

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



COMMERCE CITY EMPLOYEES
ASSOCIATION,

Charging Party,

v.

CITY OF COMMERCE,

Respondent.

Case No. LA-CE-388-M

PERB Decision No. 1937-M

January 11, 2008

Appearances: David Twedell, Field Representative, for Commerce City Employees Association; Liebert, Cassidy & Whitmore by Richard Kreisler, Attorney, for City of Commerce.

Before Neuwald, Chair; Shek and Rystrom, Members.

DECISION

RYSTROM, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a Board agent's dismissal (attached) of an unfair practice charge filed by Commerce City Employees Association (CCEA) against the City of Commerce (City). The charge alleges that the City violated section 3505 of the Meyers-Milias-Brown Act (MMBA)¹ by making a unilateral change in working conditions without giving CCEA notice and an opportunity to bargain and that the City failed to follow its local rules in violation of the MMBA.

Specifically, the charge alleges that the City refused to respond to CCEA member Hugo Lopez's (Lopez) grievance contrary to the City's personnel rules requiring a response within ten days.

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

The Board agent provided CCEA with a warning letter indicating the deficiencies in the charge resulting in its failure to state a prima facie case. The deficiencies included a failure to allege sufficient facts to show that the City had breached a written agreement or past practice; failure to allege that the violation had a generalized effect or continuing impact; and failure to provide the terms of the City's personnel rules which had been violated. Upon CCEA's failure to respond to this warning letter, the Board agent dismissed CCEA's complaint because it did not state a prima facie case as outlined in the Board agent's warning letter.

Having considered the parties filings, arguments and submissions on appeal, with certain limitations discussed below, the Board agent's warning and dismissal letters and the entire record before the Board, we affirm the dismissal of the charge. Because the Board agent's warning and dismissal letters are a correct statement of the law and well reasoned, we adopt them as the decision of the Board itself, subject to the following discussion.

DISCUSSION

On appeal CCEA claims that this is a simple case of an employer refusing to process a grievance and that the charge should not have been dismissed due to lack of documentation. As part of its appeal CCEA submits "the relevant portions of the grievance procedure in the MOU^[2] governing Mr. Lopez's terms and conditions of employment" and argues that the City's failure to respond to the grievance, pursuant to the MOU's grievance procedures, is an unfair practice.

PERB cannot consider either these new allegations regarding the MOU grievance procedures or CCEA's new evidence of the MOU provisions presented in its appeal. PERB

²"MOU" refers to the 2003-2006 Memorandum of Understanding governing the terms and conditions of employment in effect at the time of the City's alleged MMBA violations.

Regulation 32635(b)³ provides that unless good cause is shown, new charge allegations and new evidence may not be presented on appeal. CCEA makes no attempt to argue that there is good cause to consider its new allegations or evidence.

CCEA continues to argue on appeal that the City's failure to follow its own personnel rules is a violation of the MMBA notwithstanding CCEA's failure to specify or provide a copy of these local rules. PERB Regulation 32615(a)(4) requires that under the MMBA a charge must include the applicable local rules alleged to have been violated.

ORDER

The unfair practice charge filed by the Commerce City Employees Association in Case No. LA-CE-388-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Neuwald and Member Shek joined in this Decision.

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

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-2907
Fax: (213) 736-4901



August 27, 2007

Dave Twedell
Commerce City Employees Association
254-B Lindero Avenue
Long Beach, CA 90803

Re: Commerce City Employees Association v. City of Commerce
Unfair Practice Charge No. LA-CE-388-M
DISMISSAL LETTER

Dear Mr. Twedell:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 31, 2007. The Commerce City Employees Association (Union) alleges that the City of Commerce violated the Meyers-Milius-Brown Act (MMBA)¹ by unilaterally changing the grievance procedure in place between the Union and the City and by violating the City's local personnel rules regarding grievances.

I indicated to you in my attached letter dated August 14, 2007, 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 August 22, 2007, 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 August 14, 2007 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 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 95811-4124
(916) 322-8231
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.)

