STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ANDREW JEFFERS, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 616, Respondent.	Case No. SF-CO-23-M PERB Decision No. 1675-M August 19, 2004

Appearance: Andrew Jeffers, on his own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by Andrew Jeffers (Jeffers) to a proposed decision (attached) of the administrative law judge (ALJ). The underlying unfair practice charge alleged that the Service Employees International Union Local 616 (SEIU) violated the Meyers-Milias-Brown Act (MMBA)[1] by breaching its duty of fair representation. The ALJ's proposed decision found that Jeffers failed to establish that SEIU breached its duty of fair representation and dismissed the unfair practice charge and complaint.

The Board has reviewed the entire record in this matter, including the ALJ's proposed decision and Jeffer's exceptions. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

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

ORDER

The unfair practice charge and complaint in Case No. SF-CO-23-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ANDREW JEFFERS, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 616, Respondent.	UNFAIR PRACTICE CASE NO. SF-CO-23-M PROPOSED DECISION (12/19/03)

Appearances: Andrew Jeffers, pro per; Weinberg, Roger & Rosenfeld, by Stewart Weinberg, Attorney, for Service Employees International Union, Local 616.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a skilled nursing care therapist claims that his exclusive representative breached its duty of fair representation by failing to represent him in arbitration of a grievance.

On December 16, 2002, Andrew Jeffers initiated this action by filing an unfair practice charge against Service Employees International Union, Local 616 (SEIU). On May 12, 2003, the general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint. The complaint alleges that SEIU breached its duty of fair representation by failing to inform Jeffers about the status of his grievance, failing to process the grievance to arbitration and/or inform him why the grievance would not be arbitrated, and failing to respond to his inquiries regarding the grievance. This conduct is alleged to violate Government Code section 3506 and 3509(b) of the Meyers-Milias-Brown Act (MMBA or Act) and PERB Regulation 32604(b).[1]

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

On May 16, 2003, SEIU answered the complaint, denying all material allegations and asserting an affirmative defense.

On June 11, 2003, an informal settlement conference was held, but the matter was not resolved.

On October 10, 2003, a formal hearing was held before the undersigned administrative law judge. On December 3, 2003, upon filing of the parties' post-hearing briefs, the matter was submitted for decision.

FINDINGS OF FACT

Jeffers is employed as an activity therapist by the Alameda County Medical Center (Medical Center). The Medical Center is a "public agency" within the meaning of

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Section 3506 provides:

> 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.

Section 3509(b) provides:

> A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Regulation 32604(b) provides that it shall be an unfair practice for an employee organization to:

> 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.

section 3501(c). Jeffers is a "public employee" within the meaning of section 3501(d).[2] SEIU is an "employee organization" within the meaning of section 3501(a) and an exclusive representative" of a bargaining unit of public employees within the meaning of PERB Regulation 32016(b).

The Medical Center provides health care services to residents of the County. In December 1999, Jeffers was employed at Fairmont Hospital, a skilled nursing care facility. At the time, he had 16 years of experience in his position as activity therapist. Activity therapists provide recreational activities to patients for their emotional, spiritual, social and intellectual well-being. When the position of chief of occupational therapy, psychiatric specialty, occupied by Jeffers's supervisor, became vacant, Jeffers decided to seek a promotion to the position. The Medical Center is governed by a board of trustees separate from the County Board of Supervisors, and it does not adhere to rules of civil service as they relate to hiring and promotion decisions.[3]

According to Jeffers, the minimum qualifications for the posted vacancy included a certification or license in occupational therapy. The County informed Jeffers that he was disqualified from competing in the selection process because of this requirement. Viewing the minimum qualifications as biased toward occupational, rather than recreational, therapists, Jeffers decided to complain.

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[2] Although the question whether the Medical Center qualifies as a "public agency" for purposes of proper PERB jurisdiction could have been more clearly established in the hearing, SEIU admits in its answer that Jeffers is a "public employee" within the meaning of section 3501(d). Evidence was presented that the Medical Center is represented by county counsel for the County of Alameda (County). I also take judicial notice of the fact that the Medical Center fulfills the County's Welfare and Institutions Code obligation to provide indigent health care.

[3] At one time the Medical Center was under the direct jurisdiction of the Alameda County Board of Supervisors. On January 1, 1999, the Medical Center reconstituted itself as a separate entity, governed by its own board of trustees.

Jeffers received a bachelor's degree in recreation and leisure studies from Temple University in the late 1970's. John Noisette was a professor in the department who taught Jeffers and was his faculty adviser. At Jeffers's request, Noisette verified in writing that Jeffers earned more than the 20 credits required for a specialty called Therapeutic Recreation. Noisette noted that Jeffers's diploma and transcript would not have documented the specialty. The same information was verified in an e-mail from John Shank, chair of the Department of Therapeutic Recreation, the successor department to Recreation and Leisure Studies. Shank noted that because the specialty was only offered as an "academic option," not a separate major within the department, it would not have shown on Jeffers's diploma or transcript.

At some point earlier in his tenure, the Medical Center reclassified his position from recreational therapist to activity therapist. Jeffers claims that being a recreational therapist, or having a "specialty" in that field, was sufficient to meet the minimum qualifications, based on his interpretation of the Business and Professions Code statute he believed motivated the Medical Center's change in minimum qualifications for the position.[4]

Jeffers first lodged his objections at a meeting of the Medical Center board of trustees. Among other points, Jeffers noted that his previous supervisor lacked either a degree or certification in occupational therapy. Having no success, Jeffers decided to initiate a grievance.

Jeffers has been active in SEIU. He has served as a job steward and has participated in contract negotiations involving SEIU and the Medical Center. In this connection, Jeffers received some training in the filing of grievances. Thus, he was familiar with the grievance forms and how to complete them.

[4] Neither party identified the statute.

Jeffers acknowledges that in framing his grievance he did not review the collective bargaining agreement. However, he relied on his SEIU training when he cited a provision on "mutual respect." This apparently was a broadly worded provision that served as a catch-all basis for grievances lacking grounding in a more specific provision of the agreement.[5] According to Jeffers, it requires the Medical Center to deal with employees "openly, honestly, righteously and justly." Jeffers testified:

> No, I think I just put it under mutual respect as I was taught when I was a union steward that you can grieve everything under mutual respect, . . .

Jeffers filed the grievance himself. He processed it without SEIU's assistance through all four preliminary steps prior to arbitration. The grievance was denied at each step. Medical Center Labor Relations Analyst Paul Vitulli responded for the employer in the later steps of the process.

At some time during this process, Jeffers spoke with Alvaree Swayne, SEIU's field representative. According to Jeffers, he informed Swayne that it was "his grievance," and as a "union steward," he would "walk it through" all of the preliminary steps. He also told Swayne that when the grievance got to arbitration, he would turn to SEIU. Jeffers asked Swayne to let him know when SEIU's stewards meeting would occur so he could get approval for representation in arbitration. According to Jeffers, Swayne answered, "[O]kay, . . . contact me in five months."

By memorandum dated June 6, 2000, Vitulli informed Jeffers that he was complying with Jeffers's request that a copy of Vitulli's notes from their grievance meeting be forwarded to Swayne. Jeffers also testified that Vitulli told him he sent "all this stuff" to Swayne. Jeffers

[5] Neither party introduced into evidence a copy of the pertinent collective bargaining agreement.

further testified that he informed Swayne throughout the process that his grievance was being denied.

By memorandum to Vitulli dated September 25, 2000, Jeffers appealed his grievance to arbitration.

Jeffers testified that he handed his grievance to Swayne and informed her it was ready to go to arbitration. The following testimony was elicited:

