STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Charging Party, v. COUNTY OF CONTRA COSTA, Respondent.	Case No. SF-CE-1103-M PERB Decision No. 2367-M April 9, 2014

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 1021; Cynthia A. Schwerin, Deputy County Counsel, for County of Contra Costa.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION[1]

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Service Employees International Union, Local 1021 (Local 1021) of the partial dismissal (attached) by the Office of the General Counsel of Local 1021's unfair practice charge. The charge, as amended, alleges that the County of Contra Costa (County) violated the Meyers-Milias-Brown Act (MMBA)[2] by: (1) unilaterally changing the terms of the parties' negotiated agreement regarding sick leave; (2) interfering with employees' rights to engage in a work stoppage; and (3) maintaining an unreasonable local rule regarding work stoppages.

[1] PERB Regulation 32320, subdivision (d), provides in pertinent part: "Effective July 1, 2013 a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [Board Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB Regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

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

On October 31, 2013, the Office of the General Counsel issued a complaint, based on allegation (3). On the same date, the Office of the General Counsel issued a partial dismissal of allegations (1) and (2). Local 1021 filed a timely appeal to which the County filed a timely opposition.

The Board has reviewed the case file in its entirety and has fully considered the relevant issues and contentions on appeal. Based on this review, the Board finds the partial warning and partial dismissal letters to be supported by the factual allegations contained in the unfair practice charge, as amended. The Board also finds the partial warning and partial dismissal letters to be well-reasoned and in accordance with applicable law.

The appeal raises no issues warranting the Board's further consideration. All relevant issues were thoroughly and thoughtfully examined, analyzed and disposed of by the Office of the General Counsel in its partial dismissal of the interference and unilateral change allegations.[3] As shown in this case, PERB's expertise is reflected in the daily processing and investigation of unfair practice charges performed by PERB's regional attorneys. The partial warning and partial dismissal letters demonstrate a well-grounded understanding of the

[3] Local 1021 disagrees with the County's interpretation of "probable cause" in the parties' negotiated sick leave article and argues that the term is ambiguous and therefore the Office of the General Counsel mistakenly decided a factual dispute in dismissing the unilateral change allegations. Local 1021 misstates the basis for dismissal. The Office of the General Counsel did not decide a factual issue stemming from an ambiguity in contract language, but rather determined that *as a matter of law* Local 1021's charge allegations failed to state a prima facie case. The well-reasoned analysis contained in the partial warning and partial dismissal letters speaks for itself.

Had the charge alleged facts to support Local 1021's reading of "probable cause," our analysis might have been different. Such allegations might have included facts supporting an established past practice either of invoking probable cause only in cases of an individual employee's pattern of sick leave abuse or never invoking probable cause in prior instances of concerted activities, or facts concerning the bargaining history of the sick leave verification procedures. This is not meant to be an exhaustive list of the type of allegations that might support a prima facie case, but is merely illustrative.

pertinent legal elements and a careful application of the law to the factual allegations of the charge.

Accordingly, the Board hereby adopts the partial warning and partial dismissal letters as the decision of the Board itself.[4]

ORDER

Allegations (1) and (2), as identified in the partial dismissal letter of October 31, 2013, of the unfair practice charge in Case No. SF-CE-1103-M are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Huguenin and Winslow joined in this Decision.

[4] The County argues that the appeal violates PERB Regulation 32635, subdivision (b), which provides that "[u]nless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." Because we find that the appeal lacks merit, we need not address that issue.

PUBLIC EMPLOYMENT RELATIONS BOARD

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October 31, 2013

Kerianne R. Steele, Attorney
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501

Re: *Service Employees International Union Local 1021 v. County of Contra Costa*
Unfair Practice Charge No. SF-CE-1103-M
PARTIAL DISMISSAL

Dear Ms. Steele:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 31, 2013. The Service Employees International Union Local 1021 (Local 1021 or Charging Party) alleges that the County of Contra Costa (County or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by: (1) unilaterally changing the terms of the parties' negotiated agreement regarding sick leave; (2) interfering with employees' rights to engage in a work stoppage; and (3) maintaining an unreasonable local rule.[2]

Charging Party was informed in the attached Warning Letter dated September 30, 2013, that certain allegations contained in the 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, it should amend the charge. Charging Party was further advised that, unless it amended these allegations to state a prima facie case or withdrew them prior to October 28, 2013, the allegations would be dismissed. A timely amended charge was filed on October 8, 2013.

