STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SEIU LOCAL 721, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	Case No. LA-CE-456-M PERB Decision No. 2132-M September 21, 2010

Appearances: Weinberg, Roger & Rosenfeld by James Rutkowski, Attorney, for SEIU Local 721; The Zappia Law Firm by Edward P. Zappia and Day B. Hadaegh, Attorneys, for County of Riverside.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the County of Riverside (County) to the proposed decision of an administrative law judge (ALJ). The complaint issued by PERB's Office of the General Counsel alleged that the County violated the Meyers-Milias-Brown Act (MMBA)[1] by ceasing its policy of paying overtime to employees who are exempt from the Fair Labor Standards Act (FLSA)[2] without providing SEIU Local 721 (SEIU) with notice of the change and an opportunity to request to meet and confer over the decision and/or its effects. The ALJ ruled that SEIU's unfair practice charge was untimely as to the County's decision to

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

[2] The FLSA is codified at 29 U.S.C. section 201 et seq. The FLSA requires employers to pay covered employees at least 150% of their regular pay rate for time worked in excess of their regular workweek. Employees who are exempt from the FLSA are not entitled to overtime compensation under the statute.

change its overtime policy, but concluded that the County had unlawfully refused to bargain over the effects of the policy change on certain bargaining unit employees.

The Board has reviewed the proposed decision and the record in light of the County's exceptions, SEIU's response thereto, and the relevant law. Based on this review, the Board reverses the proposed decision and dismisses the complaint for the reasons discussed below.[3]

FACTUAL BACKGROUND

SEIU is the exclusive representative of four bargaining units of County employees. SEIU and the County have been parties to a series of memoranda of understanding (MOU) since at least 1997. The 1997-2000 and 2000-2004 MOUs provided that employees who are not exempt from the FLSA would receive overtime pay beyond that mandated by the FLSA. Specifically, non-exempt employees would be paid for actual hours worked in excess of their regular work day and the workweek would be calculated based on paid status, i.e. vacation and other leave time would count toward hours worked for purposes of determining eligibility for overtime compensation.

Both MOUs were silent regarding overtime compensation for FLSA-exempt employees. Despite this silence, it is undisputed that the County paid FLSA-exempt employees overtime pursuant to the applicable MOU provisions from 1997 through 2005. Thus, both exempt and non-exempt employees received overtime on the same terms during those years.

[3] The County requested oral argument in this matter. Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453; *Monterey County Office of Education* (1991) PERB Decision No. 913.) Based on our review of the record, all of the above criteria are met in this case. Therefore, the County's request for oral argument is denied.

In 2005, the parties engaged in negotiations for a successor to the 2000-2004 MOU.[4] The County proposed, and SEIU agreed, to eliminate overtime compensation beyond that required by the FLSA. Under the amended overtime provisions, non-exempt employees would receive overtime pay for hours actually worked beyond a 40-hour workweek and only time actually worked during that week would be used to determine overtime eligibility. The 2006-2009 MOU took effect January 1, 2006. As with the previous two MOUs, this MOU was silent regarding overtime compensation for FLSA-exempt employees.

In early 2006, the County began two projects necessary for implementation of the change in overtime policy: (1) reprogramming its payroll system; and (2) conducting a complete review of the FLSA classification of County employees. These projects took longer than the County expected and the new overtime policy was not implemented until July 1, 2008. The County continued to pay both exempt and non-exempt employees overtime pursuant to the 2000-2004 MOU provisions until July 1, 2008.

On August 29, 2007, SEIU and the County executed a side letter to the 2006-2009 MOU. The side letter stated, in relevant part:

> WHEREAS the parties negotiated a Memorandum of Understanding ('MOU') that, with some limited exception, pays overtime in accordance with the rules established in the Fair Labor Standards Act ('FLSA');
>
> AND WHEREAS the County has reviewed all the classifications in the bargaining units represented by SEIU to determine which classifications are exempt from the FLSA overtime provisions;
>
> AND WHEREAS the County recognizes that immediately applying the FLSA rules to certain exempt classifications would result in a recruiting and/or retention problem;
>
> NOW THEREFORE the parties hereto agree as follows:

[4] By mutual agreement, the parties extended the term of the 2000-2004 MOU through December 31, 2005.

