

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DEBRA E. ROY,

Charging Party,

v.

SERVICE EMPLOYEES INTERNATIONAL
UNION, UNITED HEALTHCARE WORKERS
WEST,

Respondent.

Case No. SA-CO-122-M

PERB Decision No. 2428-M

June 4, 2015

Appearances: Debra E. Roy, in propria persona; Weinberg, Roger & Rosenfeld by Bruce A. Harland, Attorney, for Service Employees International Union, United Healthcare Workers West.

Before Huguenin, Banks and Gregersen, Members.

DECISION¹

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Debra E. Roy (Roy) from the dismissal (attached) of her unfair practice charge. Roy's charge alleges that the Service Employees International Union, United Healthcare Workers West (SEIU) violated the Meyer-Milias-Brown Act (MMBA)² when it deducted fees from her paycheck without her authorization.

¹ PERB Regulation 32320(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. Unless otherwise indicated, all statutory references herein are to the Government Code.

We have reviewed the unfair practice charge, the amended charge, the warning and dismissal letters, the appeal and the entire record in light of relevant law. Based on this review, we affirm the dismissal.

PROCEDURAL HISTORY

On December 30, 2014, Roy filed an unfair practice charge. On January 27, 2015, SEIU filed a notice of appearance. On March 3, 2015, PERB's Office of the General Counsel sent Roy a warning letter. On March 19, 2015, the Office of the General Counsel dismissed Roy's charges. On April 1, 2015, Roy filed a timely appeal of her dismissal. On April 22, 2015, PERB's Appeal Assistant notified the parties that the filings were complete.

FACTS

Roy is employed by the County of San Joaquin (County) as an In-Home Supportive Service (IHSS) provider. SEIU is the exclusive representative for her bargaining unit.

Roy alleges in her charge that on some undisclosed date an issue arose between Roy and a "case worker."³ (Warning Ltr., p. 1.) On or about July 29, 2014, Roy went to an SEIU office at an unidentified location and met with a person named Aimee.⁴ As alleged by Roy, she believed she was going to SEIU to discuss some questions she had regarding her encounter with the case worker but was subjected, instead, to heavy solicitation from SEIU. (*Ibid.*)

Roy alleges in her charge that at the SEIU office she was "given many papers to sign" and invited to an SEIU event in Sacramento. (Warning Ltr., p. 1.) Roy was non-committal about attending the event and indicated that she could "probably afford \$20-25.00" if she were able to attend. (*Id.* at p. 2.) "[L]ong before the day of pick up," Roy informed SEIU that she

³ No details of this issue were disclosed in the charge and the case worker and her employer were not identified.

⁴ This person is not further identified in the charge, but she appears to be an employee of SEIU in some undisclosed capacity.

would not attend the event. (*Ibid.*) Roy appears to allege that SEIU deducted the money for the Sacramento trip, but she does not indicate if it was \$20, \$25 or some other amount.

Roy alleges in her charge that she took pain medication during her meeting with SEIU, “made many comments about not feeling well,” and left before completing SEIU’s payroll deduction authorization. (Warning Ltr., p. 2.) Nevertheless, alleges Roy, the payroll deduction was completed and processed without her consent.

WARNING AND DISMISSAL

In its warning letter of March 3, 2015, the Office of the General Counsel determined that, based on the context of the charge, Roy appeared to be challenging the agency shop agreement between SEIU and the County. The Office of the General Counsel noted that MMBA section 3502.5(a)⁵ authorizes a public agency to enter into an agency shop agreement with a recognized exclusive representative and that written authorization by agency fee payers or bargaining unit members is not required before an employer may withhold agency fee deductions. (*San Jose Unified School District* (1984) PERB Decision No. 463; *King City High School District Association, CTA/NEA; King City Joint Union High School District; et al. (Cumero)* (1982) PERB Decision No. 197.)

⁵ MMBA section 3502.5. “Agency shop agreements; payments in lieu of dues or fees; rescission; application; records”

(a) Notwithstanding Section 3502, any other provision of this chapter, or any other law, rule, or regulation, an agency shop agreement may be negotiated between a public agency and a recognized public employee organization that has been recognized as the exclusive or majority bargaining agent pursuant to reasonable rules and regulations, ordinances, and enactments, in accordance with this chapter. As used in this chapter, “agency shop” means an arrangement that requires an employee, as a condition of continued employment, either to join the recognized employee organization or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization.

The Office of the General Counsel also addressed the Supreme Court's decision in *Harris v. Quinn* (2014) 134 S.Ct. 2618 (*Harris*) which Roy relied upon for the proposition that MMBA section 3502.5(a) was unconstitutional and the agency fee deduction was, thus, unenforceable. The Office of the General Counsel determined that PERB does not have jurisdiction to declare a statute unconstitutional or to refuse to enforce a statute on constitutional grounds absent a determination by an appellate court that the statute is unconstitutional. (*The Regents of the University of California* (1999) PERB Order No. Ad-293-H.) The Office of the General Counsel determined that Roy had failed to state a prima facie case and afforded Roy the opportunity to file an amended charge.

