STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DARRELL J. MOORE, SR., Charging Party, v. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 36, Respondent.	Case No. LA-CO-104-M PERB Decision No. 2165-M February 25, 2011

Appearance: Darrell J. Moore, Sr., on his own behalf.

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

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (Board) on appeal by Darrell J. Moore, Sr. (Moore) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the American Federation of State, County and Municipal Employees, Council 36 (AFSCME) violated the Meyers-Milias-Brown Act (MMBA)[1] when it failed to represent Moore in his disputes with his employer, the Housing Authority of the City of Los Angeles. The Board agent dismissed the charge as untimely. Even assuming the charge was timely, the Board agent found the charge failed to state a prima facie case that AFSCME breached its duty of fair representation.

The Board has reviewed the dismissal and the record in light of Moore's appeal and the relevant law. Based on this review, the Board finds the Board agent's warning and dismissal

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

letters to be well-reasoned and in accordance with applicable law. The Board therefore adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-104-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2804
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September 21, 2010

Darrell J. Moore, Sr.

Re: *Darrell J. Moore v. AFSCME Council 36*
Unfair Practice Charge No. LA-CO-104-M
DISMISSAL LETTER

Dear Mr. Moore:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 2, 2009. Darrell J. Moore (Moore or Charging Party) alleges that the AFSCME Council 36 (Union or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act).[1]

Charging Party was informed in the attached Warning Letter dated August 13, 2010, 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 that 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 23, 2010, the charge would be dismissed. Moore requested and received a one-week extension of time to file an amended charge. Moore filed an amended charge on September 1, 2010.

As explained in the August 13, 2010 Warning Letter, PERB Regulation 32615(a)(5)[2] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

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

prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) 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.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

1. Timeliness of Moore's Allegations

In the present case, Moore filed the instant unfair practice charge on November 2, 2009. This means that the statute of limitations extends back until May 1, 2009. Any allegations of wrongdoing by the Union occurring prior to May 1, 2009, are therefore untimely and must be dismissed. In the amended charge, Moore alleges that, in March 2009, the Union misrepresented information in a letter addressed to the U.S. Equal Employment Opportunity Commission. This alleged conduct occurred prior to May 1, 2009 and is therefore outside of the statute of limitations period. Therefore, this allegation is dismissed.

2. Duty of Fair Representation

In original charge, Moore did not provide any facts regarding the Union and its obligation to represent Moore.[3] In the amended charge, Moore alleges that "Moore met with Union officials in an attempt to mediate and negotiate representation, although Moore is prohibited from discussing the exact contents of the meeting, the Union has failed to fairly an equally represent and/or investigate Moore's employment status[.]" Moore also alleges that the Union "has failed to represent Moore and/or allow him to represent himself with HACLA under the terms of any Union agreement[.]"

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, 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.4th 1213.) 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."

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

[3] The original charge consisted of a statement of facts and allegations that is identical to the statement included in a charge Moore filed against the Housing Authority for the City of Los Angeles, PERB case number LA-CE-572-M.

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).

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, 1274; see also, *Robesky v. Quantas Empire Airways Limited* (9th Cir. 1978) 573 F.2d 1082.)

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)*, *supra*, 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 this case, Moore does not provide sufficient information to conclude whether the Union has breached the duty of fair representation. Moore acknowledges that he has declined to provide any specific allegations of misconduct by the Union in either the original or the amended charge. More specifically, Moore has not provided facts demonstrating when or how the Union failed to represent him, failed to investigate his employment status, or prevented Moore from representing himself. Thus, Moore has not met his burden of providing a "clear and concise statement of facts" to demonstrate a violation of the MMBA. (See PERB Regulation 32615(a)(5).) Moore's conclusory remarks that the Union failed to represent him or investigate his employment issues are not sufficient to demonstrate a violation. Therefore, these allegations are dismissed. (*State of California (Department of Food and Agriculture)*, *supra*, PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)*, *supra*, PERB Decision No. 944.)

3. Interference with Right to Union Membership

Although not entirely clear, Moore also appears to allege that the Union refused to accept dues payments from him, interfering with his right to be represented by the employee organization of his choosing. The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons.

(*Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807.) The Board has applied this same standard to the conduct of employee organizations. (*State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S.)

The MMBA protects employees' ability to "form, join, and participate in the activities of employee organizations of their own choosing" in employer-employee relations. (Gov. Code, § 3502.) However, the MMBA permits employee organizations to "make reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership." (Gov. Code, § 3503.) In the present case, Moore does not provide any of the factual circumstances for the Union's decision not to accept Moore's dues money. It appears that, at some point, the Union informed Moore that he was not included in the bargaining unit that the Union represents. Moore has not stated that the Union's conclusion was in error. Therefore, Moore has not met his burden of establishing that the Union's actions interfered with his MMBA-protected rights and this allegation is dismissed.