> [Jeffers] A . . . I said this is ready to go to arbitration. Let me know when the Stewards Council is to get this approved. I have to show up. It's in the by laws.
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> . . . . . .
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> [Administrative Law Judge] Q Okay. Did you go to the Stewards Council meeting?
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> A No. I said let me know when you set it up. In the past, she's always said, okay, Drew, this is the date the Union, the Stewards Council will sit on this and let you know. I said okay. And I said, well, what about my grievance? When are we going to sit on this one? When are we going to sit down and talk about it? She goes, Drew, this is a no-brainer. Don't worry about it. I'll just have them approve it and we'll just go on from there.
>
> Q Okay. And then what was your next -- what happened next?
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> A After a few weeks, I called and I said what's the situation with this? When is the date for the arbitration? And she goes they're backlogged, Drew. You know, give me a call in a few weeks. Call in a few weeks. Two weeks later, what's the situation. I don't know, Drew, they're this and they're that. I go okay. I wait another week and I say where is this? Where is it right now? And she goes it's sitting on Lydia Daniels' desk collecting dust. And that's when I picked up the phone and I believe I called the CEO and I just lambasted him.
>
> Q Wait a second. Who is Lydia Daniels?
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> A She's the head of Human Resources for the whole Medical Center. And I, you know, just said why is my Union Rep saying this thing is sitting on your head of Human Resources desk for so long collecting dust? What's the problem? You

know, it's been, you know, X-amount of days, months now. And I believe that's when the County Counsel got involved. . . .

Deputy County Counsel Donna R. Ziegler was assigned the case for arbitration. She testified that she spoke with Jeffers by telephone regarding scheduling of the arbitration. She understood that Jeffers was representing himself and advised him he needed to submit his contribution of the arbitrator's fee in order to proceed. Jeffers informed her that SEIU was representing him. Ziegler had had no contact with SEIU prior to this. Jeffers asked Ziegler for some time to "straighten out" the confusion.

By letter dated June 27, 2001, Ziegler advised Swayne of her conversation with Jeffers, at the same time she advised Swayne that she had been assigned to represent the Medical Center in the matter. Ziegler indicated her desire to proceed with the selection of an arbitrator. Swayne and Ziegler never spoke directly, but Swayne did leave a voicemail asking for clarification.

Daniel Boone is an attorney in the firm that represents SEIU in grievance and arbitration matters. Boone testified that Swayne would refer grievances to him to assess their merits. SEIU's relationship with Boone had developed over the years to the point that SEIU would unequivocally accept Boone's evaluation of a grievance. Boone's firm represented Jeffers in an April 1998 grievance involving a disciplinary suspension.[6] In June or July of 2001, Swayne referred him the promotion grievance to assess. Swayne informed him that her call was triggered by Ziegler's letter. Boone determined that the grievance lacked merit. The minimum qualifications for the chief occupational therapist position required that the

[6] Jeffers took a group of patients on an outing. One of the patients with a troubled history left the group during the outing and was found dead several days later. Jeffers was supervising the group by himself and he claims he was not forewarned of the patient's history. SEIU was able to reduce the severity of the proposed discipline. Jeffers was not entirely pleased with the outcome.

incumbent be a licensed occupational therapist, according to Swayne's investigation, and Jeffers did not fulfill this requirement. Reviewing the collective bargaining agreement, Boone also found no language that would provide grounds for a successful grievance. The vacant position was outside of the bargaining unit, and the hiring decision was one committed to the discretion of the employer. Boone also gave weight to Jeffers's disciplinary record, believing that it would weaken his claim to a promotion. Boone advised Swayne to communicate to Jeffers his opinion that the grievance lacked merit and would not be pursued.

In the meantime, Ziegler also had a conversation with an SEIU intern, Wayne Templeton. Templeton testified that he and Jeffers had been friends for some time. They worked together on various SEIU matters. Jeffers approached Templeton and asked him to find out the status of his grievances. Jeffers had at least two grievances pending. One involved the suspension and the other involved the denial of promotion. Templeton agreed to do "due diligence" for Jeffers and inquire on his behalf. Templeton informed Ziegler he did not have a copy of the promotion grievance, noting Jeffers had raised several different issues. Ziegler forwarded Templeton a copy.

Templeton also spoke with Swayne. Swayne was aware of both of these grievances. She informed Templeton that the promotion grievance was without merit. Templeton did have one or more conversations with Jeffers after talking with Swayne. However Templeton's testimony was unclear as to exactly what he told Jeffers.[7] Templeton did testify that Jeffers intimated there was a conspiracy within SEIU against him. Approximately one year later in

[7] Jeffers asked Templeton on cross-examination, during which counsel for SEIU repeatedly interposed objections, to admit or deny that in the presence of other co-workers he told Jeffers that Swayne said Jeffers's grievances were "stale and they don't know why you're bringing it up." Due to the objections, Templeton never answered this question.