On or about March 13, 2015, Roy spoke with Deputy General Counsel Wendi Ross (Ross) from the Office of the General Counsel concerning Roy's charge:

During the conversation, Charging Party confirmed receipt of the initial Warning Letter and asked that it be provided to her again, via e-mail message. In response, Ross sent Charging Party an e-mail message with the March 3, 2015 Warning Letter attached. Charging Party then responded to Ross stating that she would take her "chances with the Board."

(Dismissal Ltr., p. 1.) Roy did not file an amended charge addressing the deficiencies addressed in the warning letter, and her charge was dismissed on March 19, 2015.

APPEAL

On appeal, Roy asserts that she is "no longer liable to pay any fees whatsoever." (Appeal, p. 1.) Although not clearly stated, Roy presumably reasserts her argument that *Harris, supra*, 134 S.Ct. 2618 found agency fee provisions unconstitutional, therefore MMBA section 3502.5(a) is unconstitutional and SEIU may not collect an agency fee without her consent. Based on her interpretation of *Harris*, Roy maintains that SEIU's payroll deduction authorization is fraudulent because it indicates that County IHSS providers must pay fees despite *Harris's* holding to the contrary.

Roy also alleges that SEIU's payroll deduction authorization is ambiguous and purposefully misleading. Roy also reasserts her allegation that she did not complete the payroll deduction authorization and that it was completed by someone else and processed without her consent. In support of her contentions, Roy submits two documents that were not submitted with her unfair practice charge: (1) a December 19, 2014, letter from SEIU Lead Membership Auditor, Ivan Gasparini (Gasparini); and (2) a copy of her July 29, 2014, SEIU "Membership Application/Payroll Deduction Authorization."

DISCUSSION

Standard of Review

Our discussion below addresses charge allegations. We presume the facts alleged in the charge are true. We do so because when assessing the dismissal of an unfair practice charge, we view the allegations in the light most favorable to the charging party.⁶

Constitutionality of MMBA section 3502.5(a)

We concur with the Office of the General Counsel that PERB lacks jurisdiction to determine that the statutes it enforces are unconstitutional. (*San Dieguito Union High School District* (1977) EERB⁶ Decision No. 22 [Constitutional validity of statute will be left to judiciary]; *Association of California State Attorneys and Administrative Law Judges (Mayer)* (1987) PERB Decision No. 637-S [PERB has no authority to declare a statute unconstitutional; Board must assume statute "suffers no constitutional infirmity"]; *San Ramon Valley Unified School District* (1989) PERB Decision No. 751 [Absent antecedent appellate court decision, not within Board's authority to refuse to enforce portion of statute even if Board believes it is

⁶ At this stage of the proceedings, we assume, as we must, that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB Decision No. 12 (Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.); *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755.)

unconstitutional].) Thus, to the extent Roy alleges that MMBA section 3502.5(a) is unconstitutional and that therefore SEIU is no longer able to deduct fees from her paycheck without her consent, her charge allegations are dismissed.

Fraud and Misrepresentation Allegations

We conclude that Roy's allegation that her payroll deduction authorization was completed and processed without her consent is conclusory and unsupported by any evidence. (*California School Employees Association (Lohmann)* (1991) PERB Decision No. 898 [pleading a bare allegation without supporting facts is insufficient for purposes of alleging a prima facie case].) Roy does not state with any specificity how SEIU's conduct was fraudulent or what portions of the payroll deduction authorization were fraudulently procured. Therefore, we dismiss Roy's charge allegations that her consent to the payroll deduction authorization was obtained through fraud.

Evidence submitted for the First Time on Appeal

PERB Regulation 32635(b) states:

Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

In her appeal, Roy submits two documents that were not submitted to the Office of the General Counsel in support of her unfair practice charge.⁷ Both of the documents submitted by Roy for the first time on appeal were available to her when she filed her unfair practice charge and before her charges were dismissed by the Office of the General Counsel. The Office of the

⁷ Roy submitted: (1) a copy of a letter dated December 19, 2014, from SEIU Lead Membership Auditor, Gasparini, which indicated that SEIU was ceasing the collection of agency fees from non-members in light of the uncertainty over the *Harris* decision, but that Roy had signed a Membership Application/Payroll Deduction Authorization on July 29, 2014, which irrevocably authorized dues deductions for one year; and (2) a copy of Roy's July 29, 2014, SEIU Membership Application/Payroll Deduction Authorization, which indicated that Roy was a member of SEIU.

