

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



NELSON A. ESTIVAL,

Charging Party,

v.

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 1021,

Respondent.

Case No. SF-CO-169-M

PERB Decision No. 1998-M

January 14, 2009

Appearances: Nelson A. Estival, on his own behalf; Weinberg, Roger & Rosenfeld by Kerianne R. Steele and Vincent A. Harrington, Jr., Attorneys, for Service Employees International Union, Local 1021.

Before Neuwald, Chair; McKeag and Wesley, Members.

DECISION

NEUWALD, Chair: This case is before the Public Employment Relations Board (Board) on appeal by Nelson A. Estival (Estival) to a Board agent's dismissal (attached) of his unfair practice charge. Estival alleged that the Service Employees International Union, Local 1021 (SEIU) violated the Meyers-Milias-Brown Act (MMBA)<sup>1</sup> by breaching its duty of fair representation when it failed to file a grievance or challenge his release from employment.

The Board reviewed the entire record including the unfair practice charge, the amended charge, the warning and dismissal letters, Estival's appeal, and SEIU's response to the appeal. The Board finds the Board agent's dismissal and warning letters to be free of prejudicial error and adopts them as the decision of the Board itself.

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<sup>1</sup>MMBA is codified at Government Code section 3500 et seq.

## DISCUSSION

On appeal, Estival presents new charge allegations and new supporting evidence that were not previously presented and that were known to Estival when he filed his unfair practice charge. PERB Regulation 32635(b)<sup>2</sup> precludes a charging party from raising new charge allegations or new supporting evidence on appeal without good cause. Estival fails to demonstrate good cause for the presentation of new allegations and/or supporting evidence on appeal, and nothing in the documents filed, related to the appeal, indicates good cause.

## ORDER

The unfair practice charge in Case No. SF-CO-169-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.

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<sup>2</sup>PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.



him to go to Human Resources and apply for another position. Furthermore, “[w]hen the Union finally realize[d] that [Charging Party had] a reason for a grievance it was too late to file one.”

As noted in the Union’s Response, and in the July 31, 2008 Warning Letter, the Union investigated the circumstances of Charging Party’s termination and determined that, as a provisional employee, he was not entitled to a “just cause” protection for his position. Indeed, under the “Provisional Appointments” section of the City’s Charter, Charging Party was not entitled to hold a provisional position for more than three years unless, for reasons beyond his or her control, the Human Resources Director has been unable to conduct examinations for the position. According to the Union, it investigated Charging Party’s discrimination claims and was unable to find any evidence that Charging Party was dismissed for retaliatory reasons, rather than for the simple reason that his provisional appointment had expired.

Charging Party does not state what “evidence” he provided to the Union in August 2007. Even assuming his complaint to the DOL was protected activity under the EERA, the fact that Charging Party filed a complaint with the DOL, which was resolved in his favor six months before his termination, does not, without more, establish that he was terminated in retaliation for protected activity. (Charter Oak Unified School District (1984) PERB Decision No. 404.) Assuming the copy of the complaint to the DOL was the extent of the “evidence” provided to the Union in August 2007 of the alleged retaliatory termination, as amended, the charge lacks evidence that the Union acted arbitrarily, discriminatorily or in bad faith when it failed to challenge Charging Party’s termination. That the Union may have reached an incorrect conclusion after consideration of Charging Party’s evidence does not demonstrate a breach of the Union’s duty of fair representation. (California State Employees Association (Calloway) (1985) PERB Decision No. 497.)

Therefore, I am dismissing the charge based on the facts and reasons contained in this letter and the July 31, 2008 Warning Letter.

#### Right to Appeal

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

A document is considered “filed” when actually received 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

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<sup>2</sup> PERB’s Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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.)

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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,

TAMI R. BOGERT  
General Counsel

By:

\_\_\_\_\_  
Alicia Clement  
Regional Attorney

Attachment

cc: Vincent Harrington, Jr., Attorney

**PUBLIC EMPLOYMENT RELATIONS BOARD**

San Francisco Regional Office  
1330 Broadway, Suite 1532  
Oakland, CA 94612-2514  
Telephone: 510-622-1023  
Fax: (510) 622-1027



July 31, 2008

Nelson A. Estival

Re: Nelson A. Estival v. SEIU Local 1021  
Unfair Practice Charge No. SF-CO-169-M  
**WARNING LETTER**

Dear Mr. Estival:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 11, 2008. Nelson A. Estival (Charging Party) alleges that SEIU Local 1021 (the Union) violated the Meyers-Milias-Brown Act (MMBA)<sup>1</sup> by breaching its duty of fair representation.

My investigation revealed the following facts. Charging Party began working for the Asian Art Museum (Museum), which is a Department of the City and County of San Francisco (the City), in March 2004. Charging Party was hired as a per-diem Museum Guard. In March 2006, Charging Party's status was changed to "Provisional Full-Time." Charging Party's last day at the Museum was August 31, 2007. Throughout his three and a half years' employment with the Museum, Charging Party filed several complaints against his supervisor. Charging Party's complaints included personality disputes with other Guards, requests for overtime, and sexual harassment allegations both by and against Charging Party.

According to Charging Party, he requested the Union's assistance on several occasions. Charging Party's first request for assistance was on July 25, 2006, when he filed a harassment complaint against another Guard. On January 4, 2007, Charging Party requested that the Union assist him in filing a request for overtime. Charging Party's third request for assistance from the Union was on March 11, 2007, when he wanted to take a day off of work. His final request for assistance was sometime after his August 31, 2007 release from employment, although an exact date is not provided. According to Charging Party, despite his requests, the Union never assisted him with any of these complaints.

In July 2007, the City created five new, permanent positions at the Museum. Charging Party applied for one of these positions. On August 30, 2007, Charging Party was notified by the Museum that he was not selected for a full-time, permanent position, and would be released

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<sup>1</sup> 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](http://www.perb.ca.gov).

from his provisional appointment, effective at the close of business on August 31, 2007. The written notice from the Museum states that Charging Party's release is "Non-Disciplinary."

On September 24, 2007, Charging Party wrote to Union President Damita Howard. In his letter, Charging Party requests a refund of his Union dues and a written explanation from Chief Steward Robert Jones as to why the Union did not challenge Charging Party's release from employment. Additionally, Charging Party requests that Mr. Jones be removed from his position as Union Steward, and complains that Don Evans (who is not identified by title) told him, on an unspecified date, that it was too late to file a grievance over his release from employment. According to Charging Party, these interactions led him to the conclusion that he and other bargaining unit members "will be wasting our time asking the Union for help . [Sic.] Because our field rep. [sic] and Union Chief Steward don't think that losing a City job is very important."

In its response to the charge, the Union states:

The Union did investigate whether or not Mr. Estival was in fact provisional, and concluded that he was. Because he did not have a "just cause protection" in his position, [and] because there was no evidence presented to the Union by [Mr.] Estival that he was the victim of any unlawful discrimination, the Union determined it could not/would not, pursue his release from the provisional appointment.

## **Discussion**

As a threshold matter, PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board (2005) 35 Cal.4th 1072.) Many of the alleged complaints made by Charging Party to the Museum, and the Union's alleged failure to assist him in filing those complaints, occurred more than six months prior to February 11, 2008. Indeed, the only timely allegation of a failure by the Union to properly represent Charging Party is the alleged refusal to challenge Charging Party's August 31, 2007 release from employment by the Museum. To the extent that the other alleged failures to assist Charging Party in filing complaints against the Museum are alleged to have violated the MMBA, these allegations must be dismissed.

With regard to the remaining alleged failure to represent Charging Party, it is important to note that the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations. However, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (Hussey v. Operating Engineers (1995) 35 Cal.App.4<sup>th</sup> 1213, (Hussey)). In Hussey, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the

union's power." Furthermore, regardless of the merits of a grievance, the union does not breach its duty of fair representation by failing to pursue the grievance, as long as its decision is rationally based. (California State Employees Association (Calloway) (1985) PERB Decision No. 497.)

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting Dutrisac v. Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082.)

In International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M, the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions in such cases, including Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332 and American Federation of State, County and Municipal Employees, Local 2620 (Moore) (1988) PERB Decision No. 683-S, are consistent with the approach of both Hussey and federal precedent (Vaca v. Sipes (1967) 386 U.S. 171).

Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (United Teachers – Los Angeles (Wyler) (1993) PERB Decision No. 970.)

In the present case, Charging Party has not provided facts demonstrating that the Union's failure to challenge his release from employment was without a rational basis or devoid of honest judgment. Indeed, Charging Party's own facts state that, at the time he inquired about his right to grieve his termination, he was informed it was too late to file a grievance. Under the circumstances, it is not possible for PERB to find that the Union breached its duty of fair representation when it refused to file an untimely grievance.

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.

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If I do not receive an amended charge or withdrawal from you before August 8, 2008, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Alicia Clement  
Regional Attorney

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