May 2002, Templeton assumed Swayne's duties. Swayne had become ill and went on leave. She passed away some time prior to May 2002.

ISSUE

Did SEIU breach its duty of fair representation owed to Jeffers with respect to the processing of the grievance concerning the denial of his application to promote to chief occupational therapist?

CONCLUSIONS OF LAW

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the California 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 International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M, the Board determined that it is appropriate in MMBA 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]).[8] PERB further noted that the duty is not breached by mere negligence. (International

[8] Andrews v. Board of Supervisors of Contra Costa County (1982) 134 Cal.App.3d 274 [184 Cal.Rptr. 542] held that because section 3502 allows individuals to represent themselves in their employment relations with the public agency, exclusive representation was absent and the need for a reciprocal duty of fair representation did not exist. However, in light of International Association of Machinists (Attard), supra, PERB Decision No. 1474-M, Andrews is not controlling in PERB's view.

Association of Machinists (Attard), supra, PERB Decision No. 1474-M, citing Hussey.) The Hussey court stated:

> . . . A union is accorded wide latitude in the representation of its members, and courts are reluctant to interfere with a union's decisions in representing its members absent a showing of arbitrary exercise of the union's power. [Citation.]
> (Id. at p. 1219.)

Relying on Board precedent under the other acts it administers, PERB also noted, with respect to a refusal to process a grievance, that the aggrieved unit member must show how the exclusive representative's decision was "without rational basis or devoid of honest judgment." (International Association of Machinists (Attard), supra, PERB Decision No. 1474-M, citing Reed District Teachers Association, CTA/NEA (Reyes), supra, PERB Decision No. 332 and American Federation of State, County and Municipal Employees, Local 2620 (Moore), supra, PERB Decision No. 683-S.)

Initially, this case presents the novel threshold issue of whether the duty of fair representation applies at all given that a Medical Center employee in SEIU's bargaining unit may pursue a grievance in arbitration on his own without the union's consent. In other contexts, where the union does not have exclusive control over the pursuit of a remedy for the aggrieved employee, PERB has held that the duty does not apply. (California Union of Safety Engineers (John) (1994) PERB Decision No. 1064-S; San Francisco Classroom Teachers Association (Chestangue) (1985) PERB Decision No. 544.) I conclude that the duty of fair representation does apply in this context. (See Machinists, Local 697 (1976) 223 NLRB 832, 834 [91 LRRM 1529].) In Conley v. Gibson (1957) 355 U.S. 41, 46 [41 LRRM 2089], the United States Supreme Court stated:

> . . . The bargaining representative's duty . . . does not come to an abrupt end, . . . with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the

> contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. . . .

(See also Teamsters Local 559 (1979) 243 NLRB 848, 850 [101 LRRM 1577].)[9]

The complaint alleges that SEIU's bad faith was demonstrated in several ways. SEIU is alleged to have (1) failed to inform Jeffers about the status of his grievance, (2) failed to process the grievance to arbitration and/or inform him why the grievance would not be arbitrated, and (3) failed to respond to his inquiries regarding the grievance. The framing of the complaint compels a brief statement about what this case is not about, based on the evidence presented. This case is not about SEIU's failure to process the grievance through the initial steps, nor even its failure to request arbitration of the grievance. Jeffers's own testimony establishes that he initiated the grievance on his own and processed it through all of the preliminary steps. Jeffers informed Swayne of this, including advising her of the denials at each step. Jeffers requested that Vitulli forward Swayne information on the status of the grievance and was led to believe he had. Jeffers then requested arbitration on his own, which he was authorized to do under the terms of the collective bargaining agreement.[10] Jeffers informed Swayne that he would process the case in this manner and that when he reached the arbitration step, he would contact SEIU for assistance. Swayne did not object to this approach.

