STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME, Charging Party, v. CITY OF ONTARIO, Respondent.	Case No. LA-CE-112-M PERB Decision No. 1695-M September 27, 2004

Appearances: Maureen Douglas, Business Representative, for AFSCME; Filarsky & Watt by Steve A. Filarsky, Attorney, for City of Ontario.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by AFSCME of a Board agent's partial dismissal (attached) of its unfair practice charge. The charge alleged that the City of Ontario (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by making unilateral changes to disciplinary procedures and retaliation against two employees. AFSCME alleged that this conduct constituted a violation of MMBA sections 3502.1, 3504, and 3506, and PERB Regulations 32603(a) and (c).[2]

The Board has reviewed the entire record, including the unfair practice charge and three amendments, the City's responses to the charge and amendments, the warning and dismissal letters, AFSCME's appeal and the City's response to AFSCME's appeal. The Board finds the

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

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

Board agent's partial dismissal to be free of prejudicial error and adopts it as a decision of the Board itself.

ORDER

The partial dismissal of the unfair practice charge in Case No. LA-CE-112-M is hereby AFFIRMED.

Chairman Duncan and Member Neima joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8384
Fax:(916)327-6377

August 19, 2003

Maureen Douglas, Business Representative
AFSCME Council 36
320 West G Street, Suite 201C
Ontario, CA 91762

Re: AFSCME v. City of Ontario
Unfair Practice Charge No. LA-CE-112-M
PARTIAL DISMISSAL LETTER

Dear Ms. Douglas:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 26, 2003. On March 21, and June 12, and August 15, 2003 the charge was amended. AFSCME alleges in part that the City of Ontario violated the Meyers-Milias-Brown Act (MMBA)[1] by making unilateral changes to disciplinary procedures.

I indicated to you in my attached letter dated May 13, 2003, that the above-referenced charge did not state a prima facie violation of unilateral change. 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 May 21, 2003 the charge would be dismissed. Because you were unable to amend the charge by that date, you requested an extension to amend. I received the amended charge on June 12, 2003. In the June 12, amended charge in addition to alleging that the City made unilateral changes to the parties' disciplinary procedure, you alleged that the City retaliated against two employees.[2] The charge was amended a final time on August 15, 2003.

The following facts were contained in the original unfair practice charge, as well as the amended charges.

AFSCME represents Unit 6, Miscellaneous Employees, in the City of Ontario. AFSCME and the City are parties to a memorandum of understanding effective from July 1, 2001 through June 30, 2005. Article I if the Agreement provides in part:

> 1.5 The parties acknowledge that during the course of the negotiations which resulted in this MOU, each had the unlimited

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

[2] This allegation is not addressed in this dismissal letter. Rather a complaint has issues as to the retaliation violations.

right and opportunity to make demands with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this MOU.

1.6 This MOU supersedes all previous Memoranda of Understanding.

Article IV, Employee Rights, of the Agreement provides:

4.1 The City shall afford permanent employees the procedural due process safeguards as set out in the published decisions of the California courts.

4.2 Where specific misconduct is stated as the cause for City employment termination of an employee, who has permanent status, upon written request made by the employee prior to the effective date of the termination, the employee is entitled to a hearing, (underline in original)

4.3 An employee shall have right of Union representation when the employee reasonably anticipates that such a meeting is for the purpose of disciplining the employee, or is to obtain facts to support disciplinary action that is probable, or that is being seriously considered. Prior to any such meetings, an employee's waiver of right to representation shall be documented in writing.

Article VII, Disciplinary Procedure, 7.1 provides in pertinent part:

The following disciplinary procedure must be used for all serious disciplinary actions involving permanent full time employees BEFORE the actions go into effect. Basically, the disciplinary procedure provides that: (underline in original)

A. The employee shall receive advance notice of the proposed disciplinary action 10 working days before the action is to be implemented. The notification time frame shall begin the day after the notice of proposed disciplinary action is served. The notice shall include:

1. The specific grounds and particular facts upon which the proposed action is based;

2. Any materials, reports, or documents upon which the action is based.

B. The employee shall have the right to respond to the proposed disciplinary action, orally or in writing, and shall have such responses considered by an independent reviewer of the proposed action. Such review shall be conducted by the Agency Head for the employee's department prior to the imposition of the disciplinary action. If the Agency Head is proposing the disciplinary action, an alternate City Agency Head shall conduct the review.

C. Following the review of the proposed action, the Personnel Officer shall serve on the employee, by registered mail or personal delivery, a statement informing the employee of the grounds for the decision and the acts or omissions, which support the grounds. This statement shall also include the employee's appeal rights.

D. The employee shall have 14 calendar days to file an appeal with the Personnel Officer.

E. Appeal Hearings:

1. Within 14 calendar days after a serious disciplinary action is imposed (as defined in Section 7. 1F), the employee shall have the right to appeal the disciplinary action. An independent Hearing Officer shall hear the appeal. Such appeal shall be conducted as an evidentiary hearing.

. . . . . .

4. After the hearing is completed, the Hearing Officer shall issue findings and a decision to overturn, modify, or uphold the disciplinary action. The Hearing Officer's decision shall be issued within 30 days after the completion of the Hearing and the submission of closing statements, if required. The City or the appellant may request that the Hearing Officer's decision be submitted to the City Council for review. If submitted to the City Council for review, the City Council may overturn, modify or uphold the Hearing Officer's decision. The City Council's shall be final.

. . . . . .

On January 3, 2003, Public Service Technician David Las Cano and Utility Worker II Tom Bartlett, were placed on administrative leave pending investigation of their job performance. Messrs. Las Cano and Bartlett work together on a two person team, that maintains valves throughout the City. Both employees were interviewed by management during the week of January 6, 2003 and on January 31, 2003, each was given a notice of intent to terminate. They were being terminated for allegedly failing to complete job assignments and falsifying paperwork. The notices list several inconsistencies between the work logged by Messrs. Las Cano and Bartlett and the work that was done. The notices stated in part:

> Prior to this action, you received a written warning dated December 17, 2001...That action was related to taking extended breaks and failing to be at your assigned work area. You were further advised to adhere to your scheduled break time and to call your immediate supervisor to obtain permission to leave your assigned work area during your assigned work hours.
>
> Before this action is implemented you have a right to respond to these charges no later than 2/18/03 and present any information, which you feel, may cause the Public Works/Community Services Director to amend this proposed action. You may provide written and/or oral response to these charges.
>
> If you desire to make an oral presentation to the Public Works/Community Services Director, please call 395-2610 no later than 2/10/03, to schedule a meeting. You may have a representative present at the meeting. The time period for your response may only be extended by mutual agreement of the parties involved.

On February 11, 2003, AFSCME Representative Maureen Douglas sent a letter to Human Resources Manager Gordon Johnson. Therein she explained that there is no provision in the MOU imposing a deadline, such as the February 10 deadline, for making an oral presentation to the City. She explained that the language of Article VII, as well as past practice was that employees have ten working days to respond in writing or request a meeting for an oral presentation to rebut the proposed discipline. Ms. Douglas noted that Messrs. Las Cano and Bartlett were invoking their right to a hearing pursuant to Article IV Section 4.2 of the MOU. Ms. Douglas stated in her letter, "[a]s you are aware hearings are defined in Article 7, section 1(E).[3] Please contact me as soon as possible to begin the process to select a hearing officer."

[3] That is the section of the MOU entitled "Appeal Hearing," which states in part that an "independent Hearing Officer shall hear the appeal. Such appeal shall be conducted as an evidentiary hearing."

On February 12, 2003, Mr. Johnson sent an email to Ms. Douglas. Therein he explained that Article IV Section 4.2 merely granted employees the right to respond to the City Manager before a discharge was finalized. In addition, he explained:

> . . . . . .
>
> Article VII, Section 7. IB of the current MOU states that a permanent full-time employee has the right to have any proposed disciplinary action considered by the Agency Head for the employee's department before it is finalized. In the cases of Messrs. Lascano and Bartlett, that reviewer is Mr. Ken Jeske as noted in their Notices of Intent to Terminate dated January 31, 2003. Article VII, Section E of the current MOU provides that a serious disciplinary action may be appealed to an independent Hearing Officer. With these changes, Article VI (sic), Section 4.2 is no longer necessary.[4]

On February 18, 2003, Ms. Douglas sent a letter to Mr. Johnson. Therein she explained in part:

> I have received your responses to AFSCME's concerns. Unfortunately, the City's position on these matters illustrates the City's intent to unilaterally impose new disciplinary procedures and timelines that were never agreed to or discussed at the time the changes to MOU Articles 4 and 7 were negotiated in 2001.
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> . . . . . .
>
> The City's unilateral decision to implement a new deadline for oral presentations is also an unfair labor practice. The deadlines for response to a notice of intent to discipline are 10 working days. There has never been a provision or practice that oral presentations take place prior to the deadline. In fact just the opposite is true. It has been a long-standing practice that the request for an oral presentation had to be submitted by the 10-day deadline. In those cases scheduling was dependent on the availability of the City representative.
>
> . . . . . .

