STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 721, Charging Party, v. COUNTY OF VENTURA (OFFICE OF AGRICULTURAL COMMISSIONER), Respondent.	Case No. LA-CE-663-M PERB Decision No. 2227-M December 21, 2011

Appearances: Weinberg, Roger & Rosenfeld by James Rutkowski, Attorney, for Service Employees International Union Local 721; Cynthia Krause, Assistant County Counsel, for County of Ventura (Office of Agricultural Commissioner).

Before Martinez, Chair; McKeag and Huguenin, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (Board) on appeal by Service Employees International Union Local 721 (SEIU) of the dismissal (attached) of its unfair practice charge by a Board agent. The charge alleged that the County of Ventura (Office of Agricultural Commissioner) (County) violated the Meyers-Milias-Brown Act (MMBA)[1] when it unilaterally reduced an employee's work hours from ten days per pay period to six days per pay period. SEIU alleged this conduct constituted a violation of MMBA sections 3502, 3503, 3504, 3504.5 and 3505.

The Board agent ruled that section 901 of the parties' memorandum of agreement (MOA) authorized the County to reduce the hours of bargaining unit positions due to lack of

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

work or for other legitimate reasons. Accordingly, the Board agent concluded that the specific contractual language at issue constitutes a clear and unmistakable waiver of the right to negotiate the County's unilateral reduction in hours. (See *Grossmont Union High School District* (1983) PERB Decision No. 313 and *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74 [waiver must be established by clear and unmistakable language].)

We have reviewed the entire record in this matter and find the warning and dismissal letters are well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as a decision of the Board itself.

DISCUSSION

PERB Regulation 32635(b) provides: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (*Los Banos Unified School District* (2009) PERB Decision No. 2063.) The purpose of this regulation "is to require the charging party to present its allegations and supporting evidence to the Board in the first instance, so that that Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case." (*South San Francisco Unified School District* (1990) PERB Decision No. 830.)

In its appeal, SEIU argues for the first time that MOA section 901 can only be properly interpreted when read in connection with MOA sections 902 and 903. SEIU, however, did not offer any evidence of good cause for its failure to provide this evidence to the Board agent at the charge processing stage. Accordingly, we find good cause does not exist to consider this new evidence.

ORDER

The unfair practice charge in Case No. LA-CE-663-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Huguenin joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2804
Fax: (818) 551-2820

April 15, 2011

Pamela M. Briscoe
SEIU, Local 721
2372 Eastman Avenue, Suite 30
Ventura, CA 93003

Re: *SEIU Local 721 v. County of Ventura (Office of Agricultural Commissioner)*
Unfair Practice Charge No. LA-CE-663-M
DISMISSAL LETTER

Dear Ms. Briscoe:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 25, 2011. SEIU Local 721 (Union or Charging Party) alleges that the County of Ventura (Office of Agricultural Commissioner) (County or Respondent) violated section 3505 of the Meyers-Milias-Brown Act (MMBA or Act)[1] by unilaterally changing unit member schedules.

Charging Party was informed in the attached Warning Letter dated March 24, 2011, 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 April 8, 2011, the charge would be dismissed.

After not receiving either an amended charge or a request for withdrawal, the undersigned attempted to contact you by telephone on April 8, 2011 to determine whether the Union intended on filing any additional materials with PERB. The undersigned left you a voice-mail message but, to date, you have not contacted PERB. In addition, PERB has not received either an amended charge or a request for withdrawal. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the March 24, 2011 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[2] 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

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

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,

WENDI L. ROSS
Interim General Counsel

By _____
Eric J. Cat
Regional Attorney

Attachment

cc: Cynthia Krause

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2804
Fax: (818) 551-2820

March 24, 2011

Pamela M. Briscoe
SEIU, Local 721
2372 Eastman Avenue, Suite 30
Ventura, CA 93003

Re: *SEIU Local 721 v. County of Ventura (Office of Agricultural Commissioner)*
Unfair Practice Charge No. LA-CE-663-M
WARNING LETTER

Dear Ms. Briscoe:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 25, 2011. SEIU Local 721 (Union or Charging Party) alleges that the County of Ventura (Office of Agricultural Commissioner) (County or Respondent) violated section 3505 of the Meyers-Milias-Brown Act (MMBA or Act)[1] by unilaterally changing unit member schedules.

The Union is the recognized employee organization of the General Bargaining Unit in the County. The General Bargaining Unit includes the Planner IV position. Rita Graham is employed at the County in the Planner IV position. The Union and the County are parties to a Memorandum of Authority (MOA) containing a grievance procedure that culminates in binding arbitration.

According to the County, MOA Article 9, section 901 states in relevant part:

> The provisions of this Article are intended to define the normal work schedule and do not guarantee a minimum number of hours of work. The County retains its right to relieve employees from duty because of lack of work or for other legitimate reasons; however this does not preclude employees or [the Union] from grieving the practical consequences of that action.

On or about November 11, 2010, County Agricultural Commissioner informed Graham that the County was reducing her hours from 10 to 6 work days per pay period, effective November 29, 2010. This would also mean a commensurate reduction in salary and benefits. The County did not inform the Union of its decision.

[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.

Afterward, the Union met with the County to discuss the reduction of Graham's hours. The County stated that it was not required to negotiate with the Union over either the decision or the effects of the reduction.

Discussion:

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),[2] PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.)[3] Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Walnut Valley Unified School District* (1981) PERB Decision No. 160; *San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

However, an employer does not make an unlawful change if its actions conform to the terms of the parties' agreement. (*Marysville Joint Union School District* (1983) PERB Decision No. 314 (*Marysville*).) In *Marysville*, the Board found that the plain meaning of the agreement, which provided lunch breaks of "no less than 30 minutes," permitted the employer to unilaterally reduce employee breaks from 55 to 30 minutes. Likewise, in *Poway Unified School District* (1994) PERB Decision No. 1050, the Board found that an employer may take unilateral action on a mandatory subject of bargaining if the language of the contract expressly confers such a right.

In *County of Ventura* (2007) PERB Decision No. 1910-M, the Board interpreted contract language similar to MOU Article 9, section 901 in the present case, but regarding a different bargaining unit in the County. In that case, the Board recognized that, when interpreting contract language, it should primarily rely on the plain meaning of the language in the contract. In that case, the Board considered contract language stating "that a Department/Agency head may require any employee in his department/agency to temporarily perform service in excess of the normal schedule when public necessity or convenience so requires." The Board found this language amounted to a clear and unmistakable waiver of the right to negotiate over overtime assignments. Similar to the present case, the contact language in *County of Ventura*, *supra*,

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

[3] 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.)

PERB Decision No. 1910-M, subjected the County's decision to modify hours to the grievance process.

In this case, the County maintains that MOA, Article 9, section 901 gives the County the authority to "relieve employees from duty because of lack of work or for other legitimate reasons[.]" A plain reading of this contract language authorizes the County to reduce the hours of bargaining unit positions. Accordingly, it appears as though the Union has waived its right to negotiate over the alleged changes identified in the instant unfair practice charge.[4]

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 April 8, 2011,[6] PERB will dismiss your charge.

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[4] As explained above, the language of MOA, Article 9, section 901 was provided to PERB by the County. The Union does not describe the contents of the MOA except to state that it contains a grievance procedure that culminates in binding arbitration. PERB may rely on facts provided by a respondent's position statement where the facts are not in conflict with allegations provided by the charging party and where the position statement is served on the charging party. (*United Educators of San Francisco (Banos)* (2005) PERB Decision No. 1764; *Chula Vista Elementary School District* (2003) PERB Decision No. 1557.) If the Union disputes this or any other facts discussed in this Warning Letter, it should consider amending the charge.

[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.)

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

Sincerely,

Eric J. Cu
Regional Attorney

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