The original charge alleged that the County had sent a memorandum announcing that, in the event of a strike by IFPTE Local 21 (Local 21), employees who were ill would be required to notify their supervisor by telephone each day and would be required to submit medical verification of their illness. The original charge alleged that this memorandum (1) unilaterally changed the sick leave provisions in the parties' memoranda of understanding (MOUs); and (2) interfered with employees' rights to engage in a work stoppage.

[1] The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

[2] This letter addresses only allegations (1) and (2). Allegation (3) will be addressed in a separate document.

The Warning Letter explained that the unilateral change allegation did not state a prima facie case because the County's July 23, 2013 memorandum was consistent with the MOUs' sick leave provisions, which required an employee to provide notice of "an absence prior to the commencement of their work shift," and allowed the County to require medical verification "for probable cause" if the County had given notice of the requirement in advance.

The Warning Letter went on to explain that the interference allegation did not state a prima facie case because the County's memorandum did not threaten discipline for engaging in a work stoppage, but for submitting a falsified claim for sick leave.

The only substantive change in the amended charge is the addition of the following paragraph:

> On July 23, 2013, the date that Ted Cwiek, the County's Human Resources Director, and Kathy Gallagher, the County's Employment and Human Services Department Director, issued a memorandum to SEIU Local 1021-represented employees, which unilaterally changed the existing sick leave policy, the County and SEIU Local 1021 were engaged in successor negotiations. The parties were nowhere near impasse. SEIU Local 1021 had not announced, or even hinted, that it would participate in a strike in the near or remote future. SEIU Local 1021 had not announced, or even hinted, that its members would honor a picket line that IFPTE Local 21 might establish at County worksites. Therefore, in issuing the July 23, 2013 memorandum, the County was not responding to an actual strike threat. The County had no objective basis for concluding that there was "probable cause" to require sick leave verification. Given that there was no real strike threat in the SEIU Local 1021-represented units, the County's issuance of the memorandum constituted a clear unilateral change and interference with the rights of SEIU Local 1021 members.

The amended charge addresses the interference allegation only in the legal conclusion that the County's memorandum interfered with employee rights because there was no "real strike threat." The absence of a real strike threat, however, does not address the deficiency identified in the Warning Letter, which was that a threat to impose discipline for submitting a falsified claim for sick leave is not interference with any employee rights under the MMBA. Accordingly, the interference allegation is dismissed.

As for the unilateral change allegations, the amended charge does not address the Warning Letter's conclusion that the daily notice requirement was consistent with the MOU provisions. (See *County of Sonoma* (2012) PERB Decision No. 2242-M (*Sonoma*) ["Where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning."]; see also *County of San Joaquin* (2003) PERB Decision No. 1570-M (*San Joaquin*) ["[A] Board agent must accept the plain language of the contract or rule where it is clear and unambiguous."].) As a result, this allegation is dismissed.

(See *Los Angeles Community College District* (2000) PERB Decision No. 1377 [allegation considered in a warning letter but not addressed in an amended charge will be dismissed].)

The amended charge likewise does not dispute the Warning Letter's conclusion that the MOU allows the County to require medical verification if it (1) has probable cause and (2) provides advance notice of the requirement. (See *Sonoma*, *supra*, PERB Decision No. 2242-M; *San Joaquin*, PERB Decision No. 1570-M.) The only dispute raised by the amended charge is whether the County had "probable cause" to require medical verification under the circumstances of this case. According to the amended charge, the County could have had "probable cause" to believe that Local 1021-represented employees may engage in a work stoppage, and therefore to require medical verification, *only if* Local 1021 had announced, or at least "hinted," that its members would honor Local 21's picket lines.

Local 1021's argument points out a distinction between this case and *Regents of the University of California* (2010) PERB Decision No. 2109-H (*Regents*), which was cited in the Warning Letter. In *Regents*, the medical verification requirement was announced when the charging party-exclusive representative had announced a strike. In this case, as the amended charge makes clear, Local 1021 had neither announced nor hinted that its members would strike, or that they would honor Local 21's picket lines if Local 21 went on strike.

Notably, Local 1021 does not suggest that the County's belief in the likelihood of a strike by *Local 21* was not reasonable. And Local 1021 readily acknowledges that the no-strike provisions of the MOUs between Local 1021 and the County were expired when the County issued its memorandum. Thus, if Local 21 had announced a strike, Local 1021 could have announced a sympathy strike by its members without committing an unfair practice. (See *Oxnard Harbor District* (2004) PERB Decision No. 1580-M, citing *Children's Hospital Med. Ctr. v. Cal. Nurses Ass'n* (2002) 283 F.3d 1188 (*Children's Hospital*).) Moreover, Local 1021-represented employees could have refused to cross Local 21's picket lines, whether or not Local 1021 itself had announced a sympathy strike. That is because the right to refuse to cross a picket line belongs to the employees themselves, not the union. (See *Children's Hospital*, *supra*, 283 F.3d at p. 1193; *Cooper Thermometer* (1965) 154 NLRB 502, 503 [an employee's refusal to cross a picket line is protected under the National Labor Relations Act].)

It is true that employees may be more likely to engage in a work stoppage when their exclusive representative has announced a strike, as was the case in *Regents*, *supra*, PERB Decision No. 2109-H. But it does not follow that an announcement or hint by the exclusive representative is the only circumstance in which there may be "probable cause" to believe a strike may occur. PERB has acknowledged that employees may engage in a work stoppage without the involvement of their exclusive representative. For instance, in the context of determining whether an exclusive representative is liable for an unlawful work stoppage, the Board has held that the participation of union members and officers in an unlawful "sick out" is not an unfair practice unless there is evidence that the union "encouraged, planned, authorized or ratified the 'sick out.'" (*Compton Community College District* (1989) PERB Decision No. 728 (*Compton*), citing *North River Energy Corp. v. United Mine Workers* (11th Cir. 1981) 664 F.2d 1184 (*North River*); see also *Grossmont Union High School District* (2006) PERB Decision

No. 1859 [citing *Compton, supra*].) Underlying this rule is the principle that the union is "an entity separate from its members." (*North River, supra*, 664 F.2d at p. 1192.)[3]

Because PERB precedent expressly recognizes that employees may engage in a work stoppage independently of their exclusive representative, and because the no-strike provisions covering Local 1021-represented employees were expired, Local 1021's argument that the County lacked "probable cause" to require medical verification is unavailing. As a result, the allegation that the County's memorandum to employees unilaterally changed the MOUs' sick leave provisions is dismissed.

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (PERB Regulation 32635(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. (PERB Regulations 32135(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. (PERB Regulation 32135(b), (c) and (d); see also PERB Regulations 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 Charging Party files a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (PERB Regulation 32635(b).)

[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.)

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 PERB Regulation 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. (PERB Regulation 32135(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. (PERB Regulation 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 _____
Joseph Eckhart
Regional Attorney

JE
Attachment

cc: Cynthia Schwerin

PUBLIC EMPLOYMENT RELATIONS BOARD

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September 30, 2013

Kerianne R. Steele, Attorney
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501

Re: *Service Employees International Union Local 1021 v. County of Contra Costa*
Unfair Practice Charge No. SF-CE-1103-M
PARTIAL WARNING LETTER

Dear Ms. Steele:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 31, 2013. The Service Employees International Union Local 1021 (Local 1021 or Charging Party) alleges that the County of Contra Costa (County or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by: (1) unilaterally changing the terms of the parties' negotiated agreement regarding sick leave; (2) interfering with employees' rights to engage in a work stoppage; and (3) maintaining an unreasonable local rule.[2]

FACTS AS ALLEGED

Local 1021 is the exclusive representative of two of the County's bargaining units, a rank and file unit and a service line supervisors unit. Local 1021 and the County are parties to separate memoranda of understanding (MOUs) governing the terms and conditions of employment for each of the two units. Both MOUs expired on June 30, 2013.[3]

MOU Provisions

Each MOU contains substantively identical provisions governing sick leave. Section 14.1 states the purpose of sick leave:

[1] The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

[2] This letter addresses only allegations (1) and (2). Allegation (3) will be addressed in a separate document.

[3] All further references are to 2013, unless otherwise noted.

> The primary purpose of paid sick leave is to ensure employees against loss of pay for temporary absences from work due to illness or injury. It is a benefit extended by the County and may be used only as authorized; it is not paid time off which employees may use for personal activities.

Section 14.2 provides that sick leave may be used "only" in the instances of temporary illness or injury, permanent disability, communicable disease, pregnancy disability, medical and dental appointments, emergency care of family, the death of a family member, and for baby/child bonding.

Section 14.4(A) requires employees to

> notify[] their department of an absence prior to the commencement of their work shift or as soon thereafter as possible. Notification shall include the reason and possible duration of the absence.

Employees are also "responsible for keeping their department informed on a continuing basis of their condition and probable date of return to work."

Section 14.4(B) provides, in part:

> Abuse of sick leave on the part of the employee is cause for disciplinary action. Departmental approval of sick leave is a certification of the legitimacy of the sick leave claim. The Department Head or designee may make reasonable inquiries about employee absences. The department may require medical verification for an absence of three (3) or more working days. The department may also require medical verification for absences of less than three (3) working days for probable cause if the employee had been notified in advance in writing that such verification was necessary.

Section 14.4(B)(1) provides that inquiries may be made by calling the employee's telephone number "if telephone notification was not made in accordance with departmental sick leave call-in guidelines."

The charge alleges that the provisions of sections 14.4(A) and 14.4(b) "were enacted and had historically been implemented to prevent the 'abuse of sick leave on the part of the employee,' especially for extended absences."

Each MOU also contains a no-strike clause with a duration that is expressly limited to the term of the MOU.

The Present Dispute

On July 23, Ted Cwiek (Cwiek), the County's human resources director, and Kathy Gallagher (Gallagher), the County's employment and human services department director issued a memorandum regarding absences during an anticipated strike by IFPTE Local 21 (Local 21). The memorandum stated:

> It appears that the Local 21 bargaining unit may go on strike. As you may be aware, employees who are absent from work for any reason that is not approved by the County, including a strike, are not eligible to be paid by the County. Consequently, you are hereby notified that effective upon announcement of a strike, employees requesting sick leave are required to provide a medical certification substantiating that the employee's absence was necessary due to a bona fide illness or injury of the employee or their immediate family member. . . .
>
> The certification must be provided to the employee's supervisor upon their return to work . . . . If a certificate is not submitted, the absence has not been authorized and the employee will be considered absent without pay (AWOP). . . . Any employee who submits a false claim for sick leave will be subject to disciplinary action.
>
> Each day that an employee is absent, they are directed to personally contact their supervisor by telephone by the beginning of each assigned shift to advise of their illness or injury and explain the facts that constitute the basis for being unable to report for duty. If, for any reason, an employee is unable to talk personally with a supervisor when he or she calls, that employee shall call [one of three telephone numbers]. If you cannot get through on the phone, you may send an e-mail to: EHSD_Attendance@ehsd.cccounty.us.

The County did not provide Local 1021 with notice or an opportunity to bargain over the sick leave policy before issuing the memorandum.

DISCUSSION

I. Unilateral Change

The charge alleges that the County unilaterally changed the sick leave policy in two ways: (1) by requiring medical verification of all sick leave; and (2) by requiring employees to call their supervisor before each assigned shift from which they were absent.

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c), 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.) Unilateral changes are considered "per se" violations of the duty to meet and confer in good faith if the following criteria are met:

> (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; (4) the action had a generalized effect or continuing impact on terms and conditions of employment.

(*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262.)

A. Medical Verification

The MOUs set forth the County's existing policy regarding sick leave.[4] They provide that the County may require medical verification for absences of less than three working days "for probable cause," if the employee has been notified, in advance and in writing, of the need to provide verification. By issuing the July 23 memorandum, it appears the County provided written notice that medical verification would be required for all employees in the event of a strike.

The charge alleges, however, that a strike does not provide sufficient "probable cause" to allow the County to require medical verification. The Board addressed, and rejected, a similar argument in *Regents of the University of California* (2010) PERB Decision No. 2109-H (*Regents*). In that case, the negotiated sick leave policy stated:

> When it appears to be justified, an employee may be required to submit satisfactory documentation of personal illness or disability to the University in order to receive an excused absence from work and/or sick leave pay. The employee shall be given notice prior to returning to work that he/she will be required to provide such documentation.

Anticipating a strike, the employer in *Regents* sent a document stating, "If any employee does not report to work as assigned, the University will presume—absent medical certification—that her/his absence from work during a declared strike period is strike related." The Board

[4] In general, the terms and conditions of employment contained in a written agreement continue in effect following expiration of the agreement. (*Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M.)

concluded that there had been no change in the sick leave policy, because it allowed the employer to require verification "[w]hen it appears to be justified." The Board also rejected an argument that there was a binding past practice of requiring verification only from employees with an abusive pattern of absences, noting that it is "not an unlawful unilateral change for the employer to enforce the written terms of the contract." (*Ibid.*, citing *Marysville Joint Unified School District* (1983) PERB Decision No. 314; see also *Chico Unified School District* (1983) PERB Decision No. 286 [because parties' agreement allowed employer to "reasonably require[]" proof of illness or injury, medical verification requirement following suspected sick-out was not a unilateral change].)

While the contract language in this case and *Regents*, *supra*, PERB Decision No. 2109-H, differs in form, it does not appear to differ in substance. Both phrases—"probable cause" and "appears to be justified"—suggest that there must be objective reason to believe that employees who call in sick may be improperly claiming sick leave. According to *Regents*, an announced strike provides a sufficient basis to require medical verification. The County's memorandum in this case stated that the medical verification requirement would apply "upon announcement of a strike." Thus, it does not appear that the memorandum announced a change in policy.

Local 1021 appears to suggest that the sick leave policies regarding medical verification do not apply in the type of situation presented here, because the policies were enacted and aimed at preventing the "abuse of sick leave" by employees, "especially for extended absences." This argument is unavailing. "Where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning." (*County of Sonoma* (2012) PERB Decision No. 2242-M.) The MOUs expressly allow the County to require medical verification for absences of less than three days—absences that are, by definition, not "extended"—when it has "probable cause." Moreover, to the extent Local 1021 argues that the use of sick leave by employees participating in a work stoppage is not an "abuse of sick leave," this argument, too, is foreclosed by the MOUs. The MOUs authorize the use of sick leave for specific purposes only. There is no provision in the MOUs authorizing employees to use sick leave while participating in a work stoppage. Because the clear and ambiguous language of the contract gives the County the right to require medical verification when it has "probable cause," the charge fails to allege that the County's July 23 memorandum changed the sick leave policies regarding medical verification. (See *Regents*, *supra*, PERB Decision No. 2109-H.)

B. Notification

The charge also alleges that the July 23 memorandum changed the sick leave policy by requiring notice of an absence before each shift. However, the MOUs provide that employees must notify their departments "of *an absence* prior to the commencement of their work shift." (Emphasis added.) By their own terms, then, the MOUs appear to contemplate notification before each shift. Moreover, employees must keep their departments informed regarding their status and probable date of return "on a continuing basis." The July 23 memorandum's specification that the "continuing basis" must be prior to each subsequent shift was therefore

not inconsistent with the MOU. As a result, the charge fails to allege that the July 23 memorandum changed the policy regarding notification of absences. (See *Regents*, *supra*, PERB Decision No. 2109-H.)

II. Interference

The charge alleges that the July 23 memorandum "threatened employees with discipline or a loss of pay if they failed to follow its new, stringent sick leave verification policy," and therefore "interfered with, intimidated, restrained, coerced and discriminated against" employees.

The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons.

(*Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807.)

The crux of Local 1021's argument appears to be that the sick leave verification policy interfered with the right of employees to engage in a work stoppage. For instance, the charge states that the July 23 memorandum "is simply an unabashed threat by the County to its employees to not participate in the strike."

It is unclear how the July 23 memorandum can be interpreted as a threat of discipline for employees who participated in a work stoppage. The memorandum did not threaten discipline against all employees who were absent during a strike, only those who submitted a falsified claim for sick leave. Thus, the memorandum's only coercive effect would be to discourage employees from participating in a work stoppage while falsely claiming sick leave. The MMBA does not protect such activity. (Cf. *Rio Hondo Community College District* (1983) PERB Decision No. 292 [employer may lawfully refuse to pay striking employees].) While it is true that the July 23 memorandum placed a more onerous burden on employees claiming sick leave, any employee with a legitimate claim for sick leave during a strike would not be participating in the strike. Because this heightened burden on sick leave claimants would therefore not impact protected activity, the July 23 memorandum did not interfere with employees' protected rights.

For these reasons the allegations that the County unilaterally changed its sick leave policies and interfered with employee rights under the MMBA, as presently written, do 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 October 28, 2013,[6] PERB will dismiss the above-described allegation from your charge. If you have any questions, please call me at the telephone number listed above.

Sincerely,

Joseph Eckhart
Regional Attorney

JE

[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.)