

Relations Resolution (ERR). The Office of the General Counsel dismissed the charge for failure to state a prima facie case. The Association filed a timely appeal.

The Board has reviewed the record in its entirety and given full consideration to the Association's appeal. Based on this review, the Board finds the warning and dismissal letters to be well-reasoned, adequately supported by the record and in accordance with the applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself, supplemented by a brief discussion of the appeal.

DISCUSSION

The Association raises three issues on appeal. First, the Association argues that ERR section 9A is illegal on its face. Under section 9A, the window period for filing a request for modification is as follows:

Requests for modification of an established representation unit may be filed only during the 30 days beginning nine months before the expiration of the unit's current Memorandum of Understanding.

(ERR, § 9A.)

The Association argues that this rule does not allow for the filing of a request for modification after the expiration of a memorandum of understanding.

The charge alleges, however, that the Association's request for modification was filed pursuant to section 9A, and explicitly acknowledges the applicability of the window period provided for in the ERR:

The request for modification was filed in a timely manner, pursuant to the County Resolution. The resolution requires an employee organization to file during the window period. The question of how long the County takes to process a petition or a request is not addressed. Charging party complied with its obligations under the resolution.

(Initial charge, attachment, p. 1.)

To the extent the Association is asking the Board to opine about the reasonableness of this rule as applied in a factual context unrelated to the facts of this charge, the Board declines the invitation. PERB does not issue advisory opinions or generalized declarations of law. (*Santa Clarita Community College District (College of the Canyons)* (2003) PERB Decision No. 1506.)

To the extent the Association is alleging that it filed its request for modification after the expiration of a memorandum of understanding and before the execution of a successor agreement, the Association may not do so for the first time on appeal without good cause. (PERB Reg. 32635, subd. (b).²) The Board has found good cause when “the information provided could not have been obtained through reasonable diligence prior to the Board agent’s dismissal of the charge.” (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.) Such is not the case here. We note that the Association was invited to amend its charge in a pre-dismissal warning letter, which provided a methodical and comprehensive analysis of the deficiencies of the charge, but declined to do so.

Second, the Association argues that the County should have allowed the Association’s appeal of the County’s denial of the Association’s request for modification to go forward to the Board of Supervisors under ERR section 9H. This issue was adequately addressed in the warning letter, and requires no further discussion.

Last, the Association argues that it should not be penalized for the County’s delay in processing the Association’s requests for verification and modification. As alleged, the Association filed its requests on October 13, 2011. The timing of the Association’s filings left

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

the County with insufficient time to act before the window period closed.³ Thirteen calendar days (nine business days) later, on October 26, 2011, the County recognized the Association as a verified employee organization. Had the Association filed its request for verification at the beginning of the window period, assuming no change in response time by County, the Association would have had sufficient time within the window period to file its request for modification as a verified employee organization. Moreover, there is no window period under the ERR for filing a request for verification. Such requests can be filed at any time under the ERR. Assuming arguendo the legal relevance of the Association's third argument, as a factual matter, the Association's assertion that the County delayed the processing of the Association's requests to the prejudice of the Association is not supported by the allegations of the charge.

ORDER

The unfair practice charge in Case No. LA-CE-734-M is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Dowdin Calvillo and Huguenin joined in this Decision.

³ See letter of November 18, 2011, from the County to the Association, attached as Exhibit D to the unfair practice charge:

Unfortunately, since the County was not able to assess the information you provided and recognize OCMDA as a verified employee organization in the one day that would have been required in order for the request to have been timely, the request for modification as a verified employee organization was outside the window for filing for the unit modification.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 322-3198
Fax: (916) 327-6377



September 5, 2012

Lawrence Rosenzweig, Attorney
Law Offices of Lawrence Rosenzweig
2730 Wilshire Blvd., Suite 425
Santa Monica, CA 90403

Re: *Orange County Medical & Dental Association v. County of Orange*
Unfair Practice Charge No. LA-CE-734-M
DISMISSAL LETTER

Dear Mr. Rosenzweig:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 7, 2011. The Orange County Medical & Dental Association (OCMDA or Charging Party) alleges that the County of Orange (County) violated its local rules and the Meyers-Milias-Brown Act (MMBA or Act)¹ by: 1) refusing to process Charging Party's request for modification of the Healthcare Professional Unit (Healthcare Unit); 2) refusing to allow an appeal by Charging Party to be processed by the Board of Supervisors regarding the County's denial of the request for modification; and 3) violating the physicians' and dentists' rights as professional employees to a separate bargaining unit. Charging Party alleges the County's conduct violated sections 3507 and 3507.3 of the MMBA and sections 7, 8, 9, 10 and 11 of the Orange County Employee Relations Resolution (ERR).

Charging Party was informed in the attached Warning Letter dated August 14, 2012, 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 on or before August 24, 2012, the charge would be dismissed. On August 24, 2012, Charging Party received an extension of time to August 31, 2012, to respond to the Warning Letter dated August 14, 2012.

On September 4, 2012, you informed me by telephone that Charging Party would not be filing an amended charge. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the August 14, 2012 Warning Letter.

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.

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 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).)

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

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,

M. SUZANNE MURPHY
General Counsel

By _____
Ronald Pearson
Senior Regional Attorney

Attachment

cc: Carl Crown, Human Resources Director

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
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August 14, 2012

Lawrence Rosenzweig, Attorney
Law Offices of Lawrence Rosenzweig
2730 Wilshire Blvd., Suite 425
Santa Monica, CA 90403

Re: *Orange County Medical & Dental Association v. County of Orange*
Unfair Practice Charge No. LA-CE-734-M
WARNING LETTER

Dear Mr. Rosenzweig:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 7, 2011. The Orange County Medical & Dental Association (OCMDA or Charging Party) alleges that the County of Orange (County) violated its local rules and the Meyers-Milias-Brown Act (MMBA or Act)¹ by: 1) refusing to process Charging Party's request for modification of the Healthcare Professional Unit (Healthcare Unit); 2) refusing to allow an appeal by Charging Party to be processed by the Board of Supervisors regarding the County's denial of the request for modification; and 3) violating the physicians' and dentists' rights as professional employees to a separate bargaining unit. Charging Party alleges the County's conduct violated sections 3507 and 3507.3 of the MMBA and sections 7, 8, 9, 10 and 11 of the Orange County Employee Relations Resolution (ERR). The County filed a position statement in response to the Charge on December 21, 2011.²

Summary of Facts

OCMDA is an employee organization seeking to represent physicians and dentists employed by the County. Physicians and dentists are professional employees in the County's Healthcare Unit. This unit also includes approximately 66 other classifications including non-professional classifications such as dental hygienists, health education assistants, and dental assistants. The Healthcare Unit is exclusively represented by the Orange County Employees Association.

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. Unless otherwise indicated, all statutory references are to the Government Code.

² A Board agent is permitted to consider undisputed facts provided by a respondent during the investigation of a charge. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

On October 13, 2011, Charging Party filed a request with the County to be recognized as a verified employee organization. On October 13, 2011, Charging Party also filed with the County a request to modify the County's Healthcare Unit by severing physicians and dentists from the established unit. Charging Party alleges that "[b]oth requests were filed in a timely manner pursuant to the" ERR.

The County has adopted local rules and regulations contained in the ERR governing employer-employee relations pursuant to its authority under MMBA section 3507.

ERR section 3 defines terms that are used in the ERR. An "employee organization" is defined as "an employee organization which has been verified in accordance with Section 7. of this Resolution."³

ERR section 7 contains procedures for an employee organization to be verified by the County, which states in relevant part:

Section 7. VERIFICATION AS AN EMPLOYEE ORGANIZATION

To be verified as a County employee organization, an employee organization must comply with the following procedures:

- A. A request shall be submitted by the organization, signed by an authorized representative, to the Personnel Director, and shall contain the following information: (1) Name and address of organization. (2) A statement that the organization has, as one of its primary purposes, the representation of County employees in their employer-employee relations. (3) A statement that the organization includes employees of the County as its members who have designated it to represent them in their employer-employee relations with the County. (4) Certified copies of the organization's constitution and by-laws. (5) The names of the employees it represents together with the class titles and departments where employed. (6) A designation of those persons who are authorized to act as representatives of the organization in any communications with the Personnel Director and the Board of Supervisors. (7) Proof of representation such as active membership cards which designate the employee organization as the representative of the employee in employee-employer relations or such other proof which in the judgment of the Personnel Director reasonably tends to demonstrate that the organization does in fact represent employees of the County.

³ Charging Party attached a copy of the County's ERR to the Charge as exhibit E.

- B. When an employee organization has fulfilled the requirements of this section to the satisfaction of the Personnel Director, he/she shall issue a statement that the organization is verified as a County employee organization representing certain County employees.

ERR section 8 contains procedures to establish a new representation unit and criteria for determining an appropriate representation unit.

ERR section 9 contains procedure for modifying an established representation unit in the County, which states in relevant part:

Section 9. MODIFICATION OF REPRESENTATION UNITS

- A. An employee organization or Exclusively Recognized Employee Organization may request the modification of an established representation unit by filing a request with the Personnel Director accompanied by a petition signed by the majority of the regular and probationary employees within the requested modified representation unit. The petitions must include: a) full printed name of employee, b) signature, c) date signed. The signatures on the petition must have been obtained within 30 days prior to the date the request is submitted. Requests for modification of an established representation unit may be filed only during the 30 days beginning nine months before the expiration of the unit's current Memorandum of Understanding.

The other subdivisions of section 9 contain procedures for posting notice of the unit modification request and resolution of challenges by employee organizations regarding the composition of the proposed unit. Subdivision H of section 9 states:

If agreement cannot be reached between the involved employee organizations or Exclusively Recognized Employee Organizations and the Personnel Director, the matter shall be submitted to the Board. The Board shall hold a hearing at which time the involved employee organizations and the Personnel Director shall be heard. The Board shall make the final determination.

On October 26, 2011, the County's Human Resources Director (County Director) informed Charging Party by letter that the County was recognizing Charging Party as a verified employee organization.⁴ In the same letter, Charging Party was informed that its request to

⁴ The October 26, 2011 letter is attached to the Charge as exhibit B.

modify the Healthcare Unit would not be processed because the County can only consider requests for unit modification from recognized employee organizations pursuant to ERR section 9A, which requires the County to first recognize Charging Party as a verified employee organization. Charging Party was further informed that when the County made its determination to verify Charging Party as an employee organization, the time period to file a unit modification request, which is 30 days beginning nine months before the expiration of the unit's Memorandum of Understanding, had passed.

Charging Party alleges the County refused to process the request for modification on the ground the County was unable to process the requests for verification and modification during the window period set by the ERR. Charging Party also alleges that "the question of how long the County takes to process a petition or a request is not addressed." Charging Party further alleges that it "complied with its obligations under the" ERR.

On November 4, 2011, Charging Party filed an appeal with the Board of Supervisors, pursuant to ERR section 9H, of the County's denial of its request for unit modification. On November 18, 2011, the County Director informed Charging Party by letter that its appeal would not be allowed to proceed.⁵ The County informed Charging Party that because its request for unit modification was not processed by the County, there is no action to be appealed to the Board of Supervisors.

Charging Party makes three separate allegations regarding the County's conduct. First, the County violated its local rules when it refused to process Charging Party's request to modify the Healthcare Unit. Second, the County violated its local rules by refusing to submit to the Board of Supervisors Charging Party's appeal of the County's refusal to process the unit modification request. Third, by violating its local rules the County is denying physicians and dentists their statutory right as professionals to a separate bargaining unit under section 3507.3.

The foregoing facts fail to state a prima facie violation of the MMBA for the reasons that follow.

Violation of Local Rules

1. Violation of Local Rules Concerning Request for Unit Modification.

By not processing its request to modify the Healthcare Unit, Charging Party claims the County violated its own local rules. Stated differently, Charging Party alleges it complied with the procedures in the local rules for requesting modification of a unit but the County refused to process the request.

⁵ The November 18, 2011 letter is attached to the Charge as exhibit D.

PERB Regulation 32615(a)(5)⁶ requires, inter alia, that an unfair practice charge include a “clear and concise statement of the facts and conduct alleged to constitute an unfair practice.” To do so, the charging party should include the “who, what, when, where and how” of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.) During charge investigation, the charging party must provide sufficient facts to the Board agent that, if proven at a subsequent hearing, would constitute an unfair practice. (*SEIU-United Healthcare Workers West Local 2005 (Hayes)* (2011) PERB Decision No. 2168-M.) The charging party’s factual allegations must be accepted as true at the investigation stage of the proceedings. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489; *San Juan Unified School District* (1977) EERB⁷ Decision No. 12.)

Public agencies are authorized under MMBA section 3507 to “adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations.” It is an unfair practice under section 3509(b) and PERB Regulation 32603(g) for a public agency employer to violate the MMBA or to violate any rules and regulations adopted pursuant to section 3507. It is well-settled that a Board agent must accept the plain language of the contract or rule where it is clear and unambiguous. (*Glendora Unified School District* (1991) PERB Decision No. 876; *Butte Community College District* (1985) PERB Decision No. 555.) However, where the contract language or rule is unclear or ambiguous, the Board has held that the parties should be given an opportunity to offer evidence to support their differing interpretations at an evidentiary hearing. (*Long Beach Community College District* (2000) PERB Decision No. 1378.)

Two requirements under ERR Section 9 are relevant in analyzing Charging Party’s contention that the County violated its local rules: who may file a request to modify a bargaining unit, and the time period in which a request may be filed. Section 9A provides that “[a]n employee organization or Exclusively Recognized Employee Organization may request the modification of an established representation unit by filing a request with the Personnel Director....” (Emphasis added.) Section 3 of the ERR defines an employee organization as one “which has been verified in accordance with Section 7 of the” ERR. (Emphasis added.) Thus, the plain reading of those sections specify that verification of an employee organization by the County in accordance with section 7 is a prerequisite for an employee organization to file a request to modify a unit under section 9. The Charge does not allege a contrary interpretation of those sections.

⁶ PERB’s Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

⁷ Prior to 1978, PERB was known as the Educational Employment Relations Board, or EERB.

Charging Party states it filed a request to be verified as an employee organization on October 13, 2011. On the same day, Charging Party submitted a request for modification of the unit. Charging Party further states the County verified Charging Party as an employee organization on October 26, 2012. Thus, taking Charging Party's allegations as true, it was not a verified employee organization on October 13, 2011, when it filed its request to modify the Healthcare Unit as is required under section 9A.

Charging Party alleges that its request to modify the Healthcare Unit was "filed in a timely manner, pursuant to the" ERR. While Section 7 is silent regarding a timeframe in which a request to be verified as an employee organization must be filed, section 9A states "Requests for modification of an established representation unit may be filed only during the 30 days beginning nine months before the expiration of the unit's current Memorandum of Understanding." In the October 26, 2011 letter attached to the Charge as exhibit D, the County notes that Charging Party's requests to be verified as an employee organization and to modify the unit were filed on the last day of the window period contained in section 9A.⁸ Thus, the Charge and accompanying exhibits provide facts demonstrating that the request for modification was filed during the applicable window period.

However, the Charge fails to allege any facts or reference any ERR sections that provide the timely filing of a modification request alone requires the County to process the request. In other words, besides stating the request for modification was filed within the applicable window period and that Charging Party complied with its obligations under the ERR, the Charge fails to allege facts demonstrating that Charging Party complied with the other requirements in section 9 for filing a unit modification request. The Charge also states the ERR "requires an employee organization to file during the window period." (Emphasis added.) However, Charging Party was not verified as an employee organization as of October 13, 2011, when it filed its request to modify the unit, as is required under the plain reading of ERR sections 3, 7, and 9. Finally, Charging Party fails to allege facts demonstrating that when it was verified by the County as an employee organization on October 26, 2011, this date fell within the window period to request a unit modification under section 9A. Thus, the Charge fails to demonstrate how the County has violated its local rules.

While not so stated, Charging Party appears to argue that when a request for unit modification is filed in conjunction with a request to be verified as an employee organization, and since there is no timeframe for how long it takes the County to process a verification request, if both requests are filed within the window period for filing a request for unit modification set forth

⁸ Under PERB 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. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M, citing *Fontana Teachers Association, CTA/NEA (Alexander, et al.)* (1984) PERB Decision No. 416; *Golden Plains Unified School District, supra*, PERB Decision No. 1489.)

in section 9A, that a determination of the sufficiency of the request for unit modification and the running of the applicable window period, are stayed pending determination by the County of the request to be verified as an employee organization. However, the Charge fails to state any facts or identify any provisions in the ERR to support this contention. Indeed, a similar argument regarding the same local rules was addressed in *County of Orange* (2010) PERB Decision No. 2138-M.⁹

In *County of Orange, supra*, PERB Decision No. 2138-M, the union filed an unfair practice charge alleging the County of Orange violated the MMBA by rejecting a petition to sever several classifications from the County's Healthcare Professional bargaining unit. (*Id.* at p. 1.) The Board found that the County properly rejected the union's severance petition, one of the grounds being that the union was not a "verified" employee organization at the time it filed its severance petition, which was a requirement under the County's local rules. (*Id.* at p. 14.) The union contended that "once the UAPD was verified [as an employee organization] the petition should have been activated by the County or the County should have told UAPD to refile in its own name." (*Id.* at p. 15.) In addressing this contention, the Board noted, "Though the County could have taken either of those actions, there was no legal requirement that it do so. The County was not obligated to process a petition that had been rejected earlier on proper grounds, nor was the County required to solicit a new petition from UAPD. Consequently, this argument is without merit." (*Ibid.*) Here, Charging Party appears to make a similar argument, i.e., once the County verified Charging Party as an employee organization, the County then should have considered its request to modify the unit as it was timely filed within the window period. However, there is no requirement that the County process Charging Party's request in this scenario under a plain reading of the County's local rules.

What the facts as alleged and taken as true demonstrate is that Charging Party was not verified by the County as an employee organization as required under section 9A when it filed its request to modify the Healthcare Unit. The facts as alleged also demonstrate that the date Charging Party was verified as an employee organization, October 26, 2011, was outside the window period for filing a request for unit modification.

Charging Party also alleges the "County has represented, and PERB has ruled, that filing a request for modification under section 9A of the resolution is the appropriate method to sever classifications from an already existing unit. (See PERB Dec. No. 2138-M, 2010))." However, Charging Party fails to state facts demonstrating that the County's representation and the cited PERB decision excuses an employee organization from complying with the requirements under section 9A when seeking to sever classifications from an existing unit. As discussed above, in *County of Orange, supra*, PERB Decision No. 2138-M, the Board upheld

⁹ The County of Orange's Employee Relations Resolution, which is attached to the charge as exhibit E, notes that it was adopted in May 1990. That is the same date, as noted by the Board in *County of Orange, supra*, PERB Decision No. 2138-M, when the County of Orange adopted its Employee Relations Resolution in that case. (*Id.* at p. 2.)

the Administrative Law Judge's determination that the County of Orange properly denied the union's severance petition for failing to comply with ERR Section 9.A. (*Id.* at p. 14.)

Thus, Charging Party fails to allege facts sufficient to state a prima facie case that the County violated its local rules and the MMBA when it refused to process Charging Party's request to modify the Healthcare Unit.

2. Violation of Local Rules Concerning Appeals to the Board of Supervisors.

Charging Party alleges the County violated its local rules when it refused to submit to the Board of Supervisors Charging Party's appeal of the County's denial of its request for unit modification. Charging Party states that on November 4, 2011, it appealed the County's denial of its request for modification to the Board of Supervisors pursuant to ERR section 9H, that provides for an appeal to the Board of Supervisors. Charging Party further states that in a letter dated November 18, 2011, the County Director refused to allow the appeal to proceed to the Board of Supervisors. The November 18, 2011 letter from the County, which is attached to the Charge as exhibit D, states that the appeal was not processed by the County Director to the Board of Supervisors because Charging Party's request for unit modification was not processed.

ERR section 9 contains procedures for requesting and modifying an established representation unit in the County. A plain reading of subdivision H, along with the other subdivisions in section 9, indicate that the subject matter that may be submitted to the Board of Supervisors for determination is a disagreement between the involved parties (employee organizations or Exclusively Recognized Employee Organizations and the Personnel Director) regarding the appropriateness of a representation unit, and not a refusal to process a request for unit modification.

The Charge fails to allege facts of a disagreement among the affected parties regarding the appropriateness of a unit, or that the procedures in ERR section 9 were complied with that would require the matter be submitted to the Board of Supervisors. Further, a plain reading of section 9 does not state that a party can "appeal" the refusal by the County to consider a request for unit modification. Accordingly, Charging Party fails to state a prima facie case that the County violated its local rules by refusing to process Charging Party's appeal of the County's denial of Charging Party's request for unit modification.

3. Violation of Local Rule and Statutory Right to Separate Bargaining Unit.

Charging Party contends the County's refusal to process its unit modification request violates the County's local rule and MMBA section 3507.3 because physicians and dentists are professional employees and have a statutory right to a separate bargaining unit. Charging

Party cites *Alameda County Assistant Public Defenders Association v. County of Alameda* (1973) 33 Cal.App.3d 825, in support of this contention.¹⁰

Section 3507.3 states:

Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of those professional employees. In the event of a dispute on the appropriateness of a unit of representation for professional employees, upon request of any of the parties, the dispute shall be submitted to the California State Mediation and Conciliation Service for mediation or for recommendation for resolving the dispute.

“Professional employees,” for the purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists.

Section 8H, which lists certain criteria to consider for determining an appropriate representation unit, states in relevant part:

Professional employees shall not be denied the right to be represented separately from non-professional employees by a professional employee organization consisting of such professional employees.

Charging Party fails to state facts sufficient to demonstrate a prima facie violation of the MMBA or the County’s local rules. As noted above, Charging Party fails to allege facts that demonstrate the County violated its local rules by refusing to process Charging Party’s request to modify the Healthcare Unit. To the extent Charging Party is contending that when it comes to creating a bargaining unit for professional employees, an employee organization does not have to comply with local rules regarding procedures for modifying or establishing a bargaining unit, Charging Party fails to state any facts or legal authority to support this claim.

¹⁰ While *Alameda County Assistant Public Defenders Association v. County of Alameda*, *supra*, 33 Cal.App.3d 825, established the right to separate representation for professional employees, the case does not stand for the proposition that an employee organization does not have to comply with the local rules adopted by a public agency for modifying an established bargaining unit, when seeking to establish a separate bargaining unit for professional employees under section 3507.3.

(See *Modesto Irrigation District* (2005) PERB Decision No. 1768-M, at pp. 5-7 [where PERB upheld the dismissal of an unfair practice charge filed by employees over the irrigation district's denial of their unit modification petitions, one of which sought to have certain professional employees represented in a separate bargaining unit. The Board upheld the dismissal finding the petitions were not filed by an employee organization, which was required under the irrigation district's local rules to file a unit modification petition].)

Here, the facts demonstrate that Charging Party was not an employee organization verified by the County under ERR section 7 at the time it filed its request to modify the Healthcare Unit, which is a prerequisite for filing a modification request under section 9.

4. Violation of Local Rules Concerning Certification of Recognized Employee Organization and Decertification Procedure.

The Charge also alleges the County violated sections 10 and 11 of the ERR. Section 10 contains procedures for certifying an exclusively recognized employee organization in the County. Section 11 contains decertification procedures. There are no allegations in the Charge as to how the County violated those sections. To the extent Charging Party's allegations regarding the County's violation of those local rules are contained in its exhibits attached to the Charge, this is insufficient to meet Charging Party's burden to state facts sufficient to state a prima facie case. PERB Regulation 32615(a)(5) requires that a charge contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice," in the charge itself and not just in attachments to the charge. (*Sacramento City Teachers Association* (2008) PERB Decision No. 1959.)

Reasonableness of Local Rules

Where a local rule adopted by a public agency conflicts with the MMBA and its fundamental purposes, enforcement of such a rule will be denied. (*International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 196-206.) The *City of Gridley* court noted that the scope of authority to supplement provisions of the statute must be "consistent with, and effectuate the declared purposes of, the statute as a whole." (*Id.* at p. 202, citation omitted.) The burden of proving unreasonableness is on the party challenging the rule. (*City & County of San Francisco* (2009) PERB Decision No. 2041-M; *City & County of San Francisco* (2007) PERB Decision No. 1890-M.) When examining whether a local agency rule adopted pursuant to MMBA section 3507, subdivision (a) is reasonable, PERB's inquiry is not whether a different rule would be more reasonable or whether the rule is reasonable when measured against an arbitrary standard. Rather, the question is whether the rule "is consistent with and effectuates the purposes of the express provisions of the MMBA." (*City of San Rafael* (2004) PERB Decision No. 1698-M, citing *International Brotherhood of Electrical Workers, Local 1245 v. City of Gridley, supra*, 34 Cal.3d 191.)

The Charge does not contend or allege facts demonstrating that the County's local rules are unreasonable. While Charging Party does state the question regarding how long it takes to process a petition or request is not addressed in the local rules, Charging Party fails to explain

or allege facts how this constitutes an unreasonable rule. Further, in *County of Orange, supra*, PERB Decision No. 2138-M, the Administrative Law Judge, in construing ERR section 9, which is at issue in this charge, found that it was a reasonable local rule which allows for severance of classifications from an established unit. (*Id.* at p. 14.) The Board noted in that case that “ERR section 9.A and PERB’s MMBA severance regulations are largely identical and serve a similar purpose, namely to reconfigure an existing unit.” (*Id.* at p. 10.) Thus, Charging Party fails to allege facts demonstrating the unreasonableness of any local rule.

Interference

While not alleged in the charge, a statement of a prima facie case by Charging Party that the County violated its local rules in refusing to process, and allow an appeal of, Charging Party’s request to modify the unit, would necessarily state a prima facie case as derivative violations that the County interfered with Charging Party’s right to represent its members in violation of section 3503, and interfered with the rights of County employees in violation of section 3506. As addressed above, Charging Party fails to allege sufficient facts to demonstrate the County violated its local rules and the MMBA as alleged in the Charge. Thus, Charging Party fails to state a prima facie case that the County interfered with Charging Party’s and County employees’ protected rights under the MMBA.

For these reasons the charge, as presently written, does not state a prima facie case.¹¹ 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

¹¹ 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.*)

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PERB. If an amended charge or withdrawal is not filed on or before August 24, 2012,¹² PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Ronald Pearson
Senior Regional Attorney

RP

¹² A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)