The remainder of the side letter sets out overtime compensation formulas for certain FLSA-exempt social services and nurse classifications.

On April 3, 2008, Employee Relations Division Manager Tom Prescott (Prescott) emailed SEIU Regional Director George Daniels (Daniels) a chart that displayed the results of the County's FLSA classification review. The chart indicated that no FLSA-exempt classification would receive overtime compensation under the new policy.

On April 11, 2008, Daniels wrote a letter to Prescott that stated in full:

> Per our rights under the Myers[sic]-Milias-Brown Act SEIU Local 721 wishes to meet and confer over the impact of impending changes to the FLSA non-exempt to exempt status of our Information Technology members.
>
> Due to the devastating financial impact to our members we wish to meet at your earliest possible convenience. I can be contacted at [phone number]. I look forward to your prompt response.

Prescott responded by letter dated April 14, 2008. He acknowledged receipt of Daniels' letter, then stated, "Unfortunately, we are unable to agree to this request as we already met and conferred with your predecessors about this issue before concluding our current MOU."[5]

SEIU filed the instant unfair practice charge on May 22, 2008. On October 6, 2008, PERB's Office of the General Counsel issued a complaint alleging that the County violated the MMBA by unilaterally changing its overtime policy. The complaint also alleged that the County notified SEIU of the intended change on or about May 5, 2008.

Proposed Decision, Exceptions and Response

The ALJ found that SEIU had actual knowledge of the County's intent to cease paying overtime compensation to FLSA-exempt employees no later than August 29, 2007, when it

[5] The 2006-2009 MOU was negotiated with SEIU Local 1997. In 2007, Local 1997 merged with six other Southern California locals to form Local 721.

signed the side letter exempting certain classifications from the policy change. Based on this finding, the ALJ concluded the charge was untimely as to the County's decision to change the overtime policy.

The ALJ further found, however, that SEIU's failure to request bargaining in August 2007 did not waive its right to bargain over the effects of the overtime policy change. She therefore concluded that the County unlawfully refused SEIU's request to bargain over the effects of the change on Information Technology (IT) department employees.

The County's primary argument on appeal is that the parties negotiated and agreed to the cessation of overtime payments to FLSA-exempt employees in the 2006-2009 MOU. Thus, the County contends, it was merely implementing the MOU when it ceased paying exempt employees overtime effective July 1, 2008. The County also argues that this case is moot because the parties subsequently agreed to revisions of the overtime provisions in the 2009-2010 MOU.

SEIU counters that the parties never agreed to cease overtime payments to exempt employees and that the County unilaterally changed its established past practice of doing so on July 1, 2008. SEIU also objects to the County's inclusion of documents not presented at the hearing as part of its exceptions and argues that this case is not moot because PERB can provide a remedy for the period of July 1, 2008 to August 1, 2009.

DISCUSSION

1. New Documents on Appeal

Attached to the County's exceptions are minutes from labor-management committee meetings on April 13, 2006, and August 9 and November 8, 2007, and an email dated September 25, 2007. SEIU objects to the inclusion of these documents because they were

never offered at trial and the County did not request to keep the record open to submit additional exhibits.

When considering a request to reopen the record to admit new evidence, the Board applies the standard set forth in PERB Regulation 32410(a)[6] for a request for reconsideration based on the discovery of new evidence. (*State of California (Department of Parks and Recreation)* (1995) PERB Decision No. 1125-S.) The regulation provides, in relevant part:

> A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

The County's new exhibits fail to meet this standard for two reasons. First, the exhibits are not supported by a declaration under penalty of perjury. Second, it is clear from the dates of the documents that they were in the County's possession at the time of the April 20, 2009 hearing in this matter. The County has provided no reason why these exhibits could not have been introduced at the hearing. Therefore, we decline to consider the four exhibits attached to the County's exceptions as well as any exceptions based upon those exhibits.