On February 21, Mr. Johnson sent Ms. Douglas a letter. Mr. Johnson explains that the City's actions are consistent with Article VII of the MOU and that there is nothing in the MOU that

[4] From the context and content of the email, Mr. Johnson intended to write that Article IV, Section 4.2 is no longer necessary. The MOU does not contain Article VI, Section 4.2.

specifies a requirement for granting employees more than ten working days from the date of receipt of the notice of proposed disciplinary action for the Agency Head to meet with or consider input. Mr. Johnson also explains:

> Article IV of the current MOU (and several prior MOU's) entitled "Employee Rights", has been consistently interpreted to relate exclusively to pre-disciplinary "Skelly" rights. There is nothing in the current MOU (or prior MOU's) which indicates that the hearing referenced in Article IV, Section 4.2, is an evidentiary hearing.

On February 21, 2003, Ms. Douglas sent Mr. Johnson letters appealing to Article 7.1(E) the terminations of Mr. Las Cano and Mr. Bartlett. Therein Ms. Douglas notes that pursuant to Article 7 of the MOU, the terminations upheld by Mr. Jeske, do not take effect until the appeal has been completed.

On February 24, 2003, Ms. Douglas sent another letter to Mr. Johnson. Therein she explained the parties' long standing interpretation Article VII:

> .. .The long-standing interpretation of Article 7 has been that an employee had a set amount of time to either provide a written response or request an appointment to make an oral response. Whether it was one day or ten days after the request relied solely on the individual reviewer. No action was taken until which time the reviewer had considered the information presented. Again this varied and relied solely on the reviewer.
>
> Nothing in Article 7 supports the City's assertion that the 10 day notice is intended to be a deadline by which an employee is to request an appointment for an oral presentation, make the oral presentation to the reviewer, have the matter fully and fairly considered, and receive a response as to the determination.
>
> In fact Article 7 contradicts that theory. Article 7, section 1 (A) provides a ten day advance notice of a proposed action. This advance notice has always been held as the effective date if there was no response. It was never intended or interpreted to be a deadline by which to complete the entire Skelly process.
>
> Article 7, section 1(B) ensures an employee's right to review and to have that review considered. The City's position that the 10 days is intended for a deadline by which the entire Skelly process is conducted and concluded would clearly infringe on the rights afforded employees in Article 7, section 1(B). There is no mention

> of time limits for the scheduling of a presentation or the review of the response or the time taken by the reviewer to respond.
>
> . . . . . .

Ms. Douglas then addresses Mr. Johnson's statement that Article IV is no longer relevant.

> . . . . . .
>
> The City's position, as you expressed on February 18, 2003, is that this provision was intended to be a reiteration of Skelly Rights. Clearly, this is not true. Article 4 section 1 was intended for that purpose. Article 4, section 2 refers specifically to proposed termination. Article 7 has never provided employees with the right to a hearing. The opportunity was only available to those employee's facing termination. Nothing in the current MOU contradicts the intent of this provision.

On February 25, 2003, Mr. Johnson sent a letter explaining that the language of 7.1 that states, "the following disciplinary procedure must be used for all serious disciplinary actions involving permanent full time employees BEFORE the actions go into effect" only applies to 7.1 (A) and 7.1(B). According to Mr. Johnson, it is ludicrous to believe that an appeals hearing must occur prior to the imposition of the disciplinary action.

As of February 18, 2003, Mr. Las Cano and Mr. Bartlett have been officially terminated by the City. Their pay and benefits ended on that date.

In the amended charges of June 12 and August 15, 2003, Charging Party asserts in part:

> . . . . . .
>
> The long-standing interpretation of MOU Article 7 (Disciplinary Procedure) has been that an employee had a set amount of time to either provide a written response or request an appointment to make an oral response. Whether it was one day or ten days after the request relies solely on the calendars of the reviewer and the representative. No action was taken until which time the reviewer had considered the information presented. The amount of time taken by the reviewer has varied by case.
>
> Although the language of the MOU regarding a deadline for presentations is ambiguous, the interpretation and application of this language has been consistent as evidenced by past notices of intent. In the notices for disciplinary action since Mr. Bartlett

> and Mr. Las Cano's terminations the City has resumed the practice of allowing 10 days to request an oral presentation.
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> . . . . . .
>
> Prior to the implementation of the current MOU, disciplinary appeals were addressed through the arbitration process of the grievance procedure (Article 13). There was a great deal of time and discussion spent on the placement of the new appeal procedure. The City proposed it would be a different section of Article 7. The Union proposed it would be included in Article 7 under the heading of section 1. After much discussion the City's final proposal was agreed upon in its present form.

In the June 12 and August 15 amended charges, Charging Party, states that prior to the implementation of the new MOU, a hearing pursuant to Article 4, was different than a hearing pursuant to Article 7. Under Article 4 hearings, the City Manager held the hearing during which evidence and arguments were presented by both parties. Under Article 7, the Department Head or Agency Head ran the hearing and the employee and or the representative presented information and answered any questions that were asked.

In addition, Charging Party asserts that between sometime in 2000 to July 2001 of the five employees threatened with termination, two requested hearings, which were different under Articles IV and VII. These proposed terminations occurred prior to the adoption of the current MOU.

Discussion

As explained in the May 13, 2003 warning letter Charging Party alleges that Respondent made three unilateral changes to the disciplinary procedure by Mr. Johnson's February 12 statement that Article IV, section 4.2, "was no longer necessary," by reducing the number of days given an employee to respond orally to proposed discipline and by terminating Messrs. Las Cano and Bartlett prior to the exhaustion of the Article VII, section 7.1(E) appeals process. For the following reasons, these allegations are dismissed.

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),[5] PERB utilizes either the "per se" or "totality of the 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.)[6] Unilateral

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

[6] 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.)

changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (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; Grant Joint Union High School District (1982) PERB Decision No. 196.)

An employer does not make an unlawful change if its actions conform to the terms of the parties' agreement. (Marysville Joint Union School District (1983) PERB Decision No. 314.)

First, as explained in the May 13 warning letter, Charging Party alleges that Mr. Johnson's February 12, 2003 email statement that Article IV, section 4.2 "was no longer necessary" amounts to a unilateral change. Other than this statement by Mr. Johnson, Charging Party provides no facts demonstrating a change in the policy set forth in Article IV. Section 4.2 entitles permanent employees facing termination for specific misconduct to a "hearing." Article IV does not indicate what type of hearing is required, or when the hearing is to take place. In the June 12 and August 15 amended charges, Charging Party asserts that pursuant to Article 4, in the past a full evidentiary was provided. However, in the February 11 letter, Ms. Douglas states that the "hearing" in Article IV is the appeal hearing set forth in Article VII. Charging Party provides no facts demonstrating that the Article VII appeal hearing was denied by the City. On February 21, 2003, Ms. Douglas notified the City that Messrs. Las Cano and Bartlett were appealing their terminations and were in the process of choosing a hearing officer. As such, it appears that pursuant to Ms. Douglas' theory that the "hearing" referred to in Article IV, is the appeal hearing set forth in Article VII, there was no change in policy. The Federation appealed the terminations, and there are no facts indicating that the City denied Messrs. Las Cano and Bartlett their Article 7.1(E) rights to such a hearing. Although Mr. Johnson stated once that Article IV, section 4.2 was no longer necessary, the actions of both parties indicate that this statement did not effectuate a change in policy and was merely a misstatement by Mr. Johnson. The allegation that Mr. Johnson's February 12 statement was a unilateral change is dismissed.

Second, Charging Party alleges that Respondent implemented a unilateral change in Article VII and the parties' past practice by reducing the number of days given an employee to respond orally to proposed discipline. The January 31 notices of discipline state that if Mr. Las Cano and Mr. Bartlett wanted to make an oral presentation to the Public Works/Community Services Director, they needed to call no later than February 10, to schedule a meeting and they had until February 18, to present information to the Public Works Community Services Director.

According to Charging Party, Article VII and past practice allows employees up to ten working days to submit an oral response to proposed discipline. Ten working days from January 31, 2003 would have been February 14, 2003. Despite Charging Party's contention, Article VII, does not provide a timeline for an employee's response to proposed discipline. The only time

frame referred to in sections 7.1 (A) and 7.1(B) are the ten working days advance notice that the City must give the employee prior to implementing the disciplinary action in 7.1 (A). There is nothing in the text of Article VII establishing a policy that allows an employee ten days to respond to proposed discipline. In addition, Charging Party provides no facts establishing a past practice whereby employees utilizing the Article VII, Disciplinary Procedures, were allowed ten working days to respond orally to the potential discipline. Even if such a past practice or policy were established, according to the January 31 notices of intent to terminate, the City gave the employees until February 18, more than ten working days, to respond to the proposed action. As such, Charging Party provides no facts indicating that Mr. Las Cano and Mr. Bartlett were forced to respond within ten days or that they ever requested to make an oral response. Without a change in policy, there is no unilateral change and the allegation that Respondent implemented a unilateral change in Article VII and the parties' past practice by reducing the number of days given an employee to respond orally to proposed discipline is dismissed.

