STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WAYNE MCKAY, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000, Respondent.	Case No. SA-CO-474-S PERB Decision No. 2406-S January 13, 2015

Appearances: Wayne McKay, on his own behalf; Anne M. Giese, Senior Staff Attorney, for Service Employees International Union, Local 1000.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION[1]

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Charging Party Wayne McKay (McKay) from a dismissal (attached) of his unfair practice charge by the Office of the General Counsel. The charge alleged that the Service Employees International Union, Local 1000 (SEIU) violated the Ralph C. Dills Act (Dills Act or Act)[2] by retaliating against him and breaching its duty of fair representation.

The Office of the General Counsel dismissed the charge on timeliness grounds and for failure to state a prima facie unfair practice case. McKay timely filed an appeal from dismissal on September 22, 2014, and on October 16, 2014, SEIU timely filed its statement in

[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 Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

opposition. By letter of October 17, 2014, the Board's Appeals Assistant informed the parties that the filings were complete and that the case had been placed on the Board's docket on October 16, 2014. Despite that, on November 14, 2014, McKay submitted a document entitled "Appeal of Dismissal, 1st Amendment." In response thereto, on November 18, 2014, SEIU submitted a document entitled "SEIU's Opposition to Amendment on Appeal."

The Board has reviewed the unfair practice case file in its entirety in the course of the Board's consideration of McKay's appeal and SEIU's statement in opposition thereto. The Board finds that the warning and dismissal letters accurately describe the factual allegations of the charge,[3] and that they are well-reasoned and consistent with applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself as supplemented below.

DISCUSSION

Pursuant to PERB Regulation 32635, subdivision (a), an appeal from dismissal must:

> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the grounds for each issue stated.

To satisfy the requirements of PERB Regulation 32635, subdivision (a), the appeal must sufficiently place the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H (*State Employees Trades Council*); *City & County of San Francisco* (2009) PERB Decision No. 2075-M.) An appeal that does not reference the substance of the Board agent's dismissal fails to comply with PERB Regulation 32635, subdivision (a). (*United Teachers of*

[3] By this decision, we correct a minor typographical error on page 4 of the warning letter. The date by which McKay knew or should have known that SEIU would no longer respond to his requests, as referenced in the second paragraph, is August 8, 2013 (not 2014).

Los Angeles (Pratt) (2009) PERB Order No. Ad-381 (*Pratt*); *Lodi Education Association (Huddock)* (1995) PERB Decision No. 1124; *United Teachers – Los Angeles (Glickberg)* (1990) PERB Decision No. 846.) Likewise, an appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635, subdivision (a). (*Pratt; State Employees Trades Council; Contra Costa County Health Services Department* (2005) PERB Decision No. 1752-M; *County of Solano (Human Resources Department)* (2004) PERB Decision No. 1598-M.)

The appeal in this case merely restates facts alleged in the charge. It fails to reference any portion of the warning or dismissal letter, to identify any errors in the Board agent's determination, and thus does not comply with PERB Regulation 32635, subdivision (a). The appeal is denied on that basis. (*City of Brea* (2009) PERB Decision No. 2083-M.)[4]

While the appeal is being denied on procedural grounds for failure to comply with PERB Regulation 32635, subdivision (a), the Board has reviewed the warning and dismissal letters and agrees with the Office of the General Counsel's determination to dismiss the charge. The allegations are not timely, and even if they were, they do not constitute an unfair practice, whether labeled as retaliation or a breach of the duty of fair representation.

Also, the untimely allegations do not fall within the continuing violation exception to the statute of limitations, as the appeal urges. To establish a continuing violation, a charging party must show that there is some new violation, sufficiently independent of the original act,

[4] McKay attempts to correct these deficiencies in his "Appeal of Dismissal, 1st Amendment," presumably in response to SEIU's statement in opposition to his appeal. PERB Regulations provide neither for a reply to a statement in opposition, or for multiple appeals or amendments to an appeal. Accordingly, the Board has not considered McKay's "Appeal of Dismissal, 1st Amendment" or "SEIU's Opposition to Amendment on Appeal" documents. Notwithstanding the regulatory constraints on multiple filings by a single party, McKay submitted the "Appeal of Dismissal, 1st Amendment" outside the 20-day time period for filing an appeal (PERB Reg. 32635, subd. (a)), without a showing of good cause. Under PERB Regulation 32136, a late filing may be excused in the discretion of the Board for good cause only.

occurring within the statutory limitations period. (*North Orange County Community College District* (1999) PERB Decision No. 1342.) A continuing violation is not found where the respondent's conduct during the statutory limitations period is simply maintaining the original position or action it took outside the limitations period. (*Compton Unified School District* (2009) PERB Decision No. 2015.) McKay's claim is based on SEIU's failure to respond to his communications and to arrange a meeting between McKay and his union representative and the union representative's manager. A claim based on such conduct cannot continue without end. (See *Pasadena Unified School District* (1977) EERB Decision No. 16 [prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB].)

