

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SPENCER TACKE,

Charging Party,

v.

MODESTO IRRIGATION DISTRICT,

Respondent.

Case No. SA-CE-384-M

PERB Decision No. 1856-M

September 1, 2006

Appearances: Spencer Tacke, on his own behalf; Joy A. Warren, Senior Staff Attorney, for Modesto Irrigation District.

Before Duncan, Chairman; McKeag and Shek, Members.

DECISION

MCKEAG, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Spencer Tacke (Tacke) of a Board agent's dismissal (attached) of his unfair practice charge. The unfair practice charge alleges that the Modesto Irrigation District (District) violated the Meyers-Milias-Brown Act (MMBA)¹ by providing insufficient notice for an election regarding an agency shop agreement.

The Board has reviewed the entire record, including the unfair practice charge, the warning letter, the dismissal letter and Tacke's appeal. The Board finds the Board agent's dismissal to be free of prejudicial error and adopts it as a decision of the Board itself.

LATE FILING

The District was served with Tacke's appeal on June 14, 2006. Thereafter, the District filed its response on July 12, 2006, 28 days after the service of the appeal. PERB

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

Regulation 32635(c)² provides that a response to an appeal may be filed within 20 days following the date of service of the appeal. Based on this regulation, the District's response was not timely filed.

Concurrent with the filing of its response, the District filed a request for acceptance of the late-filed response. For the reasons set forth below, we deny the request.

Pursuant to PERB Regulation 32136, the Board may, in its discretion, excuse late filings upon a showing of good cause. Good cause is a flexible standard that is defined and constrained by the considerations of fairness and reasonableness. (United Teachers of Los Angeles (Kestin) (2003) PERB Order No. Ad-325 (Kestin)). The Board has found good cause to exist when the explanation was "reasonable and credible". (Barstow Unified School District (1996) PERB Order No. Ad-277 (Barstow)). The Board has also found good cause to exist for "honest mistakes" such as mailing or clerical errors. (Barstow.) Additionally, the Board has ruled that good cause exists only when the party made a conscientious effort to timely file and the delay did not cause prejudice to any party. (Kestin.)

The District asserted two reasons for its late filing. First, the District alleged its response was untimely because it anticipated an additional notice from PERB regarding the timelines for filing its response. PERB regulations, however, do not provide for such a notice. In a similar case, the Board recently ruled that a party's ignorance that PERB does not notify respondents of the rules on appeal does not support a finding of good cause to excuse the late filing. (Public Employees Union Local 1 (Coleman) (2005) PERB Decision No. 1780-M.) Accordingly, we reject this reason.

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

Next, the District alleged the extended absence of a key District employee, John Gronholt (Gronholt), due to a back injury, made it impossible to “craft a complete response” to the appeal. When a late filing is caused by an alleged illness, the party must still demonstrate a conscientious effort to timely file. (North Monterey County Unified School District (1996) PERB Order No. Ad-274.) According to the District, because of the “backlogged workload” resulting from this absence, it took Gronholt “some time” to identify the appeal. Gronholt, however, returned to duty before the appeal was filed. Moreover, Tacke served his appeal on both Gronholt and Joy Warren, the District’s senior staff attorney. Based on these factors, we conclude the District failed to adequately explain how Gronholt’s pre-appeal absence prevented it from making a conscientious effort to timely file its response. Although the absence of a key employee may be sufficient to support a finding of good cause, the facts of this case do not support such a finding.

For these reasons, we hereby deny the District’s request to excuse its late filing. The District’s response, therefore, was not considered by the Board in reaching its conclusion.

ORDER

The unfair practice charge in Case No. SA-CE-384-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Shek 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



May 26, 2006

Spencer Tacke

Re: Spencer Tacke v. Modesto Irrigation District
Unfair Practice Charge No. SA-CE-384-M
DISMISSAL LETTER

Dear Mr. Tacke:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 7, 2006. Your charge alleges that the Modesto Irrigation District violated the Meyers-Milias-Brown Act (MMBA)¹ by interfering with protected employee rights.

I indicated in the attached letter dated May 1, 2006, 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 May 18, 2006, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. I called and left a message for you on May 24, 2006, asking you to contact me no later than May 25, 2006, if you intended to pursue the charge. Since I received no communication from you, I am dismissing the charge based on the facts and reasons contained in my May 1, 2006 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.

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A document is considered "filed" when actually received during a regular PERB business day. (Regulations 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business 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.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also 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.)

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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: Joy Warren

PUBLIC EMPLOYMENT RELATIONS BOARD

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



May 1, 2006

Spencer Tacke

Re: Spencer Tacke v. Modesto Irrigation District
Unfair Practice Charge No. SA-CE-384-M
WARNING LETTER

Dear Mr. Tacke:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 7, 2006. Your charge alleges that the Modesto Irrigation District violated the Meyers-Milias-Brown Act (MMBA)¹ by interfering with protected employee rights.

The charge alleges that Spencer Tacke is employed as a Senior Electrical Engineer by the Modesto Irrigation District (MID). Mr. Tacke is a member of the Professional and Supervisor bargaining unit exclusively represented by IBEW Local 1245.

IBEW Local 1245 is also the exclusive representative of the members of the Utility Service Maintenance (USM) bargaining unit. On or about November 22, 2005, IBEW and MID signed an agreement to conduct a secret ballot election supervised by the California State Mediation and Conciliation Service. The election would allow the members of the USM bargaining unit to decide whether to approve an agency shop arrangement and impose an agency fee on the non-union members of the unit. The election agreement set forth the terms and procedures for the election.

On December 1, 2005, MID posted the Notice of Secret Ballot Election on MID bulletin boards. The notice informed employees that the election would be held on December 13, 2005. The notice also specified that there were three voting locations and set forth the time that unit members could vote at each location as follows:

6:30 – 7:30 am Water Treatment Plant, Waterford, Conference Room
9:00 – 10:00 am Service Center 929 Woodland, Modesto, Training Room
11:00 am – 4:00 pm Downtown Office, Modesto, Multi-Purpose Room

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.

No other means of notifying USM bargaining unit members of the agency shop election was provided. In contrast, MID has communicated with employees by e-mail, memorandum or letter for announcements about other employment-related matters such as changes in health insurance plans or health plan open enrollment. For changes to MID policies, every employee is required to sign an acknowledgment that they have received a copy of the revised policy.

On December 7, 2005, Mr. Tacke expressed concern about the sufficiency of the election notice to MID's Human Resources Department. The Department recommended that he call State Mediator Shirley Campbell. Ms. Campbell informed Mr. Tacke that the posted election notices were sufficient and that e-mail notification was not necessary. She also indicated, however, that she had encouraged IBEW and MID to issue a joint communication to unit members by whatever method they thought appropriate, including e-mail, explaining the agency shop arrangement and informing USM unit members of the pending election. IBEW and MID did not issue a joint notification.

The charge alleges that most MID bulletin boards are cluttered with many flyers and announcements, and that most employees do not check bulletin board notices regularly or at all. Some USM bargaining unit members expressed frustration that they did not learn of the election until only a day or two before the election. Other unit members did not know about the election until after it had occurred. However, Union members knew of the pending election by attending union meetings and receiving information sent to them by the Union. Ultimately, less than 50% of the USM bargaining unit members voted on December 13, 2005.

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

An individual does not have standing to allege interference with protected rights if the employee is not a member of the class affected by the employer's action. (Hayward Unified School District (1981) PERB Decision No. 172; Los Rios College Federation of Teachers, Local 2279, CFT/AFT (Deglow) (1992) PERB Decision No. 950.) An employee has no standing to challenge a violation of another employee's rights. (United Teachers of Los Angeles (Hopper) (2001) PERB Decision No. 1441.)

Mr. Tacke alleges that MID interfered with the rights of the members of the USM bargaining unit by entering into an election agreement that was biased against the non-union members of the unit. However, Mr. Tacke is not a member of the USM bargaining unit. Thus, he is not a member of the class which he alleges has been harmed. As Mr. Tacke has no standing to allege a violation of the rights of the members of the USM bargaining unit, the charge must be dismissed.

Even if Mr. Tacke had standing to allege a violation of the MMBA, the charge does not provide sufficient evidence of unlawful interference. In Chaffey Joint Union High School District (1988) PERB Decision No. 669, a case against both the employer and the union, the Board similarly considered whether the employer interfered with employee rights in the conduct of an agency fee election. In Chaffey, the Board applied a "totality of the circumstances" test to find that the charge stated a prima facie case of interference based on the

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following allegations. First, the school district told site administrators not to announce the election. Second, district representatives failed to adequately post and maintain the election notices, as notices posted on bulletin boards were often missing or covered. Finally, the charge alleged that the school district collaborated with the union in formulating the terms of the election agreement to limit polling locations and hours. In this case, there were six school sites within the school district and voting sites were available at three schools from 10:45 a.m. to 4:00 p.m. Some teachers complained that their after school duties precluded them from reaching a polling site by 4:00 p.m.

In the present case, the charge alleges only that MID did not utilize additional methods of communicating with employees. Contrary to the Chaffey case, there are no facts alleged that MID failed to adequately maintain posted notices. Further, there is no evidence or specific examples demonstrating that employees were unable to reach the polling locations during the voting hours. Thus, there is insufficient evidence to establish a prima facie case of interference.

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 by May 18, 2006, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney