STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SEIU LOCAL 620, Charging Party, v. CITY OF GUADALUPE, Respondent.	Case No. LA-CE-595-M PERB Decision No. 2170-M February 28, 2011

Appearance: Bruce Corsaw, Interim Executive Director, for SEIU Local 620.

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 appeal by SEIU Local 620 (SEIU) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the City of Guadalupe (City) violated the Meyers-Milias-Brown Act (MMBA)[1] when it unilaterally imposed furloughs on City employees represented by SEIU. On February 22, 2010, a personnel commission convened pursuant to the final step of the grievance procedure in the parties' memorandum of understanding (MOU) and issued a final and binding decision concluding that the furloughs did not violate the MOU. The Board agent dismissed the charge on the ground that PERB must defer to the commission's decision because it is not repugnant to the MMBA.

The Board has reviewed the dismissal and the record in light of SEIU's appeal and the relevant law. Based on this review, the Board finds the Board agent's warning and dismissal letters to be well-reasoned and in accordance with applicable law. The Board therefore adopts them as the decision of the Board itself, as supplemented by the discussion below.

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

DISCUSSION

The scope of PERB's review of an arbitration award is limited to whether the award is repugnant to the purposes of the MMBA. (PERB Reg. 32620(b)(6).[2]) Repugnancy review is not a traditional appeal procedure; therefore, PERB may not conduct an independent review of the arbitrator's decision. (*Ventura County Community College District* (2009) PERB Decision No. 2082.) Accordingly, repugnancy review does not allow parties to re-litigate before PERB matters resolved by the arbitration award. (*Ibid.*)

SEIU argues on appeal that the personnel commission decision was not based on the facts provided at the hearing and therefore PERB should conduct its own hearing on the issue of whether the City's imposition of furloughs violated the MOU. Essentially, SEIU seeks to re-litigate the matters it presented to the personnel commission. Because PERB has no authority to conduct an independent review of the personnel commission's decision, and SEIU has not alleged facts demonstrating that the decision is repugnant to the MMBA, we affirm the Board agent's dismissal of the charge.

ORDER

The unfair practice charge in Case No. LA-CE-595-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.

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

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1020
Fax: (510) 622-1027

August 12, 2010

Bruce Corsaw, Field Services Director/
Interim Executive Director
SEIU Local 620
2345 S. Broadway, Suite C
Santa Maria, CA 93454

Re: *SEIU Local 620 v. City of Guadalupe*
Unfair Practice Charge No. LA-CE-595-M
DISMISSAL LETTER

Dear Mr. Corsaw:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 16, 2010. SEIU Local 620 (SEIU or Charging Party) alleges that the City of Guadalupe (City or Respondent) violated section 3504 of the Meyers-Milias-Brown Act (MMBA or Act)[1] by unilaterally imposing furloughs over a three-month period of time.

Charging Party was informed in the attached Warning Letter dated May 17, 2010, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party was further advised that, unless Charging Party amended the charge to state a prima facie case or withdrew it prior to May 24, 2010, the charge would be dismissed.

On May 19, 2010, Charging Party filed an amended charge via facsimile transmission. The amended charge consists of a one-page letter, labeled "Statement of Charge," attached to a PERB unfair practice charge form marked "amended."

"Statement of Charge"

The "Statement of Charge" states verbatim in pertinent part:

> First, the Personnel Committee does have final authority when acting in accordance to the facts supplied at the hearing. In this case the facts are that to this date Local 620 has not received a final ruling signed by the committee and it is our understanding

[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.

> that the decision by 2 of the 3 committee members was based on economic concerns for the City and not based on the facts provided at the hearing. This alone constitutes reasonable evidence that this issue should be heard by an un-bias PERB hearing officer.
>
> Local 620 is prepared to subpoena all 3 committee members to the hearing to establish that: A) the decision of the committee has yet to be finalized; B) the non-signed decision was not based on statute or facts, but by concern over the availability of the City to compensate effected employees for the wrongful violation of their MOU. and C) that the unilateral imposing of the 20% furlough did in fact violate our MOU by the City Council.
>
> Local 620 is requesting that PERB recognizes the fact that we have been diligently attempting to resolve this matter with the City in compliance with our MOU since April 3, 2009 and since February 3, 2010 with PERB. It is our position that this issue needs to be heard by an appointed PERB Hearing Officer and that we be given the opportunity to make our case to and receive a meaningful decision to this issue based on the facts provided at a PERB hearing and not by personal concerns over the City's finances.
>
> In regards to the timeliness issue as state in our February 25, 2010 letter to you, we have continuously work to resolve this issue as outlined by our MOU and that we are timely based on that fact and the fact that we have not received an official response from the Personnel Committee signed by that committee as provided in our MOU. If you still maintain that we are not timely or that our complaint lacks merit then I hereby appeal that decision and request that the issue of timliness and merit be considered at the PERB Board level. . . .

MOU Provisions

As stated in the Warning Letter, Article 10.4 of the MOU governs hours of work and overtime. It provides:

> The normal working schedule of full-time employees shall be eight (8) hours of pay or forty (40) hours per week.

Article 7 "GRIEVANCES/DISPUTES" of the MOU provides three steps (informal, formal, and appeal to City Administrator) before the matter may be appealed to the Personnel Commission (Commission). Step Four provides in pertinent part:

Selection of Personnel Committee

The Personnel Commission shall be appointed for each grievance and shall consist of a member appointed by the City Administrator, a member appointed by the union and a member mutually agreed upon by the City and the union.

Unless the parties agree otherwise, a hearing shall be commenced no later than twenty-eight days from selection of the Personnel Commission. An independent hearing officer selected by mutual consent of the City and the union shall preside over the hearing. However, the hearing officer shall not participate in the final determination or the deliberations of the Personnel Commission.

Personnel Committee's Authority

Those issues which directly relate to alleged violations of this Memorandum of Understanding or City ordinances, resolutions and written policies related to personnel policies and working conditions shall be subject to review by the Personnel Commission . . .

Hearing Procedure

Except as indicated in this Article, the hearing shall be conducted in accordance with the California Code of Civil Procedure and the California Evidence Code. In addition, the hearing officer may allow the admission of hearsay evidence in the interest of justice. The hearing shall be conducted in private unless a public hearing is requested by the employee or the City.

Decision

After a hearing, an opportunity to present evidence, and an opportunity to present such closing arguments as may be appropriate, the matter shall be submitted to the Personnel Commission for deliberation. The Personnel Commission will make a reasonable effort to issue his/her decision within fourteen (14) days after the conclusion of the hearing. The decision shall be in writing and set forth the Personnel Commission's findings of fact, reasoning and conclusions on the issues submitted. The decision shall be final and binding on the parties.

Discussion

The May 17, 2010 Warning Letter contained a full discussion regarding the statute of limitations and deferral to arbitration/repugnancy review issues. The letter concluded that: (1) the unfair practice *was* timely because the limitations period was equitably tolled for the period that Charging Party pursued the grievance through the parties' grievance procedure culminating in the Commission's February 2010 decision, and (2) the parties' Step Four process appears to satisfy the requirement of a binding process, albeit not a traditional labor arbitration process. The Warning Letter went on to state:

> Like arbitration, the Personnel Commission process encompasses the following: the Commission has the authority to issue a final and binding decision; the hearing is conducted in accordance with the Code of Civil Procedure and the California Evidence Code; the parties have an opportunity to present evidence and closing arguments; and the parties mutually select the third member of the Commission, as well as an independent hearing officer. The participation in, and completion of, this process therefore appears to preclude PERB from determining whether a prima facie case has been stated in the unfair practice charge, unless the Commission's decision is found to be repugnant to the Act.

Charging Party was provided extensive rationale to support the conclusion that PERB was precluded from processing the case further and informed Charging Party that it could seek to amend its charge to contest PERB's deferral determination and/or file a repugnancy claim pursuant to PERB Regulation 32661.[2] With regard to the issue of a repugnancy claim,

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[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32661 states in pertinent part:

> (a) An unfair practice charge concerning conduct subject to Government Code Section 3514.5(a)(2) or 3541.5(a)(2), or subject to final and binding arbitration pursuant to a collective bargaining agreement for parties governed by the TEERA, MMBA, HEERA, Trial Court Act or Court Interpreter Act, may be filed based on a claim that the settlement or arbitration award is repugnant to the applicable Act.
>
> (b) The charge shall comply with the requirements of Section 32615. *It shall allege with specificity the facts underlying the charging party's claim that the arbitrator's award is repugnant to the purposes of the applicable Act.* [Emphasis added.]
>
> (c) In reviewing the charge to determine whether a complaint shall issue, the Board agent shall have all of the powers and

Charging Party was informed that it must allege *with specificity* the facts underlying its claim that the Commission's award is repugnant to the purposes of the MMBA as required by PERB Regulation 32661.

Charging Party's amendment concedes that the Commission "does have final authority when acting in accordance to the facts supplied at the hearing." However, Charging Party provides no facts to support its assertion that the Commission's decision is *not* final because it was not signed. Nothing in the parties' procedure requires that the decision be signed. In addition, the decision was issued utilizing the following memorandum format where individual signatures were not required:

CITY OF GUADALUPE

GRIEVANCE MEMORANDUM

TO: City Manager & SEIU Local 620

FROM: Guadalupe Personnel Commission

SUBJECT: Grievance Appeal Filed by SEIU

Date: February 22, 2010

In the second paragraph, the decision named the participants and identified the Commissioner that dissented. Therefore, the fact that the decision was not signed, which is neither required by the MOU nor by the format in which it was issued, does not invalidate the result reached by the Commission.

As to the repugnancy issue, Charging Party only states that the decision was based on economic concerns for the City and not based on statute or facts provided at the hearing. However, the Commission's decision contains the following pertinent statements/considerations which rebut Charging Party's claims. First, the decision states that "The facts and issues presented for a decision in this case ask whether it was a violation of the MOU to establish a work time furlough." Second, the decision discusses the management rights clause and Article 10.4. Third, the decision recites the history leading up to the implementation of the furloughs, including the City's budget issues, various presentations/meetings, and meet and confer sessions. Fourth, the decision states MMBA meet and confer requirements. Based upon the

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duties specified in Section 32620. A Board agent's issuance of a complaint under this section shall not be appealable to the Board itself except as provided in Section 32360.

(d) The Board itself may, at any time, direct that the record be submitted to the Board itself for decision.

foregoing, the Commission reached the conclusion that (1) the management rights clause allowed the City to alter Article 10.4 of the MOU due to legitimate business reasons, and (2) the MOU had not been violated by the implementation of mandatory furloughs from April 3 until June 26, 2009.

In this case, it is clear that the Commission was presented with and considered all of the evidence relevant to the instant charge. (*Los Angeles Unified School District* (1982) PERB Decision No. 218.) In addition, "the arbitral and statutory issues are so intertwined that resolution of one necessarily resolves the other. (*Fremont Unified School District* (1994) PERB Decision No. 1036) The possibility that the Board may have reached a different conclusion does not render the award unreasonable or repugnant. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 218.) Even if there is room for disagreement with the conclusions reached by the Commission, they are not unreasonable or repugnant to the purposes of the MMBA, nor are they "palpably wrong." (*Fremont Unified School District*, *supra*, PERB Decision No. 1036.) For these reasons and those contained in the May 17, 2010, Warning Letter, the unfair practice charge 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 _____
Anita I. Martinez
Regional Director

Attachment

cc: David M. Fleishman, City Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

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May 17, 2010

Bruce Corsaw, Field Services Director/
Interim Executive Director
SEIU Local 620
2345 S. Broadway, Suite C
Santa Maria, CA 93454

Re: *SEIU Local 620 v. City of Guadalupe*
Unfair Practice Charge No. LA-CE-595-M
WARNING LETTER

Dear Mr. Corsaw:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 16, 2010. SEIU Local 620 (SEIU or Charging Party) alleges that the City of Guadalupe (City or Respondent) violated section 3504 of the Meyers-Milias-Brown Act (MMBA or Act)[1] by unilaterally imposing furloughs over a three-month period of time.

BACKGROUND

My investigation revealed the following alleged facts. SEIU is the exclusive representative of the City's employees. The City and SEIU have been parties to a memorandum of understanding (MOU) since January 12, 2007.

1. MOU Provisions

Article 10.4 of the MOU governs hours of work and overtime. It provides:

> The normal working schedule of full-time employees shall be eight (8) hours of pay or forty (40) hours per week.

Article 7 "GRIEVANCES/DISPUTES" of the MOU provides three steps (informal, formal, and appeal to City Administrator) before the matter may be appealed to the Personnel Commission (Commission). Step Four provides in pertinent part:

[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.

Selection of Personnel Committee

The Personnel Commission shall be appointed for each grievance and shall consist of a member appointed by the City Administrator, a member appointed by the union and a member mutually agreed upon by the City and the union.

Unless the parties agree otherwise, a hearing shall be commenced no later than twenty-eight days from selection of the Personnel Commission. An independent hearing officer selected by mutual consent of the City and the union shall preside over the hearing. However, the hearing officer shall not participate in the final determination or the deliberations of the Personnel Commission.

Personnel Committee's Authority

Those issues which directly relate to alleged violations of this Memorandum of Understanding or City ordinances, resolutions and written policies related to personnel policies and working conditions shall be subject to review by the Personnel Commission . . .

Hearing Procedure

Except as indicated in this Article, the hearing shall be conducted in accordance with the California Code of Civil Procedure and the California Evidence Code. In addition, the hearing officer may allow the admission of hearsay evidence in the interest of justice. The hearing shall be conducted in private unless a public hearing is requested by the employee or the City.

Decision

After a hearing, an opportunity to present evidence, and an opportunity to present such closing arguments as may be appropriate, the matter shall be submitted to the Personnel Commission for deliberation. The Personnel Commission will make a reasonable effort to issue his/her decision within fourteen (14) days after the conclusion of the hearing. The decision shall be in writing and set forth the Personnel Commission's findings of fact, reasoning and conclusions on the issues submitted. The decision shall be final and binding on the parties.

2. City's Financial Picture and Furloughs

Due to a dismal fiscal outlook, including a projected negative fund balance of over $350,000, the City Council approved mandatory furloughs for City employees consisting of four-day work weeks from April 3, 2009 until June 26, 2009. The decision by the Council was made on February 10, 2009, with the knowledge that meet and confer obligations arose regarding the impact of the furlough decision.

On February 13, 2009, SEIU notified the City that implementing mandatory furloughs was a violation of the MOU and requested to meet with the City to discuss actions that could be taken to reduce the need for furloughs. The parties met on March 6 and 19, 2009. On April 1, 2009, the City notified SEIU that: (1) it had made offers to SEIU that had been rejected; (2) it was the City's position that the decision to furlough employees was a management right as per the management rights article in the MOU; and (3) the parties were at impasse. In response, SEIU notified the City that the parties were not at impasse and that "if the City implements any furloughs or reductions of hours without a mutual agreement than [sic] Local 620 will immediately invoke Article 7 Grievances/Disputes . . . ."

The City imposed the furloughs commencing April 3, 2009 and ending on June 26, 2009.

3. SEIU's Grievance and Personnel Commission Decision

SEIU initiated a grievance on or about April 1, and April 15, 2009, citing the City's violation of a number of MOU articles, including Article 10.4. Upon the City's denial of the grievance at Step Three on or about June 11, 2009, SEIU gave formal notice on June 16, 2009, that it wished to submit the grievance to Step Four.

The Commission held the hearing on December 16, 2009. At the hearing, both SEIU and the City presented their respective positions regarding the furlough issue. On February 22, 2010, the Commission issued its written decision. The majority of the Commission found in favor of the City.

DISCUSSION

1. Statute of Limitations

The charging party's burden includes alleging facts showing that the unfair practice charge was timely filed within six months of when 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 *Long Beach Community College District* (2009) PERB Decision No. 2002, p. 15, decided under the Educational Employment Relations Act (EERA), the Board held that the six-month statutory limitations period is equitably tolled while parties use a "non binding dispute resolution procedure" if: (1) the procedure is contained in a written agreement negotiated by

the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent. (*Ibid.*) In *Solano County Fair Association* (2009) PERB Decision No. 2035-M, the Board applied the equitable tolling doctrine to cases under MMBA when a party uses "a bilaterally agreed upon dispute resolution procedure." This slight change in language seems to suggest that the Board in *Solano* intended that the equitable tolling doctrine applies to both binding and non-binding arbitration under MMBA.

In a recent decision, the Board declined to apply the equitable tolling doctrine to a case under EERA where the parties' agreement provided for binding arbitration. (*Los Angeles Community College District* (2009) PERB Decision No. 2059.) The Board noted that EERA provides for both statutory and equitable tolling. (*Ibid.*) Statutory tolling applies when parties may avail themselves of binding arbitration, whereas equitable tolling applies if only non-binding arbitration is available. (*Ibid.*)

However, clarification of this rule is provided by *Trustees of the California State University (San Jose)* (2009) PERB Decision No. 2032-H. In that case, decided under the Higher Education Employer-Employee Relations Act (HEERA), the Board specifically held that the equitable tolling doctrine (as articulated in *Long Beach Community College District*, *supra*, PERB Decision No. 2002) applies to cases under HEERA where the parties' grievance procedure ends in binding arbitration, as well as continuing to apply to those situations where the grievance procedure ends in non-binding arbitration. HEERA, like the MMBA, does not provide for statutory tolling. Accordingly, *Trustees of the California State University (San Jose)*, *supra*, PERB Decision No. 2032-H, read together with *Solano County Fair Association*, *supra*, PERB Decision No. 2035-M, establish that the equitable tolling doctrine applies under the MMBA when the parties are pursuing a bilaterally agreed upon dispute resolution procedure—regardless of whether the procedure culminates in binding or non-binding arbitration—so long as the other factors listed in *Long Beach Community College District*, *supra*, PERB Decision No. 2002 are also established.

In *Nevada Irrigation District* (2009) PERB Decision No. 2052-M, the Board confirmed that the tolling doctrine only applies when the unfair practice charge concerns the same dispute as the grievance which the Charging Party alleges triggers the tolling doctrine. In *Nevada Irrigation District*, *supra*, PERB Decision No. 2052-M, the Union filed an unfair practice charge alleging that the employer had made an unlawful unilateral change to terms and conditions of employment whereas the grievance concerned the termination of an employee. The Board held they were not the same dispute for the purposes of the tolling doctrine. (*Ibid.*) This is not an issue in the instant case because here the grievance decided by the Commission and the unfair practice charge concern the same issue: the implementation of mandatory furloughs.

The instant charge was filed on February 16, 2010. SEIU had notice on February 10, 2009, regarding the Council's decision. Furloughs were implemented on April 3, 2009, and ended on

June 26, 2009. But for the tolling doctrine, allegations occurring prior to August 10, 2009 would be untimely. However, between April 1 (or 15th), 2009, and February 22, 2010, SEIU was pursuing its grievance under the parties' MOU, a bilaterally agreed-upon dispute resolution process which culminated in binding arbitration. The grievance concerned the City's implementation of mandatory furloughs between April 3 – June 26, 2009, the same issue as is presented by this unfair practice charge. Thus, the limitations period is equitably tolled for the period that the grievance progressed through the grievance procedure, culminating in the Commission's February 2010 decision.

2. Deferral to Arbitration/Repugnancy Review

PERB Regulation 32620(b)(6)[2] requires the Board agent processing the charge to:

> Place the charge in abeyance if the dispute arises under MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act and is subject to final and binding arbitration pursuant to a collective bargaining agreement, and dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act, as provided in section 32661.

As noted above, PERB Regulation 32620(b)(6) requires "final and binding arbitration" for an abeyance determination. In this case, the parties' Step Four process appears to satisfy the requirements of a binding process, albeit not a traditional labor arbitration process.[3] Like arbitration, the Personnel Commission process encompasses the following: the Commission has the authority to issue a final and binding decision; the hearing is conducted in accordance with the Code of Civil Procedure and the California Evidence Code; the parties have an opportunity to present evidence and closing arguments; and the parties mutually select the third member of the Commission, as well as an independent hearing officer. The participation in, and completion of, this process therefore appears to preclude PERB from determining whether a prima facie case has been stated in the unfair practice charge, unless the Commission's decision is found to be repugnant to the Act.

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

[3] The term "arbitration" is simply defined as, "[t]he reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard." (Black's Law Dict. (5th ed. 1979) p.96, col. 1.)

Although at this point in time, Charging Party has not asserted that the Commission's February 22, 2010 decision is repugnant to the MMBA. The following are the applicable criteria for such a determination.

In *Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a, the Board adopted the post-arbitration deferral standard enunciated by the NLRB in *Spielberg Manufacturing Company* , *supra*, 112 NLRB 1080 and *Collyer Insulated Wire*, *supra*, 192 NLRB 837. Under this standard, the Board will exercise its discretionary jurisdiction to dismiss and defer a complaint to the arbitrator's award if: (1) the matters raised in the unfair practice charge were presented to and considered by the arbitrator; (2) the arbitral proceedings were fair and regular; (3) all parties to the arbitration proceedings agreed to be bound by the arbitral award; and (4) the award is not repugnant to the purposes of the Act.

The Board's repugnancy review in *Los Angeles Unified School District* (1982) PERB Decision No. 218 is instructive as to what facts are relevant to a unilateral change allegation. The arbitration award in favor of the District's unilateral change of bus parking locations stated "the arbitral and statutory issues are clearly parallel; both turn on whether the District had the right to unilaterally change the bus parking locations." (*Ibid.*) The Board deferred to the award because it was "clear the arbitrator was presented with and considered all of the evidence relevant to the unfair [practice charge]" including "the contractual bidding procedure itself, bargaining history and past practices of the employer." (*Ibid.*)

In *Fremont Unified School District* (1994) PERB Decision No. 1036, PERB again reviewed an arbitration award involving an alleged unilateral change. The arbitration award held that the District had the authority to unilaterally change employee hours and position descriptions and to transfer employees. The Board deferred to the arbitration because "the arbitral and statutory issues are so intertwined that resolution of one necessarily resolves the other" and "a reading of the arbitration award clearly establishes that the arbitration considered all the evidence in reaching her decision." (*Ibid.*)

> Specifically, in addition to interpreting the collective bargaining agreement, [the arbitrator] considered the past practice regarding performance of cashiering duties, the changes in work assignments, the impact of the changes, and the District's reasons for the changes, including its attempt to comply with a PERB determined unit configuration.

(*Ibid.*)

The arbitrator also considered the facts that the union was given notice and opportunity to request negotiations but failed to do so and therefore waived its meet and confer rights, and that the effects of the disputed action were previously negotiated. (*Ibid.*)

In this case, the unfair practice charge stated:

> A 20.0% work time furlough on all of our unit members imposed by the City for a three month period starting April 3, 2009 and ending June 30, 2009. Implemented unilaterally, violate our current MOU in several areas including but not limited to: Article 10, subsection 10.4, "Hours of Work"; Article 32 "Maintenance of Benefits and Terms and Conditions" and, Article 34 Waiver. No such wholesale reduction of hours can be unilaterally imposed by the City consistent with our MOU. We are seeking full restitution of all lost wages.

The Commission's final and binding decision—issued on February 22, 2010—framed the issue before the Commission as follows:

> SEIU alleges that the City of Guadalupe's implementation of a mandatory furlough program violated the terms of the Memorandum of Understanding between the City and SEIU. SEIU specifically alleges that "the 20.0% work time furlough on all of our unit members threatened by the City for a three month period, if implemented, unilaterally, would violate our MOU in several areas . . . .

The first requirement, therefore, appears to have been met because the contractual issue and the unfair practice issue are factually parallel and the Commission was presented with the facts which are relevant to resolving the unfair practice charge.

Second, the Commission's proceedings appear have been fair and regular as evidenced by the selection of each party's representative, the selection of a mutually agreed upon member by the City and SEIU, the selection of an independent hearing officer by mutual consent of the City and SEIU, the conduct of the hearing on December 16, 2009, the ability of both parties to present their cases, and the issuance of a written decision on February 22, 2010, which contained findings of fact, reasoning and conclusions on the issue.[4]

Third, both parties to the arbitration proceedings agreed to be bound by the Commission's decision as evidenced by the clear language in Article 7 Grievances/Disputes: "The decision shall be final and binding on the parties."

With regard to the fourth criteria, repugnancy, the Board has stated that unless the award is "palpably wrong" and not susceptible to an interpretation consistent with the Act, the Board

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[4] The Commission is charged with making a *reasonable effort* to issue its decision within fourteen (14) days after the conclusion of the hearing. The hearing was held on December 16, 2009, and the decision was issued on February 22, 2010. The failure of the Commission to issue its decision in a timely manner is insufficient to demonstrate the proceedings were conducted in an irregular and unfair manner.

will defer to the arbitrator's award. (*Yuba City Unified School District* (1995) PERB Decision No. 1095.) The possibility that the Board may have reached a different conclusion does not render the award unreasonable or repugnant. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 218.) Here, the Commission considered evidence from both the City and SEIU to decide whether the City's unilateral imposition of furloughs for a three-month period violated the parties' MOU. The Commission considered language contained in the MOU (particularly the management rights clause), the City's financial condition, and the fact that the parties had bargained in good faith and reached an impasse, to reach the following conclusion:

> It is the Personnel Commission's determination that use of the term "normal" in the Article 10, Section 4 does not prevent the City from establishing work hours other than those set forth in these contract sections, and that the City's change in SEIU employees' "normal" work day and work week was justified by legitimate business reasons. The City was and is still experiencing significant budget shortfalls which were undisputed in the evidence. On February 10, 2009, the City Council for the City of Guadalupe determined that the budget situation required further reductions and the decision to reduce SEIU work hours was additionally accompanied by cuts to Management, Fire, Police and the City Attorney. Such circumstances support a determination that the City's decision was founded upon significant budgetary pressures, that such circumstances constituted legitimate business considerations, and that its decision to reduce SEIU's work hours was neither arbitrary nor capricious and was implemented after good faith negotiations. For all of the above reasons, the Personnel Commission finds that the City of Guadalupe did not violate the MOU by implementing mandatory furloughs (four day work week) from April 3 until June 26.

Since the Commission was presented with and considered all of the evidence relevant to the unfair practice charge, its decision is not repugnant to the Act and the unfair practice charge must be dismissed. Even if there is room for disagreement with the conclusions reached, they are not unreasonable or repugnant to the purposes of the MMBA, nor are they "palpably wrong." (*Fremont Unified School District*, *supra*, PERB Decision No. 1036.)

SEIU may seek to amend its unfair practice charge to contest any or all of the findings made in this document including deferral to the Personnel Commission process and its February 2010 determination and/or a repugnancy claim pursuant to PERB Regulation 32661. With regards to the issue of repugnancy, SEIU must allege with specificity the facts underlying its claim that the Commission's award is repugnant to the purposes of the MMBA.

CONCLUSION

For these reasons the charge, as presently written, does not state a prima facie case.[5] 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 **May 24, 2010**,[6] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Anita I. Martinez
Regional Director

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[5] 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.*)

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