications for this position is stated as follows:

Must possess and maintain a valid California Class C driver's license and a satisfactory driving record.

On May 25, 2002, Charging Party received a citation for driving under the influence of alcohol. As a result of this citation and apparent conviction, Charging Party's driver's license was suspended by the State.

On December 2, 2002, Charging Party's employment with the City was terminated as Charging Party no longer possessed the minimum qualifications for the job. Charging Party contends that he should be allowed to continue working despite the lack of a valid driver's license and an unsatisfactory driving record.

On December 6, 2002, Charging Party appealed his termination to City Manager Jim Randall. On December 30, 2002, Mr. Randall denied Charging Party's appeal, indicting Charging Party no longer possessed the minimum qualifications for employment. On January 11, 2003, Charging Party appealed the termination to the City Council level. On that same date, Charging Party sent a letter to union representative Ron Bunch requesting the union represent him in the fact finding hearing. On February 3, 2003, Charging Party provided the union with the documents it requested regarding his termination.

On February 13, 2003, Charging Party received a letter from Local 790 Field Representative Sue Oszewski. The letter provided in relevant part as follows:

I have reviewed the documents which your father provided to me regarding your termination from the City of San Ramon and your grievance appeal. I have also discussed this matter with the Chapter Officers. In reviewing the Skelly notice, the termination notice and the letter from City Manager Randall in response to your grievance appeal, it is clear that all the documents consistently reflect that the basis of your termination is the lack of a driver's license. This is a basic job requirement of the

position of a Maintenance Worker. Without a license you do not meet the qualifications necessary to perform the job.

Based on the above understanding the Union has determined that we will not continue to pursue a grievance to the fact finding level of the grievance procedure. Since you do not meet the requirements of the position, we have determined that further appeal of this matter is not warranted and would not change the decision made by the City to terminate your employment.

On March 7, 2003, Charging Party sent a letter to the City Manager asking how the process would continue without union participation. On March 31, 2003, City Attorney Thomas Curry indicated the City was willing to continue onto fact finding providing Charging Party paid his portion of the fact finder's fees. On April 24, 2003, Charging Party agreed to pay his share of the fact finding fees.

On June 4, 2003, Charging Party sent a letter to Local 790 President Marshall Walker requesting SEIU represent him in his fact finding hearing. Mr. Walker did not respond to this letter. On July 8, 2003, Charging Party sent another letter to Local 790. This letter states that SEIU is obligated to represent the Charging Party.

On October 14, 2003, Charging Party participated in a fact finding hearing with the City. On December 30, 2003, Charging Party requested Local 790 reimburse him for the \$3200 spent on the fact finding hearing. It appears the fact finder upheld the termination on November 23, 2003.

Based on the above stated facts, the charge as presently written, fails to state a prima facie violation of the MMBA, for the reasons provided below.

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].) 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."

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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. (International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M.) 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 (Wylter) (1993) PERB Decision No. 970.)

Herein, Local 790 reviewed the facts provided to them and reviewed the likelihood of success in this matter. After reviewing such information, Local 790 decided to deny representation at the fact finding level, asserting that success was unlikely given Charging Party's failure to meet the minimum job qualifications. No information presented herein demonstrates the union acted arbitrarily or in bad faith. As a union may refuse to pursue a grievance if it makes a reasonable determination that the grievance lacks merit, the charge fails to state a prima facie case. (United Teachers of Los Angeles (2001) PERB Decision No. 1453.)

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 April 1, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR