STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 949, Charging Party, v. CITY OF SAN RAFAEL, Respondent.	Case No. SF-CE-149-M PERB Decision No. 1698-M October 20, 2004

Appearances: Weinberg, Roger & Rosenfeld by William A. Sokol, Attorney, for Service Employees International Union Local 949; Liebert, Cassidy & Whitmore by Cynthia O'Neill, Attorney, for City of San Rafael.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Service Employees International Union Local 949 (SEIU) from a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the City of San Rafael (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by enforcing an unreasonable local rule.

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

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

DISCUSSION

The facts are simple and not in dispute. SEIU is the exclusive representative for the City's miscellaneous bargaining unit. The City and SEIU are parties to a collective bargaining agreement (CBA) effective from 2002 through June 30, 2006. During the second year of the CBA, the City received a petition for modification from the San Rafael Confidential Unit. The petition proposed to modify the miscellaneous bargaining unit by severing several employee classifications. As the City's local rules do not contain a contract-bar provision[2], the petition was allowed to proceed.

SEIU argues that the City committed an unfair practice by enforcing a local rule in violation of the MMBA. (PERB Reg. 32603(g)[3].) Specifically, SEIU argues that the City's local rule governing unit modifications violates the MMBA because it fails to contain a contract-bar provision. In making this argument, SEIU fails to provide any legal authority or analysis[4], and specifically fails to address the import of Service Employees Internat. Union v. City of Santa Barbara (1981) 125 Cal.App.3d 459 [178 Cal.Rptr. 89] (City of Santa Barbara).

In City of Santa Barbara, the court addressed the exact issue raised by SEIU here. In that case, an incumbent union argued that since the MMBA was modeled after the NLRA[5], the

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[2]Simply stated, the contract bar rule under the National Labor Relations Act (NLRA) holds that an existing CBA not exceeding three years will bar a petition for redetermination of representation in most instances. (See NLRB v. Circle A & W Products Co. (9th Cir. 1981) 647 F.2d 924, 926 [107 LRRM 2923, 2924].)

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

[4]PERB Regulation 32635(3) provides that every appeal shall "State the grounds for each issue stated."

[5]The NLRA is codified at 29 U.S.C., sec. 141, et seq.

MMBA must be interpreted to include a contract-bar provision. In rejecting this argument, the court stated:

> We specifically note that the Legislature has not seen fit to apply the doctrine uniformly to various areas of public employment--in one area, the contract bar operates for two years, in another, three years, and in yet a third no time limitation is specified. From this differential treatment, we discern that the Legislature has tailored the contract bar doctrine to fit the particular needs of each area of labor relations. The time periods selected represent the result of legislative balancing of the potentially conflicting purposes of the Government Code (§ 3500), the employees' rights to free association on the one hand and the need for a stable bargaining atmosphere on the other.

Based on this reasoning, the court found that the Legislature did not intend to incorporate the contract-bar doctrine into the MMBA.

Since the decision in City of Santa Barbara, jurisdiction for administering the MMBA has been transferred to PERB. In doing so, the Legislature expressly granted the Board the power and duty to adopt regulations and issue decisional authority necessary to effectuate the purposes and policies of the MMBA. (MMBA sec. 3509(a); EERA sec. 3541.3[6].) The Board has used these powers to harmonize the various statutes under our jurisdiction where appropriate. (See, e.g., Redwoods Community College Dist. v. Public Employment Relations Bd. (1984) 159 Cal.App.3d 617 [205 Cal.Rptr. 523]; but cf. Regents of University of California v. Public Employment Relations Bd. (1985) 168 Cal.App.3d 937 [214 Cal.Rptr. 698].) However, the Board's authority to adopt regulations and issue decisional authority in the face of silence in a statute must be exercised with caution. The rule set forth in City of Santa Barbara has existed since 1982 and SEIU has not given any rationale for why the Board should now deviate from that rule. Accordingly, the dismissal is affirmed.

[6]EERA is codified at Government Code section 3540, et seq.