2. Mootness

The County argues that this case is moot because after the hearing the parties reached agreement on a new MOU effective August 1, 2009, through June 30, 2010, which contains changes to the overtime provisions of the 2006-2009 MOU. According to the County, it would be pointless for PERB to order the parties to bargain about overtime compensation under these circumstances.

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

A charge that an employer's unilateral change to a particular term or condition of employment was unlawful does not become moot merely because the parties reach agreement on that term or condition in subsequent negotiations. (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74.) Only when the agreement clearly settles the issue of whether the respondent's conduct was unlawful or explicitly waives the charging party's right to pursue the charge will PERB find a case moot under these circumstances. (*Oakland Unified School District* (1980) PERB Decision No. 126, affd. *Oakland Unified School District v. Public Employment Relations Board* (1981) 120 Cal.App.3d 1007.)

The excerpts of the 2009-2010 MOU in the record[7] do not show that the parties agreed that the County's alleged unilateral change in overtime policy was lawful or unlawful, nor do they show that SEIU explicitly waived its right to pursue the instant charge. Further, it appears that the issue of whether the County's FLSA-exempt employees will receive overtime compensation was not resolved in the MOU and thus remains active. Therefore, if PERB was to find that the County made an unlawful unilateral change to its overtime policy, it would be appropriate to order the County to bargain over the change upon request by SEIU. Moreover, even if the issue was resolved in the 2009-2010 MOU, that resolution would be prospective only and hence PERB could order a remedy for the period of July 1, 2008 to August 1, 2009. Consequently, this case is not moot.

3. Timeliness

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*

[7] The MOU excerpts were attached to the County's post-hearing brief. Because the hearing record was still open when the excerpts were submitted and SEIU did not object to the submission, the excerpts are part of the record on appeal.

Board (2005) 35 Cal.4th 1072.) "In a unilateral change case, the statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's intent to implement a change in policy. . . . [A] charging party that rests on its rights until actual implementation of the change bears the risk of running afoul of the statute of limitations." (*South Placer Fire Protection District* (2008) PERB Decision No. 1944-M.) The charging party bears the burden of demonstrating that the charge is timely filed. (*Long Beach Community College District* (2009) PERB Decision No. 2002.)

We agree with the ALJ that SEIU had actual notice no later than August 29, 2007, of the County's intent to cease paying overtime to FLSA-exempt employees. On that date, Daniels signed the side letter agreement providing overtime compensation to certain exempt classifications. While the side letter's reference to applying "FLSA rules" to those classifications could be interpreted as referring only to the FLSA method of overtime calculation, the letter also states:

> AND WHEREAS the County has reviewed all the classifications in the bargaining units represented by SEIU to determine which classifications are exempt from the FLSA overtime provisions;

If the County intended to continue providing the same overtime benefit to exempt and non-exempt employees, it would not have needed to undertake a costly and time-consuming classification review. The fact that it conducted such a review indicates an intent to treat exempt employees differently than non-exempt employees for overtime purposes. Further, if the County was not planning to cease paying overtime to exempt employees, there would have been no reason for SEIU to negotiate the side letter. For these reasons, we find that SEIU knew, or should have known, on August 29, 2007, that the County was planning to cease paying overtime to FLSA-exempt employees at the same time it implemented the overtime changes contained in the 2006-2009 MOU.

As noted, the ALJ found the charge untimely as to the County's decision to change the overtime policy but not as to the County's refusal to bargain over effects of the change on IT department employees. We find no basis for making a distinction between the County's decision and its effects for statute of limitations purposes. Whether the intended change is subject to decision and/or effects bargaining, it is the charging party's knowledge of the respondent's intent to unilaterally implement the change that starts the six-month statute of limitations period. (*Long Beach Community College District* (2003) PERB Decision No. 1568.) SEIU knew, or should have known, on August 29, 2007, that the County intended to cease paying overtime to FLSA-exempt employees yet did not file the instant charge until May 22, 2008, almost nine months after it had actual notice of the County's intent. We therefore conclude that SEIU's charge was untimely.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-456-M are hereby DISMISSED.

Members McKeag and Wesley joined in this Decision.