Third, Charging Party alleges that Respondent made a unilateral change when the City terminated Mr. Las Cano and Mr. Bartlett prior to completing the appeal procedure set forth in Article VII, section 7.1(E). Charging Party argues that the language in Article VII stating that, the "disciplinary procedure must be used for all serious disciplinary actions involving permanent full time employees BEFORE the actions go into effect," includes the appeals process. Thus an employee may not be terminated until she/he has completed the appeals process. However, this interpretation of Article VII conflicts with Article VII section 7.1(E). Article VII, section 7.1(E) provides that "within 14 calendar days after a serious disciplinary action is imposed (as defined in Section 7.1F), the employee shall have the right to appeal the disciplinary action." (underline added) Section 7.1(E)(1) expressly states that an employee may appeal after serious disciplinary action, such as discharge, is "imposed." The timeline for requesting an appeals hearing does not begin until after the discipline has been imposed. Thus, Charging Party's argument that all of Article VII must be exhausted before discipline is imposed is not supported by the language of section 7.1(E) and the language in 7.1 providing that the "disciplinary procedure must be used for all serious disciplinary actions involving permanent full time employees BEFORE the actions go into effect," appears to only apply to Article VII, sections 7.1 (A) through 7.1(D). As such Charging Party has not demonstrated that Respondent changed the policy set forth in Article VII by terminating Mr. Las Cano and Mr. Bartlett prior to the exhaustion of the appeals process and this allegation is dismissed.

Right to Appeal

Pursuant to PERB Regulations,[7] you may obtain a review of this dismissal of these allegations 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.

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

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

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

The Board's address is:

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

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

Service

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

Extension of Time

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

Final Date

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

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Marie A. Nakamura
Regional Attorney

Attachment

cc: Steve Filarsky

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8384
Fax:(916)327-6377

May 13, 2003

Maureen Douglas, Business Representative
AFSCME Council 36
320 West G Street, Suite 201C
Ontario, CA 91762

Re: AFSCME v. City of Ontario
Unfair Practice Charge No. LA-CE-112-M
WARNING LETTER

Dear Ms. Douglas:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 26, 2003. On March 21, 2003, the charge was amended. AFSCME alleges that the City of Ontario violated the Meyers-Milias-Brown Act (MMBA)[1] by making unilateral changes to disciplinary procedures.

AFSCME represents Unit 6, Miscellaneous Employees, in the City of Ontario. AFSCME and the City are parties to a memorandum of understanding effective from July 1, 2001 through June 30, 2005. Article I if the Agreement provides in part:

> 1.5 The parties acknowledge that during the course of the negotiations which resulted in this MOU, each had the unlimited right and opportunity to make demands with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this MOU.
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> 1.6 This MOU supersedes all previous Memoranda of Understanding.

Article IV, Employee Rights, of the Agreement provides:

> 4.1 The City shall afford permanent employees the procedural due process safeguards as set out in the published decisions of the California courts.

[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.

> 4.2 Where specific misconduct is stated as the cause for City employment termination of an employee, who has permanent status, upon written request made by the employee prior to the effective date of the termination, the employee is entitled to a hearing. (underline in original)
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> 4.3 An employee shall have right of Union representation when the employee reasonably anticipates that such a meeting is for the purpose of disciplining the employee, or is to obtain facts to support disciplinary action that is probable, or that is being seriously considered. Prior to any such meetings, an employee's waiver of right to representation shall be documented in writing.

Article VII, Disciplinary Procedure, 7.1 provides in pertinent part:

> The following disciplinary procedure must be used for all serious disciplinary actions involving permanent full time employees BEFORE the actions go into effect. Basically, the disciplinary procedure provides that: (underline in original)
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> A. The employee shall receive advance notice of the proposed disciplinary action 10 working days before the action is to be implemented. The notification time frame shall begin the day after the notice of proposed disciplinary action is served. The notice shall include:
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> 1. The specific grounds and particular facts upon which the proposed action is based;
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> 2. Any materials, reports, or documents upon which the action is based.
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> B. The employee shall have the right to respond to the proposed disciplinary action, orally or in writing, and shall have such responses considered by an independent reviewer of the proposed action. Such review shall be conducted by the Agency Head for the employee's department prior to the imposition of the disciplinary action. If the Agency Head is proposing the disciplinary action, an alternate City Agency Head shall conduct the review.
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> C. Following the review of the proposed action, the Personnel Officer shall serve on the employee, by registered mail or personal delivery, a statement informing the employee of the grounds for the decision and the acts or omissions, which support