ORDER

The unfair practice charge in Case No. SF-CE-149-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

February 19, 2004

William A. Sokol, Attorney
Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: SEIU Local 949 v. City of San Rafael
Unfair Practice Charge No. SF-CE-149-M
DISMISSAL LETTER

Dear Mr. Sokol:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 5, 2003. SEIU Local 949 alleges that the City of San Rafael violated the Meyers-Milias-Brown Act (MMBA)[1] by violating its local rules in allowing modification of the Miscellaneous bargaining unit.

I indicated to you in my attached letter dated February 11, 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 February 18, 2004, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my February 11, 2004 letter.

Right to Appeal

Pursuant to PERB Regulations,[2] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

[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] 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. (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 _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Cynthia O'Neill

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
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February 11, 2004

William A. Sokol, Attorney
Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: SEIU Local 949 v. City of San Rafael
Unfair Practice Charge No. SF-CE-149-M
WARNING LETTER

Dear Mr. Sokol:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 5, 2003. SEIU Local 949 alleges that the City of San Rafael violated the Meyers-Milias-Brown Act (MMBA)[1] by violating its local rules in allowing modification of the Miscellaneous bargaining unit.

Investigation of the charge revealed the following. Local 949 is the exclusive representative for the City's Miscellaneous bargaining unit. The City and Local 949 are parties to a collective bargaining agreement that expires on June 30, 2006. With regard to unit modification, City Counsel Resolution 4332 states in relevant part as follows:

> Section 3(C): Modification of Established Unit
>
> A Petition for Modification of an established unit may be filed by an employee organization with the Municipal Employee Relations Officer during the period for filing a Petition for Decertification.
>
> The Petition for Modification shall contain all of the information set forth in Section 8.A. of the Resolution, along with a statement of all relevant facts in support of the proposed modified unit.
>
> * * * * *
>
> The Municipal Employee Relations Officer shall hold a hearing on the Petition for Modification, at which time all affected

[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.

> employee organizations shall be heard. Thereafter, the Municipal Employee Relations Officer shall determine the appropriate unit or units as between the existing unit and the proposed modified unit. If the MERO determines that the proposed modified unit is the appropriate unit, then he shall follow the procedures set forth in Section 3.A. for determining formal recognition rights in such unit.

Section 3(B) provides that a decertification petition, and thus a modification petition, must be filed in October or November of each year following the first full year of recognition.[2] Section 8(A) requires the following information to be presented:

> (1) Name and address of employee organization.
> (2) Names and titles of its officers.
> (3) Names of employee organization representative who are authorized to speak on behalf of its members.
> (4) A statement that the employee organization has, as one of its primary purposes, representing employees in their employment relations with the City.
> (5) A statement whether the employee organization is a chapter or local of, or affiliated directly or indirectly in any manner with, a regional or state, or national or international organization, and, if so, the name and address of such regional, state or international organization.
> (6) Certified copies of the employee organization's constitution and bylaws.....

City Counsel Resolution 4027 defines an "employee organization" as "any organization which includes employees of the City and which has as one of its primary purposes representing employees in their employment relationship with the City."

On October 23, 2003, the City received a Petition for Modification from the San Rafael Confidential Unit (SRCU). The Petition proposed to modify the Miscellaneous bargaining unit by severing out a Confidential unit consisting of the following classifications: Legal Assistant; Legal Secretary; Human Resource Analyst; Human Resource Technician; Administrative Asst. II; Administrative Asst. III; Administrative Asst. to the City Manager; Administrative Asst. to the Police Chief; Management Analyst; and Payroll Technician/Finance. The Petition for Modification included all of the information required in Section 8(A) above, including a certified copy of the SRCU's bylaws as well as authorization cards signed by all of the proposed bargaining unit members.

In early November 2003, Municipal Employee Relations Officer Daryl Chandler informed both SRCU and Local 949 that he would hold a hearing on November 19, 2003, to determine

[2] Local 949 has exclusively represented this unit more than over one year.

the appropriateness of the proposed confidential unit. On November 12, 2003, Local 949 requested the hearing be rescheduled. Mr. Chandler agreed to reschedule the hearing to December 8, 2003. On November 20, 2003, Mr. Chandler sent both parties a letter confirming the hearing date and providing the parties with a detailed description of the hearing process, including the issues he would be resolving.

