

DISCUSSION

This matter involves a challenge by the Association to the City's designation of administrative secretaries as confidential. To the extent the Association is challenging the City's original designation of administrative secretaries as confidential, this charge is untimely. It is undisputed that the City's designation was made in 1983, over 20 years ago, and was clear and obvious to all interested parties. Thus, the limitations period on any unfair practice charge challenging that decision began running in 1983.

The Association argues that since it only became the exclusive representative of its unit in 1996, the limitations period should run from that time. The Board is aware of no legal authority that would allow every new exclusive representative the renewed opportunity to challenge decisions made during the tenure of a previous representative. Such a rule would essentially eviscerate the statute of limitations and subject the City to repeated attacks against its decisions into perpetuity. As a result, the Association's argument must be rejected.

However, the fact that the Association may not challenge the City's original designation decisions does not mean it cannot challenge the continued designation of administrative secretaries as confidential. To mount such a challenge, the Association should utilize the unit modifications procedures provided by the City's local rules. Until the Association attempts to utilize these procedures, there is simply no basis for the Association to bring an unfair practice charge alleging that the City violated its own local rules. Accordingly, the charge must be dismissed.

ORDER

The unfair practice charge in Case No. LA-CE-168-M is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8385
Fax: (916) 327-6377



June 4, 2004

Robin Nahin, Field Representative
City Employees Associates
254-B Lindero Avenue
Long Beach, CA 90803

Re: Municipal Employees Association of Beverly Hills v. City of Beverly Hills
Unfair Practice Charge No. LA-CE-168-M
DISMISSAL LETTER

Dear Ms. Nahin:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 17, 2004. The Municipal Employees Association of Beverly Hills alleges that the City of Beverly Hills violated the Meyers-Milias-Brown Act (MMBA)¹ by improperly designating all administrative secretary positions as confidential.

I indicated to you in the attached letter dated May 20, 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 June 1, 2004, the charge would be dismissed.

We discussed the attached warning letter on May 24, 2004. At that time you indicated you intended to submit a letter in response to the warning letter. Your letter was filed on June 1, 2004. I will consider your letter an amended charge filed in response to the warning letter.

The Association represents employees in classifications assigned to the Technical Services Unit. There are 14 administrative secretaries employed by the City. The administrative secretary classification has been designated confidential for over 20 years and is included in the Confidential Employee bargaining unit.

The charge alleges that the administrative secretary classification has never been properly classified as confidential. Charging Party asserts that neither the administrative secretaries' duties nor their job description meet the City's definition of "confidential employee."

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.

City Resolution No. 83-R-6687 sets forth local rules governing employer-employee relations. Article I, section 2.c, defines a confidential employee as:

an employee, who, in the course of his or her duties, has access to information relating to the City's administration of employer-employee relations.

The Association became the exclusive representative of the Technical Services Unit in 1996. The Union's interest in representing administrative secretaries was triggered in late 2003 when several administrative secretaries approached the Association seeking representation.

Article II, section 7, of the City's local rules sets forth a procedure to seek modification of established bargaining units.

The Association alleges that use of the City's unit modification procedure is inappropriate or unnecessary because the City has violated the definition of confidential employee. The Association also alleges that administrative secretaries seeking to be represented by the Association are unwilling to sign a unit modification petition because they are concerned about retaliation. Finally, the Association believes pursuit of a unit modification would be futile because the City has the discretion to rule on proposed unit modifications.

Code of Civil Procedure section 338 prohibits PERB from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than three years prior to the filing of the charge.² The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.)³ Charging Party bears the burden of demonstrating that the charge is timely filed. (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

The Association has been the exclusive representative of the Technical Services Unit since 1996. The Association has been aware since that time that administrative secretaries have been improperly classified as confidential under the City's local rules. Since the Association has known for more than three years that the City improperly classified administrative secretaries as confidential, the charge is untimely filed.

Even assuming the charge is timely filed, the charge does not state a prima facie case. As stated in the attached letter, it is an unfair practice under MMBA section 3509 and PERB

² The issue of whether the MMBA statute of limitations is three years or six months is currently under review by the California Supreme Court. (see Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board, Case No. S122060.)

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

Regulation 32603(g) for a public agency employer to violate the MMBA or any rules and regulations adopted pursuant to section 3507.

The Association alleges that use of the City's unit modification procedure would be futile and that administrative secretaries would be unwilling to sign a unit modification petition out of fear of retaliation.

The Association has not attempted to use the unit modification procedure. Thus, claims of futility are premature. Evidence of futility may be presented to PERB in the form of a Petition for Board Review or unfair practice charge.

Further, under Article II, section 7 of the City's local rules, a request to modify a bargaining unit may be "submitted in the form of a formal proposal or Recognition Petition." The rules do not specify that proof of majority support must accompany a formal proposal. Based on the discussion above and in the attached letter, the charge does not demonstrate a prima facie violation of the MMBA. Accordingly, the charge is dismissed.

Right to Appeal

Pursuant to PERB Regulations,⁴ 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

⁴ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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

Service

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

Extension of Time

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

Final Date

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

Sincerely,

ROBERT THOMPSON
General Counsel

By

Robin W. Wesley
Regional Attorney

Attachment

cc: Roy A. Clarke

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
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May 20, 2004

Robin Nahin, Field Representative
City Employees Associates
254-B Lindero Avenue
Long Beach, CA 90803

Re: Municipal Employees Association of Beverly Hills v. City of Beverly Hills
Unfair Practice Charge No. LA-CE-168-M
WARNING LETTER

Dear Ms. Nahin:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 17, 2004. The Municipal Employees Association of Beverly Hills alleges that the City of Beverly Hills violated the Meyers-Miliias-Brown Act (MMBA)¹ by improperly designating all administrative secretary positions as confidential.

Investigation of the charge revealed the following information. The Association represents employees in classifications assigned to the Technical Services Unit. There are 14 administrative secretaries employed by the City. The administrative secretary classification has been designated confidential for over 20 years and is included in the Confidential Employee bargaining unit.

City Resolution No. 83-R-6687 sets forth local rules governing employer-employee relations. Article I, section 2.c, defines a confidential employee as:

an employee, who, in the course of his or her duties, has access to information relating to the City's administration of employer-employee relations.

Article II, section 7, sets forth a procedure to seek modification of established bargaining units.

On an unspecified date, Association Representative Robin Nahin spoke to in an unidentified City official, stating that most of the administrative secretaries are not performing confidential work. Ms. Nahin stated that the Association wanted to discuss placing the administrative secretaries in the Technical Services Bargaining Unit. Ms. Nahin filed a grievance concerning this matter, however, the City declined to address the grievance.

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.

The Association contends that the work performed by most of the administrative secretaries does not meet the definition of confidential employee. Thus, the administrative secretary classification should be placed in the Technical Services Unit.

Based on the facts stated above, the charge does not state a prima facie case.

Public agencies are empowered under MMBA section 3507 to "adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations." In addition, section 3507.5 authorizes public agencies to "adopt reasonable rules and regulations providing for designation of the management and confidential employees of the public agency." It is an unfair practice under section 3509 and PERB Regulation 32603(g) for a public agency employer to violate the MMBA or violate any rules and regulations adopted pursuant to section 3507.

The City has adopted local rules which govern employee rights to be represented by an employee organization. The local rules establish nine bargaining units. The administrative secretary classification has long been designated confidential and assigned to the Confidential Employee Unit. The local rules establish a process which may be utilized by an employee organization to modify an existing bargaining unit. In petitioning to modify a bargaining unit, an employee organization can assert that employees designated confidential no longer meet the definition of confidential employee. The charge does not provide facts which demonstrate that the Association filed a unit modification petition pursuant to the local rules and the City violated the local rules in processing the petition. Accordingly, the charge does not state a prima facie case and must be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before June 1, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney