STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MICHAEL CRANDELL, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Respondent.	Case No. SF-CO-202-M PERB Decision No. 2202-M September 15, 2011

Appearances: Michael Crandell, on his own behalf; Weinberg, Roger & Rosenfeld by Kerrianne R. Steele, Attorney, for Service Employees International Union, Local 1021.

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

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Michael Crandell (Crandell) of a Board agent's dismissal (attached) of Crandell's unfair practice charge. The charge alleges that Service Employees International Union, Local 1021 (SEIU) violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to grieve or arbitrate on Crandell's behalf alleged camera-phone stalking activities by his employer, the City and County of San Francisco (City).[2] The charge alleges that this

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

[2] The charge also alleges that SEIU failed to grieve or arbitrate Crandell's termination and failed to represent him in a post-termination civil service commission hearing. These allegations are the subject of a second unfair practice charge Crandell filed against SEIU in SF-CO-204-M. Accordingly, as noted below, the decision herein disposes of the issues arising out of the camera-phone stalking allegations only. The allegations concerning Crandell's termination were previously disposed of by the Board's decision on appeal of the dismissal of the underlying charge in Case No. SF-CO-204-M. In that decision, *Service Employees International Union, Local 1021 (Crandell)* (2011) PERB Decision No. 2169-M, the Board adopted the warning and dismissal letters of the Board agent as the decision of the Board itself,

conduct violates PERB Regulation 32604.[3] The Board agent dismissed the charge, finding that it failed to state a prima facie case and was filed untimely.

We have reviewed Crandell's appeal, SEIU's response, the warning and dismissal letters and the entire record in light of the relevant law. Based on this review, we find the Board agent's warning and dismissal letters to be well-reasoned, free of prejudicial error and in accordance with applicable law. Accordingly, the Board adopts the warning and dismissal letters as the decision of the Board itself, with the following clarification.

Crandell notes in the appeal that he has two related but separate unfair practice charges against SEIU. As confirmed by Crandell, the instant charge, SF-CO-202-M, arises out of alleged camera-phone stalking activities by the City, whereas the second charge, SF-CO-204-M, arises out of the City's termination of his employment. Crandell asserts that "this is not the place to argue UPC SF-CO-204-M." We agree. Moreover, as explained in footnote 2, ante, the Board has since disposed of SF-CO-204-M. Accordingly, the Board deems the decision herein to be confined to the issue whether SEIU breached its duty of fair representation by failing to grieve or arbitrate on Crandell's behalf alleged camera-phone stalking activities by the City. Therefore, SEIU's assertions that Crandell lacked good cause to raise new allegations regarding the termination process on appeal are not considered here as those allegations are not germane to the issue before the Board in this case.

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as supplemented by a discussion of the issue raised on appeal regarding Crandell's late-filed amended charge, and dismissed the charge without leave to amend.

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

ORDER

The unfair practice charge in Case No. SF-CO-202-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Dowdin Calvillo joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

June 23, 2010

Michael Crandell

Re: *Michael Crandell v. SEIU Local 1021*
Unfair Practice Charge No. SF-CO-202-M
DISMISSAL LETTER

Dear Mr. Crandell:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 10, 2009. Michael Crandell (Crandell or Charging Party) alleges that SEIU Local 1021 (SEIU or Union or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by failing to pursue a grievance in which Crandell alleged that employees of the City and County of San Francisco (City) were conducting surveillance of him and stalking him via cell-phone camera.

Charging Party was informed in the attached Warning Letter dated April 21, 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 the charge was amended to state a prima facie case or withdrawn prior to May 5, 2010, the charge would be dismissed.

On May 5, 2010, Charging Party filed an amended charge. Because the amended charge does not cure the deficiencies discussed by the Warning Letter and does not state a prima facie case, the charge is hereby dismissed based on the facts and reasons below and those set forth in the April 21, 2010, Warning Letter.

Summary of Additional Facts

The amended charge alleges the following relevant facts, in addition to those alleged in the initial charge.

Crandell alleges that December 10, 2008 was the last day for the City to respond to Crandell's third-level grievance. This, he argues, is the date PERB should use in calculating the limitations period.

[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.

Crandell generally alleges that SEIU, through its agent Keith Snodgrass (Snodgrass), failed and refused to rectify Crandell's concerns about stalking via cell-phone camera, and that this failure constitutes fraud or bad-faith representation. Crandell formerly was a steward of the Union. Crandell contends that SEIU failed to pursue grievances with respect to: (1) his suspension from employment on October 4, 2008; (2) his termination on December 19, 2008; and (3) camera-phone stalking which occurred from July 25, 2008 through December 19, 2008. Crandell alleges that Snodgrass assured him, following his *Skelly* hearing on December 16, 2008, that Snodgrass would be contesting the termination. Crandell also alleges that Snodgrass failed to open or read e-mail messages Crandell had sent Snodgrass pertaining to retaliatory activity at a prior worksite on an unspecified date.

In a position statement dated June 17, 2010, SEIU provides a declaration from Snodgrass stating that SEIU had carefully reviewed the City's documentary evidence supporting its suspension and subsequent termination of Crandell and that SEIU had determined that it did not have any basis to contest these actions. Snodgrass then communicated this decision to Crandell on three or four occasions in late December 2008 and early January 2009.

Statute of Limitations

As discussed in the Warning Letter, there is a six-month limitations period for charges filed under the MMBA and, in this case, allegations occurring prior to December 10, 2008, are untimely. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) Crandell alleges that SEIU failed to file a grievance with respect to his suspension from employment on October 4, 2008. Crandell does not allege that he did not know or should not have known, until December 10, 2008, or after, that further assistance from the union was unlikely. (See, e.g., *SEIU, United Healthcare Workers West (Rivera)* (2009) PERB Decision No. 2025-M.) Therefore, this allegation is untimely filed and cannot form the basis of a prima facie case.

As recited in the Warning Letter, Crandell filed a grievance on September 10, 2008, regarding his concerns about being stalked via cell-phone camera. He does not allege any additional facts to establish that he did not know or should not have known until a later date that the Union was not going to assist him in addressing these concerns with the employer. Accordingly, these allegations are untimely as well.

Duty of Fair Representation

As discussed in the Warning Letter, under the MMBA, unions owe a duty of fair representation to their members which requires them to refrain from representing their members in a way that is arbitrary, discriminatory, or in bad faith. (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213.) Here, Crandell alleges that SEIU failed to grieve his termination on December 19, 2008. Although he makes general statements that the union acted fraudulently or in bad faith when it failed to file this, and other, grievances, Crandell does not allege any specific facts to show that SEIU's failure to file a grievance with respect to his termination was arbitrary, discriminatory, or in bad faith.

SEIU affirmatively alleges that it made a carefully reasoned decision to not pursue grievances over Crandell's suspension and termination, based upon the documentary evidence provided to the union by the City.[2] A Union's decision to not represent an employee with respect to his termination, based upon the employee's negative work history, is not a violation. (*Service Employees International Union, Local 790 (Fanene)* (2003) PERB Decision No. 1513.) Accordingly, Crandell has not alleged sufficient facts to establish a prima facie case that the Union breached its duty of fair representation.

Crandell alleges that Snodgrass specifically assured him on December 16, 2008, that he would be contesting Crandell's termination. As discussed in the Warning Letter, SEIU had no duty to represent Crandell in a termination hearing before the City's Civil Service Commission. Moreover, SEIU makes the uncontradicted allegations that, on multiple subsequent occasions in late December 2008 and early January 2009, the Union would not be challenging Crandell's termination. A union may lawfully decline to represent a bargaining unit member with respect to a grievance or arbitration, so long as its reasons are conveyed to the unit member. (*Oakland Education Association, CTA/NEA (Mingo)* (1984) PERB Decision No. 447.)

Crandell's allegation that Snodgrass refused to open e-mail messages he had sent also does not constitute a prima facie case of an unfair labor practice because Crandell has not alleged that any harm resulted from this failure. A charging party must plead some harm or injury in order to state a prima facie case. (*California School Employees Association and its Local Chapter No. 616 (Tornetta)* (1985) PERB Decision No. 508.)

Right to Appeal

Pursuant to PERB Regulations,[3] 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

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[2] A Board agent is not required to ignore undisputed facts provided by Respondent and to only consider the facts provided by Charging Party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.) Further, factually unsupported legal conclusions in the charge need not be accepted as true. (*Charter Oak Unified School District* (1991) PERB Decision No. 873.)

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

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 _____
Laura Davis
Regional Attorney

Attachment

cc: Kerianne R. Steele, Attorney

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

April 21, 2010

Michael Crandell

Re: *Michael Crandell v. SEIU Local 1021*
Unfair Practice Charge No. SF-CO-202-M
WARNING LETTER

Dear Mr. Crandell:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 10, 2009. Michael Crandell (Crandell or Charging Party) alleges that SEIU Local 1021 (SEIU or Union or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by failing to pursue a grievance in which Crandell alleged that employees of the City and County of San Francisco (City) were conducting surveillance of him and stalking him via cell phone camera.

Summary of Facts

The following facts are alleged.

On or about December 19, 2008, Crandell was terminated from his employment with the City. It appears that Crandell had been employed in the City's Human Resources Department, division of Workers' Compensation. It is assumed that Crandell was a member of a bargaining unit exclusively represented by SEIU.

Crandell generally alleges that on numerous dates between July 25, 2008 and December 19, 2008, various employees and managers of the City conducted surveillance of Crandell and stalked him at the workplace by using cell phones equipped with cameras. The individuals Crandell believes conducted or colluded in the surveillance and/or stalking include: Tim O'Brien (O'Brien), the Workers Compensation supervisor; Priscilla Morse (Morse), the Workers' Compensation Director; Micki Callahan (Callahan), the Human Resources director, and several staff members of the Human Resources department. In September 2008, Crandell began wearing a hat or hooded jacket to deter the surveillance and stalking and to protect himself from being photographed. Crandell also arranged boxes, a cardboard barrier and a protective curtain around his work area to deter the surveillance and stalking. On approximately September 2, 2008, Morse forcibly removed the curtain.

[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.

Crandell alleges that on September 10, 2008, he filed a first level grievance against O'Brien and Morse complaining that O'Brien and Morse were conducting surveillance and stalking him via cell phone camera. The grievance is signed by Crandell. Union stewards Digna Bautista and Penny Fernandes refused to sign and process the grievance, however, they faxed it to SEIU Field Representative Keith Snodgrass (Snodgrass.)

On October 24, 2008, Morse sent Crandell a letter denying the grievance, stating that the City had not received the grievance until October 21, 2008 and citing to the Memorandum of Understanding (MOU) between the City and SEIU which provides that "Only the Union shall have the right on behalf of a ... employee to grieve the discipline or discharge action." Morse states that Crandell's allegations concerning the surveillance and stalking are "completely untrue." Morse also states that during a meeting on September 30, 2008, Morse showed Crandell that her cell phone does not have a camera feature.

Crandell alleges that Snodgrass stated that he had delayed submitting the grievance because he wanted to consult with the union's attorneys. He further alleges, "the delayed submission was beyond the 14 days required for submission. However, the practice was ongoing."

On October 31, 2008, Crandell obtained unspecified confirmation that O'Brien was using a camera phone and advised Snodgrass to pursue the grievance.

On November 7, 2008, Crandell filed a level two grievance, which the City denied on November 13, 2008.

On November 24, 2008, Crandell filed a level three grievance. As of December 10, 2008, he had not received a response.

In December 2008, Crandell advised Snodgrass to pursue arbitration, but did not receive a response from the Union.

On December 19, 2008, Crandell was terminated.

On April 20, 2009, no Union representation was present at the post-termination Civil Service hearing regarding future employability, for which Charging Party submitted a report.

In 2009, no post-termination arbitration was provided by the Union and calls to Snodgrass and Jeff Chapman, an SEIU representative, were not returned.

On April 13, 2010, the Union filed a position statement in response to the unfair practice charge. Therein, the Union makes the uncontradicted allegations that it did not sponsor Crandell's grievance because it deemed the grievance to be frivolous, and that Crandell apparently filed on his own behalf. The Union contends that Crandell's allegations suggest, at most, that the Union forwarded the grievance to the employer at Crandell's behest. The Union further makes the uncontradicted allegations that appeals of restrictions on future employability are processed under the City's Civil Service Rules, not under the MOU between

the City and SEIU. The Civil Service Commission's appeals procedure is independent of the MOU grievance procedure and provides a separate remedy. Therefore, SEIU does not control the exclusive means to an employee's remedy under the Civil Service Rules.

Statute of Limitations

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.)[2] 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 *Saddleback Valley Unified School District* (1985) PERB Decision No. 558, the Board held that the six months statute of limitations period provided by the Educational Employment Relations Act "is to be computed by excluding the day the alleged misconduct took place and including the last day." Thus, where the school employer adopted a proposal on June 20, 1984, the Board calculated that "the six-month period started on June 21, 1984, the day after the school board adopted the proposal, and ended at the close of business on December 20, 1984." (*Ibid.*; see also *California State University, Fullerton* (1986) PERB Decision No. 605-H.) The same method of calculation should be applied to the statute of limitations under the MMBA.

The instant charge was filed on June 10, 2009. Therefore, allegations occurring prior to December 10, 2008, are untimely. Crandell alleges that he filed a grievance regarding the employer's surveillance and stalking via cell phone camera on September 10, 2008, which the employer denied on October 24, 2008. Crandell further appears to allege that the Union delayed submitting the grievance, although the documents show that Crandall, not the Union, submitted the grievance. Crandell also alleges that on October 31, 2008, he "advised Snodgrass to pursue the grievance" and that on an unspecified date in December 2008 Crandell advised Snodgrass to pursue arbitration.[3] To the extent that these allegations might constitute a prima facie charge of an unfair practice by the Union, they are untimely filed.

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[2] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

[3] It cannot be determined from the facts alleged whether this allegation occurred within the limitations period, i.e., on or after December 10, 2008. Failure to allege the specific date(s) on which unlawful conduct allegedly occurred precludes finding a charge timely filed. (*City of Santa Barbara* (2004) PERB Decision No. 1628-M.)

Duty of Fair Representation

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 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, at p. 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.)

Crandell does not allege any facts which show that SEIU's conduct towards him was arbitrary, discriminatory, or in bad faith. As discussed above, the majority of his allegations are untimely filed. Assuming, arguendo, that the allegations are timely filed, they do not support a prima facie case. Crandell essentially alleges that he filed a grievance on September 10, 2008, which the employer denied on October 24, 2008. It appears from the facts alleged that the Union did not support the grievance, but there is no showing that the Union breached its duty of fair representation in deciding not to pursue the grievance. It appears that in December 2008, the Union decided not to take the grievance to arbitration. There is no requirement that a union pursue a grievance which it believes will not be successful and a union's mere failure to pursue a grievance through the arbitration process is not a breach of its duty of fair

representation. (*California Faculty Association (Wunder)* (2007) PERB Decision No. 1889-H; *United Teachers of Los Angeles* (2005) PERB Decision No. 1781.)

Crandell further alleges that the Union did not provide him with representation at his post-termination hearing before the City's Civil Service hearing on April 20, 2009. A union's duty of fair representation is limited to contractually based remedies under the union's exclusive control. (*East Side Teachers Association, CTA/NEA (Hernandez)* (1997) PERB Decision No. 1223.) Here, Crandell pursued a non-contractual remedy with the City's Civil Service Commission. The Union makes the uncontradicted allegation that it does not exclusively control an employee's means for pursuing this remedy. Accordingly, proceedings before the City's Civil Service Commission are not covered by SEIU's duty of fair representation and Crandell does not state a prima facie case that the union breached its duty.

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 **May 5, 2010**,[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Laura Davis
Regional Attorney

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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.)