> the grounds. This statement shall also include the employee's appeal rights.
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> D. The employee shall have 14 calendar days to file an appeal with the Personnel Officer.
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>
> 4. After the hearing is completed, the Hearing Officer shall issue findings and a decision to overturn, modify, or uphold the disciplinary action. The Hearing Officer's decision shall be issued within 30 days after the completion of the Hearing and the submission of closing statements, if required. The City or the appellant may request that the Hearing Officer's decision be submitted to the City Council for review. If submitted to the City Council for review, the City Council may overturn, modify or uphold the Hearing Officer's decision. The City Council's shall be final.
>
> . . . . . .
>
> F. This disciplinary procedure should be used for all serious disciplinary actions which are normally considered (1) demotions, (2) discharges, (3) reductions in pay, and (4) suspensions.

On January 31, 2003, Public Service Technician David Las Cano and Utility Worker II Tom Bartlett, both members of Unit 6, were each given a notice of intent to terminate. They were being terminated for allegedly failing to complete job assignments and falsifying paperwork. The notices stated:

> If you desire to make an oral presentation to the Public Works/Community Services Director, please call 395-2610 no later than 2/10/03, to schedule a meeting. You may have a representative present at the meeting. The time period for your response may only be extended by mutual agreement of the parties involved.

On February 11, 2003, AFSCME Representative Maureen Douglas sent a letter to Human Resources Manager Gordon Johnson. Therein she explained that there is no provision in the MOU imposing a deadline, such as the February 10 deadline, for making an oral presentation to the City. She explained that the language of Article VII, as well as past practice was that employees have ten working days to respond orally or in writing to the proposed discipline. Ms. Douglas noted that Messrs. Las Cano and Bartlett were invoking their right to a hearing pursuant to Article IV Section 4.2 of the MOU. Ms. Douglas stated in her letter, "[a]s you are aware hearings are defined in Article 7, section 1(E). Please contact me as soon as possible to begin the process to select a hearing officer."

On February 12, 2003, Mr. Johnson sent an email to Ms. Douglas. Therein he explained that Article IV Section 4.2 merely granted employees the right to respond to the City Manager before a discharge was finalized. In addition, he explained:

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> Article VII, Section 7.1B of the current MOU states that a permanent full-time employee has the right to have any proposed disciplinary action considered by the Agency Head for the employee's department before it is finalized. In the cases of Messrs. Lascano and Bartlett, that reviewer is Mr. Ken Jeske as noted in their Notices of Intent to Terminate dated January 31, 2003. Article VII, Section E of the current MOU provides that a serious disciplinary action may be appealed to an independent Hearing Officer. With these changes, Article VI (sic), Section 4.2 is no longer necessary.[2]

Mr. Johnson further explained:

> Article VII, Section 7.1B provides that the Agency Head shall consider any oral or written responses to the proposed disciplinary action before it is imposed. Since Section 7.1 A provides that the employee (sic) shall give advance notice of the proposed disciplinary action 10 working days before the action is to be implemented and Mr. Jeske has a very busy calendar and needs advance notice if such a meeting is to take place before the 10 working days are up, an earlier date is being included in the Skelly Letters so that the Agency Head can arrange his/her schedule to have sufficient time to meet with the employee and/or review any materials submitted. This is not a misleading, arbitrary, intolerable or unenforceable requirement.

[2] From the context and content of the email, Mr. Johnson intended to write that Article IV, Section 4.2 is no longer necessary. The MOU does not contain Article VI, Section 4.2.

On February 18, 2003, Ms. Douglas sent a letter to Mr. Johnson. Therein she explained in part:

> I have received your responses to AFSCME's concerns. Unfortunately, the City's position on these matters illustrates the City's intent to unilaterally impose new disciplinary procedures and timelines that were never agreed to or discussed at the time the changes to MOU Articles 4 and 7 were negotiated in 2001.
>
> . . . . . .
>
> The City's unilateral decision to implement a new deadline for oral presentations is also an unfair labor practice. The deadlines for response to a notice of intent to discipline are 10 working days. There has never been a provision or practice that oral presentations take place prior to the deadline. In fact just the opposite is true. It has been a long-standing practice that the request for an oral presentation had to be submitted by the 10-day deadline. In those cases scheduling was dependent on the availability of the City representative.
>
> . . . . . .

On February 21, Mr. Johnson sent Ms. Douglas a letter. Mr. Johnson explains that the City's actions are consistent with Article VII of the MOU and that there is nothing in the MOU that specifies a requirement for granting employees more than ten working days from the date of receipt of the notice of proposed disciplinary action for the Agency Head to meet with or consider input. Mr. Johnson also explains:

> Article IV of the current MOU (and several prior MOU's) entitled "Employee Rights", has been consistently interpreted to relate exclusively to pre-disciplinary "Skelly" rights. There is nothing in the current MOU (or prior MOU's) which indicates that the hearing referenced in Article IV, Section 4.2, is an evidentiary hearing.

On February 21, 2003, Ms. Douglas sent Mr. Johnson letters appealing to Article 7.1(E) the terminations of Mr. Las Cano and Mr. Bartlett. Therein Ms. Douglas notes that pursuant to Article 7 of the MOU, the terminations upheld by Mr. Jeske, do not take effect until the appeal has been completed.

On February 24, 2003, Ms. Douglas sent another letter to Mr. Johnson. Therein she explained the parties' long standing interpretation Article VII:

> .. .The long-standing interpretation of Article 7 has been that an employee had a set amount of time to either provide a written response or request an appointment to make an oral response. Whether it was one day or ten days after the request relied solely on the individual reviewer. No action was taken until which time the reviewer had considered the information presented. Again this varied and relied solely on the reviewer.
>
> Nothing in Article 7 supports the City's assertion that the 10 day notice is intended to be a deadline by which an employee is to request an appointment for an oral presentation, make the oral presentation to the reviewer, have the matter fully and fairly considered, and receive a response as to the determination.
>
> In fact Article 7 contradicts that theory. Article 7, section 1(A) provides a ten day advance notice of a proposed action. This advance notice has always been held as the effective date if there was no response. It was never intended or interpreted to be a deadline by which to complete the entire Skelly process.
>
> Article 7, section 1(B) ensures an employee's right to review and to have that review considered. The City's position that the 10 days is intended for a deadline by which the entire Skelly process is conducted and concluded would clearly infringe on the rights afforded employees in Article 7, section 1(B). There is no mention of time limits for the scheduling of a presentation or the review of the response or the time taken by the reviewer to respond.
>
> . . . . . .

Ms. Douglas then addresses Mr. Johnson's statement that Article IV is no longer relevant.

> . . . . . .
>
> The City's position, as you expressed on February 18, 2003, is that this provision was intended to be a reiteration of Skelly Rights. Clearly, this is not true. Article 4 section 1 was intended for that purpose. Article 4, section 2 refers specifically to proposed termination. Article 7 has never provided employees with the right to a hearing. The opportunity was only available to those employee's facing termination. Nothing in the current MOU contradicts the intent of this provision.

On February 25, 2003, Mr. Johnson sent a letter explaining that the language of 7.1 that states, "the following disciplinary procedure must be used for all serious disciplinary actions

involving permanent full time employees BEFORE the actions go into effect" only applies to 7.1 (A) and 7.1(B). According to Mr. Johnson, it is ludicrous to believe that an appeals hearing must occur prior to the imposition of the disciplinary action.

As of February 18, 2003, Mr. Las Cano and Mr. Bartlett have been officially terminated by the City. Their pay and benefits ended on that date.

Discussion

Charging Party alleges that the City made three unilateral changes to the parties' disciplinary procedures. For the following reasons the charge fails to establish a prima facie violation of the MMBA.

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),[3] PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (19801 PERB Decision No. 143.)[4] Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (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; Grant Joint Union High School District (1982) PERB Decision No. 196.)

An employer does not make an unlawful change if its actions conform to the terms of the parties' agreement. ("Marysville Joint Union School District (1983) PERB Decision No. 314.)