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[9] I note that in its most recent pronouncement on the subject, the Board reaffirmed the rule that the duty only applies "to contractually based remedies under the union's exclusive control." (California School Employees Association (Simpson) (2003) PERB Decision No. 1550.) Following the same precedent cited herein, the Board held that the duty did not apply to representation in a disciplinary proceeding before the school district's personnel commission. I do not believe the Board intended by this case to address the issue posed here, and I would distinguish it on grounds that the union is the exclusive representative with a corresponding duty to enforce the terms of the agreement for bargaining unit members.

[10] Ziegler never took the position that the grievance was not arbitrable because Jeffers rather than SEIU had invoked arbitration. Jeffers intimates in his post-hearing brief that he was prevented from arbitrating the grievance by SEIU's failure to act. This was not the case. The only impediment to arbitration was forwarding his share of the arbitrator's fees.

There was no evidence presented that Jeffers made inquiries to SEIU during the initial processing of the grievance that were ignored. Instead, the theory of the case centers around the fact that Swayne led Jeffers to believe that SEIU would provide representation in the arbitration and then refused to do so without informing him.

I therefore turn to SEIU's assessment of the merits of Jeffers's representation request. In order to state a prima facie violation of the duty of fair representation under the MMBA, the charging party must at a minimum produce evidence establishing that the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (International Association of Machinists (Attard), supra, PERB Decision No. 1474-M.) The burden is on the charging party to show how the exclusive representative abused its discretion, and not on the exclusive representative to show that it properly exercised that discretion. (United Teachers – Los Angeles (Wyler) (1993) PERB Decision No. 970.)

Although there is a duty to process grievances, a union may refuse to process a grievance if it makes an honest and reasonable determination that the grievance lacks merit. (United Teachers - Los Angeles (Buller) (1984) PERB Decision No. 438; accord Vaca v. Sipes, supra, 386 U.S. 171, 181-192.) In Buchanan v. NLRB (4th Cir. 1979) 597 F.2d 388, 394 [101 LRRM 3142], the court stated:

> . . . The duty to avoid arbitrary conduct does not require a union to take every employee grievance to arbitration, and it has considerable discretion in sifting out grievances which it regards as lacking merit. Without such discretion, a union's effectiveness as bargaining agent would be undermined. . . . [Fn. omitted.]

Thus, merely establishing a grievance has merit is insufficient to establish a breach of the duty of fair representation. (Vaca v. Sipes, supra, 386 U.S. 171, 181-192.) On the other hand, a grievance clearly lacking in merit would appear to defeat any claim of a breach. (See United Teachers – Los Angeles (Collins) (1982) PERB Decision No. 258; California State Employees

Association (Cohen) (1993) PERB Decision No. 980-S; San Jose Community College Faculty Association (Maestas-Flores) (1997) PERB Decision No. 1200; Fremont Unified District Teachers Association (Turney) (2001) PERB Decision No. 1443.)

In his post-hearing brief Jeffers relies heavily on arguments that his grievance had merit. He argues that in its initial grievance response, the Medical Center relied on the fact that Jeffers did not qualify as a recreational therapist, but later claimed that the position required an occupational therapist license. He claims there is a document he signed which supports this claim. No such document was offered into evidence. Jeffers also claims that the original job description allowed recreational therapists to apply, but later it was changed. Again, no testimony or other documentary evidence was entered in the record to support this claim. As noted above, even assuming such evidence were in the record, merely establishing the merits of the grievance is insufficient. However, treating Jeffers's post-hearing brief generously, I construe his claim to be that SEIU's decision not to proceed was in bad faith because it either negligently or deliberately ignored evidence that the grievance had merit. Since negligence is insufficient, his argument only has merit if he establishes that SEIU acted deliberately. (International Association of Machinists (Attard), supra, PERB Decision No. 1474-M.)

SEIU counters that its refusal to provide representation was due to its belief that the grievance lacked merit. Boone examined the grievance and concluded that Jeffers lacked the minimum qualifications to compete, because he was not a licensed occupational therapist. Boone also relied on the fact that there was no language in the agreement governing the movement of a bargaining unit employee to a non-bargaining unit position.

Jeffers claims that he was qualified based on having the equivalent of a "specialty" in recreational therapy. The relevance of this is related to "the original document that [the

Medical Center was] floating to people to apply for this job," which presumably stated that a recreational therapist would be qualified. By Jeffers's own arguments (e.g., that the qualifications were changed,[11] that the prior incumbent lacked this certification, and that the qualification itself was unjustified because occupational therapists perform the duties of recreation therapists), he appears to concede that the final job posting did require licensure in occupational therapy.

Boone also examined the entire agreement and could find no language that would provide a sound basis on which to prevail. Jeffers's rebuttal to this was the existence of the "mutual respect" clause of the agreement. The theory of his grievance was based essentially on the unfairness of the qualification. Even assuming Boone failed specifically to appreciate or consider this theory, the record does not demonstrate that his omission was arbitrary, discriminatory or in bad faith.[12] Jeffers admitted that he did not review the collective bargaining agreement before drafting his grievance, and at no time in the hearing did he cite any other provision of the agreement that would have applied to his situation.

Lastly, Jeffers asserts that Templeton told him in private that the grievance was too expensive and that Jeffers was a "boat rocker." Again, no such evidence was introduced at the hearing, either from Templeton or Jeffers.

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[11] Jeffers contends in his post-hearing brief that someone at the California Therapeutic Recreation, which agency "wrote" the Business and Professions Code, offered him an interpretation supporting his position, and that the Medical Center changed its defense when he told them of this. There is no evidence in the record supporting this.

[12] Both parties appear to acknowledge that the Medical Center relied on the Business and Professions Code in establishing the qualifications for the position. The fact that Jeffers had been advised in stewards training that "everything" could be grieved under the mutual respect clause suggests that the language was so broad that when a weak grievance, lacking any concrete support in the text of the agreement, presented itself, SEIU was advising stewards to cite the mutual respect provision simply to initiate the process. This theory in my opinion would have been a long-shot at best.

With the burden on the charging party to establish an abuse of discretion, I conclude that Boone's opinion that the grievance lacked merit was reasonable and is supported by the record. Although there is some evidence that Swayne may not have dealt with Jeffers in a completely open and honest manner,[13] I find that there is insufficient evidence from which to draw an inference that SEIU deliberately skewed its examination of the grievance so as to arrive at the result that it did. Boone was only employed by SEIU as its attorney in grievance processing, and the record lacks evidence from which it can be inferred that Boone harbored any ill will toward Jeffers. I believe Boone made an honest judgment in the matter.

Based on the foregoing, I find that SEIU's refusal to represent has not been shown to be "without rational basis or devoid of honest judgment." (International Association of Machinists, supra, PERB Decision No. 1474-M.) SEIU's decision was reasonable and not unlawful, because the potential for success in the arbitration was doubtful. (Sacramento City Teachers Association (Fanning et al.) (1984) PERB Decision No. 428.) Accordingly, Jeffers has failed to demonstrate a violation involving a breach of the duty of fair representation, and SEIU did not violate MMBA section 3506(b) or PERB Regulation 32604(b). Therefore, the underlying charge and complaint must be dismissed.

[13] The complaint alleges that SEIU never provided Jeffers with an explanation of why it was not pursuing the grievance. Although Boone advised Swayne to inform Jeffers that the grievance lacked merit, Swayne did not testify. Jeffers never testified that Swayne informed him of this decision, but neither did he explicitly testify that she did not. In San Francisco Web Pressmen and Platemakers Union No. 4 (1980) 249 NLRB 88 [104 LRRM 1050] (cited in the dismissal affirmed in United Teachers - Los Angeles (Buller), supra, PERB Decision No. 438), discharged employees claimed that a union's action was arbitrary because it accepted as fact "accounts of a dispute which [were] ambiguous and susceptible of more than one interpretation without making at least an effort to obtain the grievant's explanation of his conduct." In dismissing that claim, the labor board held that accepting such a theory would result in the board's role of "second-guessing" a union's assessment of the merits. I believe the events resulting in Jeffers's lost opportunity to appear before the Stewards Council does not demonstrate bad faith on SEIU's part. However, I can understand how it fueled Jeffers's sense of betrayal in the matter.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. SF-CO-23-M, Andrew Jeffers v. Service Employees International Union, Local 616, is 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 Public Employment Relations Board (PERB or 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).)

Donn Ginoza
Administrative Law Judge