The unfair practice charge was filed on April 16, 2014. The six-month statute of limitations period prohibits PERB from issuing a complaint based on alleged conduct that occurred before October 16, 2013. As the Office of the General Counsel determined, McKay, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely by August 8, 2013, the date of McKay's e-mail message to the union representative's manager after their telephone conversation approximately a week earlier. (See *California Media Workers Guild/CWA/Local 3921 (Zhang)* (2012) PERB Decision No. 2245-I (*Zhang*).)

August 2, 2013, was the last time McKay had any contact with either his union representative or his union representative's manager. Paragraph 34 of the second amended charge confirms that at around this point in the chronology, McKay understood that SEIU might not be interested in pursuing McKay's leave balance issue but did not understand why his union representative or the union representative's manager had not told him so. As for McKay's subsequent e-mail message to the president of District Labor Council 787 requesting that he help "facilitate a meeting with my union representatives to discuss my case," the Office of the General Counsel relies on two equally relevant principles in its determination that this

communication does not alter the timeliness analysis. First, once the statute of limitations begins to run, the charging party cannot cause it to begin anew by making the same request over and over again. *(Zhang, supra,* PERB Decision No. 2245-I.*)* Also, a complaint to a higher-level union official does not extend the limitations period. *(Ibid.)* As important, this communication is dated September 27, 2013, approximately three weeks outside the statute of limitations period. Accordingly, not only do we agree with the Office of the General Counsel's statute of limitations analysis, but we also find that the doctrine of continuing violation has no application here. Even were we to find that the charge states a prima facie violation of the duty of fair representation based on conduct outside the limitations period, such an alleged violation does not retain its unlawful character on a continuing basis for purposes of a statute of limitations analysis.

ORDER

The unfair practice charge in Case No. SA-CO-474-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Huguenin and Banks joined in this Decision.

STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377

August 12, 2014

Wayne McKay

Re: *Wayne McKay v. Service Employees International Union Local 1000*
Unfair Practice Charge No. SA-CO-474-S
DISMISSAL LETTER

Dear Mr. McKay:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 16, 2014. Wayne McKay (McKay or Charging Party) alleges that the Service Employees International Union Local 1000 (SEIU or Respondent) violated the Ralph C. Dills Act (Dills Act)[1] by breaching its duty of fair representation.

Charging Party was informed in the attached Warning Letter dated July 14, 2014, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, he should amend the charge. Charging Party was further advised that, unless he amended the charge to state a prima facie case or withdrew it on or before July 28, 2014, the charge would be dismissed.

On July 28, 2014, Charging Party filed a first amended charge. On August 8, 2014, Charging Party filed a second amended charge. In the amended charge, Charging Party also includes an allegation that SEIU retaliated against Charging Party.

Factual Background as Amended

Charging Party is a CSEA member. On or about April 24, 2001, and continuing to approximately May 15, 2005, Charging Party was employed as an Associate Programmer/Analyst with the State Water Resources Control Board (SWRCB or Department).

Prior to October 2004, Charging Party pursued a number of grievances against SWRCB. During this time, Charging Party experienced "a number of issues with the way they were being handled" by CSEA. Thereafter, Charging Party went on record with CSEA management about his complaints. According to Charging Party, "the issues which prompted [the

[1] The Dills Act is codified at Government Code section 3512 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of PERB's Regulations may be found at www.perb.ca.gov.

complaints] only became worse, except now they were accompanied with personal animosity." On or about October 8, 2004, Charging Party filed an unfair practice charge against SEIU regarding the poor quality representation he had received. On or about March 28, 2005, PERB issued a complaint and the matter was ultimately settled.

Since December 22, 2008, Charging Party has been employed as an Associate Programmer/Analyst with the Department of General Services (DGS) except while employed as a limited term staff programmer/analyst with the Department of Human Resources (CalHR).

On or about March 25, 2013, upon return from a brief absence, Charging Party received a voicemail from several days prior from DGS Personnel Analyst Bettay Miller (Miller) stating that Charging Party must return her call within 3 days to make arrangements on leave balances owed to DGS over past furlough days Charging Party should not have taken. Miller stated that if no response was received, the time in question would be unilaterally debited against current leave and vacation credits.

When Charging Party finally spoke with Miller, she confirmed that the leave and vacation credits had already been debited, but agreed to send written confirmation of what had been done.

Charging Party states that because the furlough program consisted of days spent out of the office and not being paid, the logic of paying back time for days Charging Party was not present when management had given permission "made no sense."

Charging Party subsequently contacted SEIU and spoke with David Nelson (Nelson), who told Charging Party that he was supposed to receive written confirmation of the deductions the department was planning to take from Charging Party's next paycheck. Nelson also told Charging Party that he wanted to wait until after it was issued to confirm what had been done before Nelson met with Charging Party.

On or about April 1, 2013, Charging Party confirmed that his leave and vacation benefits had been debited on his following pay check. Thereafter, Charging Party contacted Nelson to set up an appointment. Nelson asked Charging Party to bring copies of his past paystubs showing what had been taken out and some type of written chart or diagram showing a side-by-side comparison of how specific leave credits had changed. Charging Party also provided Nelson with Miller's contact information.

On or about April 24, 2013, Charging Party met with Nelson. During the meeting, Charging Party provided the information requested and stated that he had not received any written accounting from DGS following the adjustment. Nelson then informed Charging Party that he "didn't have to worry about the timelines anymore because he was going to follow it up from this point." Nelson also stated that Charging Party was supposed to have already received something from DGS and that he had a call into the DGS analyst. Charging Party responded to Nelson by stating that DGS typically did not respond to informal requests, and to "be prepared for it."

Charging Party states that he took Nelson's affirmative comments "to mean that [his] efforts to restore the leave and vacation credits improperly taken by the Department had the support of the Union, and as such, in addition to having the option of arbitration available either as a bargaining chip or last resort if need be, by mutual consent, the Department and the Union could also waive a number of related procedural guidelines, such as the filing time limit among others, that individual employees acting on their own could not." Charging Party further states that because of Nelson's assurances, he never attempted to pursue his grievance as an individual employee and his right to do so "lapsed within a week" of his first meeting with Nelson.

On or about July 15, 2013, Charging Party sent an e-mail message to Nelson requesting an update of the status of his case. Charging Party also requested to meet with Nelson and Nelson's manager. On July 16, 2013, Nelson responded to Charging Party stating that DGS had not returned any phone calls. Nelson also asked Charging Party again if any personal time had been taken away. In response to the first meeting date Charging Party requested, Nelson stated he was not available.

On or about July 23, 2013, Charging Party sent a second e-mail message to Nelson asking to meet the following Friday. Nelson replied that he was unavailable.

On or about July 30, 2013, Charging Party sent a third e-mail message to Nelson asking if he was available the following day with his manager. Nelson responded that he was available, however, he did not know whether his manager would be. Nelson also asked whether DGS had taken any type of action against Charging Party. Charging Party responded only that he wanted to meet with both of them. Nelson then responded that he was gathering information and again asked whether DGS had taken any action against Charging Party. Nelson gave no further information about his manager's availability.

Charging Party states that he made a point of keeping a polite and business like tone in the e-mail messages sent to Nelson, "but for a CSEA business representative to say what he said about not being sure of his managers availability when all he had to do was pick up the phone or leave an email message and find out one way or the other, and if so, just offer the next available date, was unprofessional to say the least, and to once again be asked if the Department had taken any sort of action against me after Nelson presumably had some opportunity to check his notes since the last time he asked, meant he was dishonest and incompetent, or there was something else going on that I had experienced once before with the Union." Charging Party further states that "nothing had changed from our first meeting and Nelson was acting like he was not sure what we were going to meet and talk about, in complete contradiction of our first meeting, and the fact that he still was not arranging a meeting with his manager and not even bothering to offer excuses for it anymore left him with no further credibility in my eyes."

On July 31, 2013, Charging Party repeated his request to meet with Nelson and his manager. Nelson responded by stating his willingness to meet and again asking whether DGS had taken

any action against Charging Party. Charging Party states that "it was clear from his comments he had never filed any grievances on [his] behalf or otherwise followed up" on Charging Party's case.

On or about August 2, 2013, Charging Party spoke to Tracey Peake (Peake), Nelson's manager. During the conversation, Charging Party discussed his concerns and asked for a meeting to get things moving. Peake responded that he was willing to meet, but needed to coordinate with Nelson.

On or about August 8, 2013, Charging Party sent an e-mail message to Peake and Nelson confirming the earlier conversation and including past copies of correspondence. Charging Party also left multiple messages, but was unable to reach Peake via telephone. Charging Party states that "by now the opportunity to grieve the case on [his] own had long since passed, in a situation involving an arbitrary action on the part of the Department in which its own internal procedures were not followed, and in standing up for [him] the Union would also be standing up for a number of other employees in the same predicament and presumably should have had every legitimate reason to pursue to the end, but didn't and even if there was some disagreement about whether or not the case deserved to go forward on behalf of everyone else in the same situation, there still seemed to be no logical or rational explanation I could think of for the represented employee in this instance to at least not be notified of the fact."

On or about September 27, 2013, Charging Party sent an e-mail message to Gabe Ledesma (Ledesma), the SEIU Local President, summarizing his dealings with Peake and Nelson and again requested a meeting. Charging Party referenced his earlier unfair practice charge as "likely playing a background role in the difficulty [he] had encountered" in arranging a meeting.

On or about October 2, 2013, Charging Party sent a copy of the September 27, 2013 e-mail message to Ledesma by certified mail.

On or about October 16, 2013, Lesdema had still not responded to Charging Party's e-mail message or letter, "and it seemed by then he was not going to." Charging Party states that "whether as a facilitator or in his own capacity as the [chapter] president, in denying a represented employee an opportunity to meet with his representatives and discuss his case, the effect as well as the pattern of Ledesma's actions was no different and clearly it was no accident."

In closing, Charging Party states:

> With regard to the case itself and how it could have fallen through the cracks so completely, from grievance handling, to meeting requests, to complaints made to CSEA management, in circumstances the Union nominally should have had every legitimate reason and motivation to pursue, or at least explain why it was such a bad idea, taking into account all the hands at

> different levels it passed through along the way, it could very well represent series of unlikely and unfortunate coincidences for the charging party, but the more likely and reasonable explanation is that Nelson, Peake, and Ledesma were all working together in concert to retaliate against a represented employee they viewed as an enemy because of his longstanding history of acrimony with the Union while taking great care to leave no 'smoking gun' type verbal or written exchanges behind that could possibly be used against them the same way as before, but even without damaging quotations, the collective actions taken by the CSEA representatives in denying the charging party an opportunity to meet and discuss his case, or otherwise handle it properly, and the true motivation behind them, speak loud and clear, and they should all be held accountable.

Discussion

In the attached Warning Letter, Charging Party was informed that PERB Regulation 32615(a)(5) 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, a charging party should provide sufficient information to describe 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.)

Charging Party was further informed that the charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) In cases involving the duty of fair representation, the six-month limitations period begins to run when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (*California Media Workers Guild/CWA/Local 3921 (Zhang)* (2012) PERB Decision No. 2245-I.) In retaliation cases, the statute of limitations begins to run when the charging party discovers the conduct that constitutes the unfair practice. (*County of San Diego (Health & Human Services)* (2009) PERB Decision No. 2042-M.)

The charge was filed on April 16, 2014. Therefore, the six-month statute of limitations prohibits PERB from issuing a complaint in this case based on alleged conduct that occurred before October 16, 2013. In the Warning Letter, Charging Party was told that from the facts presented, it appeared that McKay knew or should have known as early as August 8, 2013, or shortly thereafter, that SEIU would no longer respond to his requests. It was on that date that Charging Party sent an e-mail to Peake and Nelson confirming the earlier conversation and requesting a meeting date. Despite multiple subsequent messages, Charging Party received no further response from either Nelson or Peake, nor anyone else at SEIU. In his amended

charge, Charging Party even states that after his July 31, 2013, "it was clear ... [Nelson] had never filed any grievances on [his] behalf or otherwise followed up" on Charging Party's case."

The only timely date provided by Charging Party is October 16, 2013, the date designating two weeks after Charging Party sent Ledesma a certified copy of his September 27, 2013 e-mail message. Once the statute begins to run, the charging party cannot cause it to begin anew by making the same request over and over again. (*California Media Workers Guild/CWA/Local 3921 (Zhang), supra*, PERB Decision No. 2245-I.) A charging party's complaint to a higher-level union official does not extend the limitations period. (*Ibid.*) Therefore, Charging Party's attempts to reach out to Ledesma nearly two months after the last communications with Peake and Nelson do not start the limitations anew.

To the extent that Charging Party now alleges that the same conduct amounts to retaliation, Charging Party discovered SEIU's conduct along the same timelines as addressed above. The addition of the retaliation argument does not change the above analysis. Therefore, the charge is hereby dismissed based on the facts and reasons set forth herein and in the July 14, 2014 Warning Letter.

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. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

WENDI L. ROSS
Acting General Counsel

By _____
Katharine Nyman
Regional Attorney

Attachment

cc: Anne M. Giese, Senior Staff Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377

July 14, 2014

Wayne McKay

Re: *Wayne McKay v. Service Employees International Union Local 1000*
Unfair Practice Charge No. SA-CO-474-S
WARNING LETTER

Dear Mr. McKay:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 16, 2014. Wayne McKay (McKay or Charging Party) alleges that the Service Employees International Union Local 1000 (SEIU or Respondent) violated the Ralph C. Dills Act (Dills Act)[1] by breaching its duty of fair representation.

Factual Background as Alleged

On or about April 24, 2001, and continuing to approximately May 15, 2005, Charging Party was employed as an Associate Programmer/Analyst with the State Water Resources Control Board (SWRCB or Department).

On or about October 8, 2004, Charging Party filed an unfair practice charge against SEIU regarding the poor quality representation he had received. On or about March 28, 2005, PERB issued a complaint and the matter was ultimately settled.

Since December 22, 2008, Charging Party has been employed as an Associate Programmer/Analyst with the Department of General Services (DGS) except while employed as a limited term staff programmer/analyst with the Department of Human Resources (CalHR).

On or about March 25, 2013, upon return from a brief absence, Charging Party received a voicemail from several days prior from DGS Personnel Analyst Bettay Miller (Miller) stating that Charging Party must return her call within 3 days to make arrangements on leave balances owed to DGS over past furlough days Charging Party should not have taken. Miller stated that if no response was received, the time in question would be unilaterally debited against current leave and vacation credits.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and PERB Regulations may be found at www.perb.ca.gov.

When Charging Party finally spoke with Miller, she confirmed that the leave and vacation credits had already been debited, but agreed to send written confirmation of what had been done.

Charging Party states that because the furlough program consisted of days spent out of the office and not being paid, the logic of paying back time for days Charging Party was not present when management had given permission "made no sense."

On or about April 1, 2013, Charging Party confirmed that his leave and vacation benefits had been debited on his following pay check. Charging Party subsequently contacted SEIU and spoke with David Nelson (Nelson), who set up an appointment to meet with Charging Party. Nelson further requested that Charging Party bring copies of his past pay stubs showing what had been taken out and some type of chart or diagram showing a comparison of how the leave credits changed. Nelson also took the telephone number provided by Miller to request a meeting with her.

On or about April 24, 2013, Charging Party met with Nelson. During the meeting, Charging Party provided the information requested and stated that he had not received any written accounting from DGS following the adjustment. Nelson then informed Charging Party that he "didn't have to worry about the timelines anymore because he was going to follow it up from this point." Nelson also stated that Charging Party was supposed to have already received something from DGS and that he had a call into the DGS analyst. Charging Party responded to Nelson by stating that DGS typically did not respond to informal requests, and to "be prepared for it."

On or about July 15, 2013, Charging Party sent an e-mail message to Nelson requesting an update of the status of his case. Charging Party also requested to meet with Nelson and Nelson's manager. On July 16, 2013, Nelson responded to Charging Party stating that DGS had not returned any phone calls. In response to the first meeting date Charging Party requested, Nelson stated he was not available.

On or about July 23, 2013, Charging Party sent a second e-mail message to Nelson asking to meet the following Friday. Nelson replied that he was unavailable.

On or about July 30, 2013, Charging Party sent a third e-mail message to Nelson asking if he was available the following day with his manager. Nelson responded that he was available, however, he did not know whether his manager would be. Nelson also asked whether DGS had taken any type of action against Charging Party. Charging Party responded only that he wanted to meet with both of them. Nelson then responded that he was gathering information and again asked whether DGS had taken any action against Charging Party. Nelson gave no further information about his manager's availability.

On July 31, 2013, Charging Party repeated his request to meet with Nelson and his manager. Nelson responded by stating his willingness to meet and again asking whether DGS had taken

any action against Charging Party. Charging Party states that "it was clear from his comments he had never filed any grievances on [his] behalf or otherwise followed up..."

On or about August 2, 2013, Charging Party spoke to Tracey Peake (Peake), Nelson's manager. During the conversation, Charging Party discussed his concerns and asked for a meeting to get things moving. Peake responded that he was willing to meet, but needed to coordinate with Nelson.

On or about August 8, 2013, Charging Party sent an e-mail message to Peake and Nelson confirming the earlier conversation and including past copies of correspondence. Charging Party also left multiple messages, but was unable to reach Peake via telephone.

On or about September 27, 2013, Charging Party sent an e-mail message to Gabe Ledesma (Ledesma), the SEIU Local President, summarizing his dealings with Peake and Nelson and again requested a meeting. Charging Party referenced his earlier unfair practice charge as "likely playing a background role in the difficulty [he] had encountered" in arranging a meeting.

On or about October 2, 2013, Charging Party sent a copy of the September 27, 2013 e-mail message to Ledesma by certified mail.

On or about October 16, 2013, Charging Party "had received no response to [his] e-mail or letter from Lesdema, Peake, or Nelson in 2 weeks' time and by then [he] realized [he] was not going to."

Discussion

1. Burden

PERB Regulation 32615(a)(5) 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, a charging party should provide sufficient information to describe 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.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.)

In cases involving the duty of fair representation, the six-month limitations period begins to run when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (*California Media Workers Guild/CWA/Local 3921 (Zhang)* (2012) PERB Decision No. 2245-I.)

From the facts presented, it appears that McKay knew or should have known by August 8, 2014, or shortly thereafter, that SEIU would no longer respond to his requests. It was on that date that Charging Party sent an e-mail to Peake and Nelson confirming the earlier conversation and requesting a meeting date. Despite multiple subsequent messages, Charging Party received no further response from either Nelson or Peake.

Once the statute begins to run, the charging party cannot cause it to begin anew by making the same request over and over again. (*California Media Workers Guild/CWA/Local 3921 (Zhang)*, *supra*, PERB Decision No. 2245-I.) A charging party's complaint to a higher-level union official does not extend the limitations period. (*Ibid.*) Therefore, Charging Party's attempts to reach out to Ledesma nearly two months after the last communications with Peake and Neloson do not start the limitations anew. As such, the charge appears untimely as filed.

2. Duty of Fair Representation

Regardless, even if the charge was timely filed, Charging Party has not presented sufficient facts to establish that SEIU breached its duty of fair representation.

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by Dills Act section 3515.7(g) and *California State Employees' Association (Norgard)* (1984) PERB Decision No. 451-S and thereby violated section 3519.5(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Teachers Association (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of the Dills Act, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith. In *United Teachers of Los Angeles (Collins)*, the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment.

(Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation in "cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also, *Robesky v. Quantas Empire Airways Limited* (9th Cir. 1978) 573 F.2d 1082.)

The Board has previously held that an exclusive representative's failure to respond to inquiries from a charging party and delay in filing a grievance were at most "mere negligence." (*United Teachers of Los Angeles (Strygin)* (2010) PERB Decision No. 2149.) Where there is no evidence that charging party was foreclosed from any remedy, a charge fails to establish a prima facie case for breach of the duty of fair representation. (*Ibid.*) Here Charging Party states only that SEIU failed to respond to his correspondence and set up a meeting at his request. In light of the aforementioned case law, such conduct does not rise to the level of a breach of the duty of fair representation. As written, the charge does not identify how charging party was in any way foreclosed from any remedy or otherwise harmed.

Charging Party alleges no other facts to demonstrate that SEIU abused its discretion or that its actions were without a rational basis or devoid of honest judgment. As such, the charge fails to state a prima facie violation of the duty of fair representation.

For these reasons the charge, as presently written, does not state a prima facie case.[2] 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

[2] 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.*)

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 July 28, 2014,[3] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Katharine Nyman
Regional Attorney

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