Final Date

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

LA-CE-388-M
August 27, 2007
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Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Eric J. Cu
Regional Attorney

Attachment

cc: Arlin B. Kachalia

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-2907
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August 14, 2007

Dave Twedell
Commerce City Employees Association
254-B Lindero Avenue
Long Beach, CA 90803

Re: Commerce City Employees Association v. City of Commerce
Unfair Practice Charge No. LA-CE-388-M
WARNING LETTER

Dear Mr. Twedell:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 31, 2007. The Commerce City Employees Association (Union) alleges that the City of Commerce violated the Meyers-Milias-Brown Act (MMBA)¹ by unilaterally changing the grievance procedure in place between the Union and the City and by violating the City's local personnel rules regarding grievances.

The Union is the exclusive representative of the miscellaneous bargaining unit in the City. On January 8, 2007, Robert Chavez, Department Head, wrote a letter evaluating the performance of unit member Hugo Lopez. The letter gave Lopez a poor performance evaluation and discussed attendance problems and an "unsatisfactory work relationship" with management.

Lopez submitted a written rebuttal letter within the applicable time limits of the City's personnel rules. Lopez also presented an informal verbal grievance, relating to his evaluation, to Chavez on or about January 24, 2007. According to the charge, the personnel rules of the Employer gave the City 10 days to respond to the grievance, which it did not do.

On or about February 13, 2007, Union officer, David Twedell, sent Human Resources Director, Teresa McAllister an e-mail, where he discussed Chavez's evaluation and Lopez's disagreement with "virtually everything that was in the statement." Twedell informed McAllister that Lopez had submitted a written response to the evaluation as well as "conduct[ed] an informal grievance discussion with [Chavez] as provided by the personnel rules." Twedell informed McAllister that the City had not made a timely response under the personnel rules. Twedell demanded that Chavez's letter should be "deemed null and void." On the same day, in an e-mail response, McAllister disagreed with Twedell and stated that she believed that Lopez had submitted "his 'rebuttal' to the performance evaluation," which was

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.

placed in his personnel file along with the performance evaluation. McAllister stated that the City was not aware that a grievance was filed.

Discussion

The Union alleges that the City unilaterally changed the grievance procedure by not responding to Lopez's informal verbal grievance or written rebuttal to his performance evaluation.

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),² 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.)³ 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]; 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; Walnut Valley Unified School District (1981) PERB Decision No. 160.)

In order to satisfy the first element of a unilateral change case, Charging Party must establish that the Employer "breached or altered the parties' written agreement or established past practice...and that the change has a generalized effect or continuing impact on the terms and conditions of employment of bargaining unit members" (State of California (Department of Forestry and Fire Protection) (1998) PERB Decision No. 1260-S.) In this case, the Union does not provide sufficient facts to show that the City has breached a written agreement or past practice. Charging Party references a grievance procedure but does not establish what the terms or past practices of this procedure are. Therefore, Charging Party does not establish that the City's conduct violated the terms of the grievance procedure. Even if Charging Party establishes a violation of a past practice or a written agreement, Charging Party fails to establish that the violation has a generalized effect or continuing impact on unit members. An isolated breach of contract does not state a prima facie case for a unilateral change. (Trustees of the California State University (1997) PERB Decision No. 1231-H.)

Charging Party also alleges a violation of the Personnel Rules for the City of Commerce. PERB has authority to review as an unfair practice charge the violation of local rules and

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

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.)

regulations passed by a public agency pursuant to Section 3507 or 3507.5. (MMBA, § 3509(b); PERB Regulation 32604(e).)

According to Charging Party, Section IV, E. 3, a of the Rules states:

Definition of a Grievance: A grievance shall be defined as a timely complaint by and [sic] employee or group of employees concerning the personnel practices and working conditions of the City.

Charging Party fails to establish how the City has violated its local rules. Even if, as the Union contends, the City failed to respond to Lopez's informal grievance, it is unclear how the City's failure constitutes a violation of the Section IV, E. 3, a. And as discussed above, Charging Party does not provide the terms of the City's grievance procedure leaving PERB unable to determine whether the City violated this procedure. The Union provides insufficient information to conclude the City violated its local rules.

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 August 22, 2007, I shall dismiss your charge. If you have any ~~questions~~, please call me at the above telephone number.

Sincerely,

Eric J. Cu
Regional Attorney

EC