Right to Appeal

Pursuant to PERB Regulations, Charging Party 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. (Cal. Code Regs, tit. 8, § 32635, subd. (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. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (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 PERB 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. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 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. (Cal. Code Regs, tit. 8, § 32635, subd. (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 Cal. Code Regs., tit. 8, § 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. (Cal. Code Regs, tit. 8, § 32135, subd. (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. (Cal. Code Regs, tit. 8, § 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,

TAMI R. BOGERT
General Counsel

By ______________________
Eric J. Cu
Regional Attorney

Attachment

cc: Marcos E. Cardenas

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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August 13, 2010

Darrell J. Moore

Re: *Darrell J. Moore v. AFSCME Council 36*
Unfair Practice Charge No. LA-CO-104-M
WARNING LETTER

Dear Mr. Moore:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 2, 2009. Darrell J. Moore (Moore or Charging Party) alleges that the AFSCME Council 36 (Union or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act).[1]

In 2002 Moore was hired by HACLA as an Eligibility Interviewer. In 2004, Moore was laid-off, but was rehired shortly afterwards to the same position. On June 1, 2004, Moore was instructed by HACLA to temporarily disregard increases in earned income when evaluating the eligibility of applicants for HACLA assistance. Moore believed this to be inappropriate and reported his concerns to both HACLA Chief Executive Officer (CEO) Rudolf Monteil and to the United States Department of Housing and Urban Development (HUD).

At some point not specified by Moore, he was transferred to the Asset Management Department at HACLA. By mid-February 2005, Moore was feeling ill because of stress and frustration related to his job and requested to take leave. Moore's supervisor instructed Moore to complete workers' compensation forms prior to taking leave.

During his time off, HACLA instructed Moore to meet with doctors prior to returning to work. Moore followed HACLA's instructions and, despite being cleared to work from the doctors, HACLA has not agreed to allow Moore to return to work. Moore subsequently filed to receive unemployment benefits. In September 2005, HACLA appealed the decision to award Moore unemployment benefits on the grounds that he is still considered to be an employee of HACLA.

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

Discussion:

PERB Regulation 32615(a)(5)[2] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) 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.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) In duty of fair representation cases, the statute of limitations begins to run when the charging party knew or should have known that further assistance from the union was unlikely. (*Alvord Educator's Association (Bussman)* (2009) PERB Decision No. 2046.). A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

In the present case, Moore does not provide any facts regarding the Union, Moore's relationship to the Union, or any action or inaction by the Union. For this reason, Moore has not provided a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." PERB is unable to determine even whether the Union qualifies as an employee organization that is subject to the MMBA.[3] Even assuming that the Union is an employee organization under the MMBA, Moore has not provided information establishing how it affected Moore's rights under the MMBA.

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

[3] MMBA section 3501(a) defines an employee organization as either: "(1) Any organization that includes employees of a public agency and that has as one of its primary purposes representing those employees in their relations with that public agency[; or] (2) Any organization that seeks to represent employees of a public agency in their relations with that public agency."

Moreover, Moore filed the instant unfair practice charge on November 2, 2009. This means that the statute of limitations extends back until May 1, 2009. Moore does not allege any conduct occurring after September 2005 which is more than three years beyond the statute of limitations period. Accordingly, Moore has not established that the charge was timely filed.

Moore also alleges that the Union violated a variety of other statutory schemes aside from the MMBA including the Fair Employment and Housing Act (FEHA), Title VII of the Civil Rights Act of 1964 (Title VII), the Americans With Disabilities Act (ADA), the Age Discrimination in Employment Act, workers' compensation laws and whistleblower protection laws. Moore also alleges that HACLA violated his rights under both the United States and the California Constitutions. PERB has previously found that it lacks jurisdiction over each of these claims. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2085-S [California Constitution]; *Alvord Educator's Association (Bussman), supra*, PERB Decision No. 2046 [ADA, U.S. Constitution, whistleblower protections laws]; *San Mateo County Community College District* (2008) PERB Decision No. 1980 [Title VII]; *Trustees of the California State University* (2005) PERB Decision No. 1741-H [FEHA]; *California State Employees Association (Carrillo)* (1997) PERB Decision No. 1199-S [age discrimination]; *State of California (Franchise Tax Board)* (1992) PERB Decision No. 954-S [workers' compensation laws].) Therefore, PERB lacks jurisdiction to address these issues.

To the extent that Moore alleges that the Union violated an unidentified Memorandum of Understanding, Moore has not provided sufficient information to conclude that a violation occurred.

For these reasons the charge, as presently written, does not state a prima facie case.[4] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may 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 an authorized agent of 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 an amended charge or withdrawal is not filed on or before August 23, 2010,[5] PERB will dismiss your charge.

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[4] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[5] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)

If you have any questions, please call me at the above telephone number.

Sincerely,

Eric J. Cu
Regional Attorney

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