On December 8, 2003, Mr. Chandler conducted the hearing. Both Local 949 and the SRCU presented evidence and questioned witnesses. At the conclusion of the hearing, Mr. Chandler indicated that each side could submit written arguments to him in the next 30 days, after which time he would make his determination.

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

Charging Party makes two separate allegations regarding the City's conduct. First, Local 949 contends the City violated its local rules in accepting the Petition for Modification, arguing SRCU is not an employee organization under the rules and the Petition did not conform with Section 8.A. Secondly, Local 949 contends the City's local rule is unreasonable as it allows a bargaining unit to be modified while a contract between the parties is in effect. Each of the allegations will be addressed in turn.

I. Violation of Local Rules

PERB Regulation 32603(g) states that it shall be an unfair practice for a public agency to violate the MMBA or any local rule adopted pursuant to Government Code section 3507. Herein, Charging Party contends the City violated Resolution 4332 by allowing the SRCU to file a Petition for Modification. However, facts provided by the City demonstrate the SRCU filed the Petition for Modification during the appropriate time period and with the proper documentation.[3] Contrary to Local 949's contention, the SRCU provided certified copies of its bylaws and stated that its primary purpose was the representation of employees. As the Charging Party fails to provide any facts demonstrating the SRCU failed to provide the required documentation, this allegation must be dismissed.

Local 949 also contends the SRCU is not an employee organization because it is not affiliated with a local, state or national employee organization. However, neither the MMBA nor PERB case law require an employee organization be affiliated with another organization in order to qualify as an employee organization. Indeed, the MMBA defines an employee organization in the same manner as the City's Resolution. (See, Gov. Code sec. 3501(a).) As such, this contention is also without merit.

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[3] A copy of the entire Petition for Modification was included with the City's response. The Petition includes a certified copy of the SRCU's bylaws as well as authorization from each of the bargaining unit members. Pursuant to PERB Regulation 32620(c), the City's answer was served on the Charging Party.

II. Unreasonable Local Rule

The issues raised by this charge concern the "reasonableness" of local rules adopted by the employer under the authority granted it by MMBA section 3507. As the courts have previously held,

> it is now well settled that the Legislature intended that the MMBA 'set forth reasonable, proper and necessary principles which public agencies must follow in their rules and regulations for administering their employer-employee relations. . . .' and that 'if the rules and regulations of a public agency do not meet the standard established by the Legislature, the deficiencies of those rules and regulations as to rights, duties and obligations of the employer, the employee, and the employee organization, are supplied by the appropriate provisions of the act.' [International Brotherhood of Electrical Workers, Local 1245 v. City of Gridley (1983) 34 Cal.App.3d 191; citations omitted.]

Thus, the inquiry does not concern whether, as to the disputed rules, PERB would find a different rule more reasonable or the existing rule is unreasonable measured against an arbitrary standard. Instead, the question is whether a disputed rule is consistent with and effectuates the purposes of the express provisions of the MMBA. (City of Gridley; Huntington Beach Police Officers Association v. City of Huntington Beach (1976) 58 Cal.App.3d 492.)

Charging Party contends the local rule is unreasonable as it allows the City to modify the bargaining unit while a contract is in effect. However, unlike EERA, HEERA and the Dills Act, there is no "contract bar" under the MMBA that supercedes the right of public employees to vote on a question of majority representation every 12 months. (Service Employees International Union v. City of Santa Barbara (1981) 125 Cal.App.3d 459, 465-468.) In SEIU v. City of Santa Barbara, the Court of Appeal refused to assume the Legislature intended the contract bar doctrine to apply to public agencies. Moreover, the Court stated it had "no authority to act in place of the Legislature by adopting the contract bar rule when none has been authorized." (Id. at 467-468.)

The purpose of a contract bar rule is to foster stability in labor relations between the employee organization and the employer. Although the rule adopted by the City does not exactly mimic the contract bar language in other PERB-enforced statutes, the rule does provide a limited amount of time during which a petition can be filed. As the MMBA contains no contract bar rule and as the City's rule is in accordance with the purpose of contract bar provisions, the City's adoption of a rule allowing for modification of a bargaining unit during an existing contract is not unreasonable. As such, this allegation must also 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 February 18, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR