STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

NATIONAL UNION OF HEALTHCARE WORKERS, Charging Party, v. SEIU-UNITED HEALTHCARE WORKERS WEST, Respondent.	Case No. SA-CO-78-M Request for Reconsideration PERB Decision No. 2249-M PERB Decision No. 2249a-M July 16, 2012

Appearance: Weinberg, Roger & Rosenfeld by Vincent Harrington, Jr., Attorney, for SEIU-United Healthcare Workers West.

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

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration by SEIU-United Healthcare Workers West (SEIU) of the Board's decision in *National Union of Healthcare Workers* (2012) PERB Decision No. 2249-M (*Healthcare Workers*). The underlying charge, filed June 29, 2009 by National Union of Healthcare Workers (NUHW), alleged that SEIU violated the Meyers-Milias-Brown Act (MMBA)[1] when its agents: (1) obtained unsupervised access to marked ballots and otherwise interfered with balloting by bargaining unit members; (2) engaged in physical and verbal threats toward bargaining unit members; (3) misrepresented information to bargaining unit members; and (4) unlawfully destroyed and/or removed bargaining unit members' personal property. Based on these allegations, PERB's Office of General Counsel

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

dismissed NUHW's charge for failure to state a prima facie case. NUHW appealed the dismissal.

On April 18, 2012, the Board issued its decision reversing dismissal of the charge, and remanding the charge to PERB's Office of General Counsel for issuance of a complaint. The Board held that: (1) the appropriate standard for assessing conduct alleged to interfere with employee rights freely to choose a representative or to constitute a serious irregularity in the conduct of an election, is the totality of circumstances test; (2) the name of a person alleged to be an agent of an employee organization is not an indispensable element in a prima facie case, which must provide "a clear and concise statement of the facts and conduct alleged to constitute the unfair practice;" (3) the following NUHW allegations state conduct which would reasonably tend to interfere with or restrain voters, and the conduct does not merely involve representations which voters would assess reasonably as mere electioneering puffery -- SEIU agents "'pervasively falsely told members of the bargaining unit' that, as a consequence of voting for NUHW, they would: [a] lose their health insurance; [b] lose their place on the Kaiser Health Plan waiting list; [c] have their wages reduced to $8.00 an hour; or [d] lose their jobs entirely;" and (4) alleged destruction and removal of unit members' personal property although insufficient by itself to establish a prima facie case, should be assessed under the totality of circumstances test as part of the overall conduct of SEIU.

SEIU requests reconsideration of the Board's decision on the following grounds: (1) the Board found sufficient NUHW's allegations that persons not identified in the charge by name acted as SEIU agents; and (2) the Board ignored "unrebutted" facts demonstrating there was "no basis" for NUHW's allegations that SEIU threatened bargaining unit members with loss of benefits.

The Board has reviewed SEIU's request for reconsideration. Based on this review and the relevant law, the Board denies SEIU's request for reconsideration for the reasons discussed below.

DISCUSSION

A request for reconsideration of a final Board decision is governed by PERB Regulation 32410(a)[2] which states, in pertinent part:

> Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. . . . [The request] shall state with specificity the grounds claimed and, where applicable, shall specify the page of the record relied on. . . . The grounds for requesting reconsideration are limited to claims that: (1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

Because reconsideration may only be granted under "extraordinary circumstances," the Board applies the regulation's criteria strictly. (*Regents of the University of California* (2000) PERB Decision No. 1354a-H.) A request for reconsideration is not simply an opportunity to ask the Board to "try again." (*Chula Vista Elementary School District* (2004) PERB Decision No. 1557a (*Chula Vista*).) PERB Regulation 32410(a) allows a party to request reconsideration of a Board decision on only two limited grounds, which are: (1) the decision contains "prejudicial errors of fact"; and (2) the party requesting reconsideration has

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

discovered new evidence not previously available as supported by a declaration satisfying stated criteria. These limited grounds for granting a request for reconsideration and the "extraordinary" nature of a reconsideration proceeding preclude a party from using this process to re-argue or re-litigate issues that have already been decided. (*Chula Vista; San Bernardino Teachers Association, CTA/NEA (Cooksey)* (2000) PERB Decision No. 1387.)

We note that a respondent seeking reconsideration of a Board decision reversing dismissal of an unfair practice charge and remanding for issuance of a complaint faces formidable obstacles. Our reconsideration standards focus solely on the facts, and in reviewing sufficiency of factual allegations stated in an unfair practice charge we presume that facts alleged by a charging party are true. (*San Juan Unified School District* (1977) EERB[3] Decision No. 12 (*San Juan*).) Thus, when reviewing a dismissal, we assess only the legal sufficiency of the charging party's allegations to state a prima facie case. We do not weigh charging party's allegations against conflicting allegations of the respondent. That process, deriving factual findings from conflicting factual allegations, is left to a hearing.

Reconsideration is appropriate under our procedures only where the challenged decision "contains prejudicial errors of fact" or the party seeking reconsideration proffers "new evidence not previously available" which it supports by a declaration. SEIU does not proffer new evidence. Thus, SEIU must establish that the challenged decision contained prejudicial errors of fact.

SEIU disputes the Board's decision not to require as a condition to stating a prima facie case that the charging party state the name of any person alleged to be an agent of an employee organization. We wrote on this issue in our decision:

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[3] Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

> We hold that the name of a person alleged to be an agent of an employee organization or an employer is not an indispensable element in a prima facie case. We reject a formulaic application of an oft-quoted statement from our decision in *Ragsdale*.[4] We favor a more nuanced analysis turning on the elements of the particular prima facie case. In *Ragsdale*, the Board itself adopted the warning and dismissal letters of the Board agent as the decision of the Board. We do not believe that in so doing the Board then intended to adopt a statement from the Board agent's warning letter as a litmus test for assessing the sufficiency of factual allegations. Our test for sufficiency of allegations was and is set forth in our regulation, namely, 'a clear and concise statement of the facts and conduct alleged to constitute the unfair practice.' (PERB Reg. 32615(a)(5).) The *Ragsdale* formulation, that a 'Charging Party must allege with specificity who, what, when, where and how' of the respondent's alleged violation may be useful in explaining to a charging party how to plead a violation, but is it is not a hurdle over which every charging party must leap at the risk of dismissal.
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> Thus, where, as here, it is alleged that: (1) SEIU announces that its agents will wear identification badges; (2) persons then appear in the garb of SEIU and wearing the identification badge of SEIU; (3) such persons say to voters that they are SEIU agents; and (4) such persons' conduct tends to or does promote the interest of SEIU, we may conclude prima facie that the person is an SEIU agent without the need for the person's name. If the person's conduct is improper, it may be attributed prima facie to SEIU.
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> Because NUHW did not allege the individual names of alleged SEIU representatives, the Board agent dismissed without further assessment the alleged conduct of the alleged SEIU agents. Under the circumstances here, NUHW's inability to identify by name the individuals involved did not require dismissal of the charge.

(*Healthcare Workers*, at pp. 15-16.)

SEIU contends that by failing to require that NUHW identify by name the persons alleged to be SEIU agents, the Board affords SEIU insufficient specificity and relies inappropriately on "vague and non-specific evidence." (Request for Reconsideration, at p. 3.) Thus, asserts SEIU, "[w]ithout some greater specificity or particularity of an evidentiary

[4] *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944 (*Ragsdale*).

nature, the SEIU is denied its rights to due process with respect to rebutting the claims made by NUHW." (*Id.*) We disagree that these claims of SEIU state a prejudicial error of fact. Rather they quite clearly dispute the appropriate legal standard for elements of a prima facie case,[5] and thus are not appropriately raised on reconsideration.

SEIU next contends that the decision "ignores un-rebutted facts showing no basis for the claim of 'threat of loss of benefits' made by NUHW." (Request for Reconsideration, at p. 4) SEIU thus claims that the Board should have ruled conclusively in favor of SEIU in a factual dispute over alleged campaign representations and conduct of SEIU. Given the posture of the case, both the Board agent and the Board itself were obliged to accord the presumption of truth to NUHW's allegations. (*San Juan.*) That SEIU proffered opposing, and even unrebutted, allegations, does not oblige the Board agent or the Board conclusively to credit such allegations and dispose of the charge by dismissal as though on summary judgment. Rather, when confronted with conflicting factual claims, the Board agent must issue a complaint. (PERB Reg. 32640.)[6]

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[5] By rejecting a formulaic application of the oft-quoted statement from *Ragsdale* ("who, what, when where and how"), we do not suggest that such matters need not be considered in assessing a prima facie case. Rather, we favor an analysis which focuses on the elements of the prima facie case, and the sufficiency of the charging party's allegations in respect to each of those elements. Here, the claimed pleading deficiency arose in the context of a charge alleging that respondent engaged in threatening conduct directed toward employees supporting the rival union in a heated election campaign. Requiring the charging party to provide the names of the alleged perpetrators in order to avoid dismissal is too high a pleading burden given that charging party has alleged with sufficient factual detail both the conduct alleged to constitute an unfair practice and the identity of the alleged perpetrators as SEIU agents. If this case proceeds to a hearing, NUHW will be obliged to prove its alleged facts by competent testimony and documentary evidence, including facts establishing that persons, if any, who engaged in inappropriate conduct did so as agents of SEIU.

[6] Our decisions permit a Board agent to consider allegations proffered by a respondent in accordance with the requirements of PERB Regulation 32620(c). (*United Educators of San Francisco (Banos)* (2005) PERB Decision No. 1764 [board agent improperly relied on respondent's position statement that was not signed under penalty of perjury].)

SEIU campaigned in the election, inter alia, on a claim that if NUHW were to win the election, the bargaining unit employees would lose their health benefits. NUHW's charge characterized this claim as false and threatening. SEIU asserts that it provided unrebutted evidence to the Board agent dispositive of this issue. Thus, reasons SEIU, since SEIU's evidence was unrebutted and dispositive, NUHW's allegation should have been dismissed.

SEIU's unrebutted evidence consists of a declaration submitted in August 2009 to the Board agent with SEIU's position statement. In the declaration, the declarant authenticated and interpreted documents purporting to establish health benefits received by bargaining unit members. SEIU claims that based on the declaration testimony, and appended documentary evidence, the Board agent should have ruled against NUHW on the issue, and that the Board's determination to reverse and remand violated PERB decisions authorizing a Board agent to rely on information received from a respondent in assessing whether a charging party has stated a prima facie case. We disagree.

Under our case law a Board agent investigating a charge may determine that facts properly alleged by a respondent in accordance with PERB Regulation 32620(c), which are not disputed by the charging party which has notice thereof, and which do not require a credibility determination, are dispositive of an essential element of the prima facie case, and on that basis dismiss the charge. (*Fontana Teachers Association, CTA/NEA (Alexander, et al.)* (1984) PERB Decision No. 416; *Golden Plains Unified School District* (2002) PERB Decision No. 1489.) However, a Board agent may not resolve the meaning of ambiguous contract provisions, nor accept legal conclusions advanced as allegations. (*Eastside Union School District* (1984) PERB Decision No. 466; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994.) We conclude that the declaration testimony tendered and relied upon by SEIU did not provide a sufficient basis for the Board agent, or for the Board itself, to dismiss

outright NUHW's charge allegations that SEIU falsely claimed that were NUHW to win the election that the employees would lose their health benefits, and by so claiming threatened employees. A hearing is necessary and is the appropriate venue for resolving this issue. Accordingly, we conclude that there was no prejudicial error of fact and deny reconsideration.

Finally, SEIU contends that the Board adopted and applied an incorrect legal standard for assessing alleged campaign misrepresentations. This claim is beyond the scope of reconsideration, which is limited to factual claims only.

In sum, we find no basis for granting SEIU's request for reconsideration.

ORDER

The request of SEIU-United Healthcare Workers West for reconsideration of the Board's decision in National Healthcare Workers Union (2102) PERB Decision No. 2249-M is hereby DENIED.

Chair Martinez and Member Dowdin Calvillo joined in this Decision.