First, Charging Party alleges that Mr. Johnson's February 12, 2003 email statement that Article IV, section 4.2 "was no longer necessary" amounts to a unilateral change. Other than this statement by Mr. Johnson, Charging Party provides no facts demonstrating a change in the policy set forth in Article IV. Section 4.2 entitles permanent employees facing termination for specific misconduct to a "hearing." Article IV does not indicate what type of hearing is required, or when the hearing is to take place. Charging Party provides no facts demonstrating what type of "hearing" was provided by the City in the past. Instead in the February 11 letter, Ms. Douglas states that the "hearing" in Article IV is the appeal hearing set forth in Article VII. The Article VII appeal hearing was not denied by the City. On February 21, 2003, Ms. Douglas notified the City that Messrs. Las Cano and Bartlett were appealing their terminations

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

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

and were in the process of choosing a hearing officer. As such, it appears that pursuant to the theory that the "hearing" referred to in Article IV, is the appeal hearing set forth in Article VII, there was no change in policy. The Federation appealed the terminations, and there are no facts indicating that the City denied Messrs. Las Cano and Bartlett their Article 7.1(E) rights to such a hearing. Although Mr. Johnson stated once that Article IV, section 4.2 was no longer necessary, the actions of both parties indicate that this statement did not effectuate a change in policy and was merely a misstatement by Mr. Johnson.

Second, Charging Party alleges that Respondent implemented a unilateral change in Article VII and the parties' past practice by reducing the number of days given an employee to respond orally to proposed discipline. The January 31 notices of discipline state that if Mr. Las Cano and Mr. Bartlett wanted to make an oral presentation to the Public Works/Community Services Director, they needed to call no later than February 10, to schedule a meeting. For the following three reasons Charging Party has not demonstrated a unilateral change in the number of days given employees to respond orally to proposed discipline.

Article VII, section 7.1 (A) mandates that the City notice the employee ten working days prior to taking disciplinary action. Here, that notice was provided by the January 31 notices of proposed discipline. Section 7.1 (B) allows the employee the right to respond to the proposed discipline and to have the response considered by an independent reviewer of the proposed action. However, section 7.1(B) does not provide a timeline for the employee's response. The only time frame referred to in sections 7.1 (A) and 7.1(B) are the ten working days advance notice that the City must give the employee prior to implementing the disciplinary action in 7.1 (A). Yet, according to Ms. Douglas' February 11 letter, Article VII allows employees up to ten working days to submit an oral response to the proposed discipline. Ten working days from January 31, 2003 would have been February 14, 2003. Despite this assertion, as explained above there is nothing in the text of Article VII establishing a policy that allows an employee ten days to respond to proposed discipline.

In addition, Charging Party provides no facts establishing a past practice whereby employees utilizing the Article VII, Disciplinary Procedures, were allowed ten working days to respond orally to the potential discipline.

Without facts demonstrating a policy, or past practice there is no unilateral change.

Even if Charging Party demonstrates a past practice or policy allowing an employee ten working days to respond to proposed discipline, nothing in the City's notices of discipline contradicted that alleged past practice of allowing employees ten days to respond to proposed discipline. The January 31 notices stated that if Mr. Las Cano and Mr. Bartlett wanted to respond orally, they needed to contact the Director no later than February 10 to set up a meeting. There is nothing in the notice stating that they must respond orally on or before February 10. Charging Party provides no facts indicating that Mr. Las Cano and Mr. Bartlett were forced to respond prior to the ten day past practice or even that they requested to make an oral response. Without a change in policy, there is no unilateral change.

Third, Charging Party alleges that Respondent made a unilateral change when the City terminated Mr. Las Cano and Mr. Bartlett prior to completing the appeal procedure set forth in Article VII, section 7.1(E). Charging Party argues that the language in Article VII stating that, the "disciplinary procedure must be used for all serious disciplinary actions involving permanent full time employees BEFORE the actions go into effect," includes the appeals process. Thus an employee may not be terminated until she/he has completed the appeals process. However, this interpretation of Article VII conflicts with Article VII section 7.1(E).

Article VII, section 7.1(E) provides that "within 14 calendar days after a serious disciplinary action is imposed (as defined in Section 7. 1F), the employee shall have the right to appeal the disciplinary action." (underline added) Section 7.1(E)(1) expressly states that an employee may appeal after serious disciplinary action, such as discharge, is "imposed." The timeline for requesting an appeals hearing does not begin until after the discipline has been imposed. Thus, Charging Party's argument that all of Article VII must be exhausted before discipline is imposed is not supported by the language of section 7.1 (E) and the language in 7.1 providing that the "disciplinary procedure must be used for all serious disciplinary actions involving permanent full time employees BEFORE the actions go into effect," appears to only apply to Article VII, sections 7.1 (A) through 7.1(D). As such Charging Party has not demonstrated that Respondent changed the policy set forth in Article VII by terminating Mr. Las Cano and Mr. Bartlett prior to the exhaustion of the appeals process.

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 Second 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 May 21, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Marie A. Nakamura
Regional Attorney

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