General Counsel contacted Roy by telephone on March 13, 2015. Roy was afforded an opportunity at that time to amend her charge and submit the evidence which she now submits on appeal. Roy provides no explanation for failing to present these documents during the processing of her charge; since Roy has not demonstrated good cause for her delay in submitting the documents, we may not consider them in her appeal.

ORDER

The unfair practice charge in Case No. SA-CO-122-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Banks and Gregersen joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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



March 19, 2015

Debra E. Roy
P.O. Box 1754
Stockton, CA 95201

Re: *Debra E. Roy v. Service Employees International Union United Healthcare Workers West*
Unfair Practice Charge No. SA-CO-122-M
DISMISSAL LETTER

Dear Ms. Roy:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 30, 2014. Debra E. Roy (Roy or Charging Party) alleges that the Service Employees International Union United Healthcare Workers West (SEIU or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act).¹

Charging Party was informed in the attached Warning Letter dated March 3, 2015, 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, she should amend the charge. Charging Party was further advised that, unless she amended the charge to state a prima facie case or withdrew it on or before March 17, 2015, the charge would be dismissed.

PERB has not received either an amended charge or a request for withdrawal. On March 13, 2015, Charging Party spoke with Deputy General Counsel Wendi Ross (Ross). During the conversation, Charging Party confirmed receipt of the initial Warning Letter and asked that it be provided to her again, via e-mail message. In response, Ross sent Charging Party an e-mail message with the March 3, 2015 Warning Letter attached. Charging Party then responded to Ross stating that she would take her "chances with the Board." Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the March 3, 2015 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

¹ The MMBA is codified at Government Code section 3500 et seq. PERB's 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.

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.)

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Final Date

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

Sincerely,

J. FELIX DE LA TORRE
General Counsel

By _____
Katharine Nyman
Regional Attorney

Attachment

cc: Bruce Harland, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

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



March 3, 2015

Debra E. Roy
P.O. Box 1754
Stockton, CA 95201

Re: *Debra E. Roy v. Service Employees International Union United Healthcare Workers West*
Unfair Practice Charge No. SA-CO-122-M
WARNING LETTER

Dear Ms. Roy:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 30, 2014. Debra E. Roy (Roy or Charging Party) alleges that the Service Employees International Union United Healthcare Workers West (SEIU or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act).¹

Charging Party is an In-Home Supportive Services (IHSS) worker and appears to work in the County of San Joaquin (County). Citing *Harris v. Quinn*, (2014) 134 S.Ct. 2618 (*Harris v. Quinn*), Charging Party asserts that the SEIU contract is unenforceable due to “nondisclosure, misrepresentation, duress, and unconscionability.” The Unfair Practice Charge goes on to state verbatim:

Dear Madam or Sir:

I had contacted Aimee² a few times regarding questions about my hours and an encounter I had with a case worker. I was invited to come into the office on 07/29/2014 and I believed I was there to discuss the questions I had but instead I was invited there to be heavily solicited.

I was given many papers to sign and was told about an event they were having in Sacramento and was invited to go. I told Aimee

¹ The MMBA is codified at Government Code section 3500 et seq. PERB’s 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 individual is never identified in the charge, but appears to work for the Respondent.

that because I was a live-in provider that it would depend on how my client was feeling. Aimee asked how much I could afford to give for the bus ride up there and the hotel stay. I told her that if I was going I could probably afford \$20-\$25.00. Aimee asked me if I could give any of it today and I told her that I could not and that I would give it on the date of pick up if I was going. I called and informed her that I would not be attending long before the day of pick up and I never gave consent for them to take the money out of my check but they did.

I was having severe back pain and so I had to take a Norco 10. I made many comments about me not feeling well. One of the many piece[s] of paper that I was given was the extremely ambiguous contract authorizing a payroll deduction. I was given many stories of what could happen without the unions help and I was completely overwhelmed. I eventually left without completing the form because I was just not able to do so.

The [contract] was completed without my consent and turned in. I would recommend a complete investigation on the many IHSS providers who are being deceived into signing this form. This form should have never been completed without my consent and processed. I want my money back.

Discussion

It appears from the context of the charge, that Charging Party takes issue with the agency shop agreement currently in place between the SEIU and the County. As an IHSS worker for the County, Charging Party is currently subject to the MMBA.

MMBA section 3502.5 authorizes a public agency and a recognized exclusive representative (i.e., union) to enter into an agency shop agreement. This statute provides that, under an agency shop agreement, employees of the public agency are required, as a condition of employment, either to join the union and pay union dues, or to refrain from joining the union and pay an agency fee in lieu of union dues. (*City & County of San Francisco (Department of Aging and Adult Services)* (2012) PERB Decision No. 2295-M.) Here, there appears to be a bargaining relationship between SEIU and the County. SEIU appears to be the exclusive representative of County IHSS workers. Therefore, it appears Charging Party must pay union dues, or, in the alternative, an agency fee. Based upon the facts provided, this is a lawful requirement authorized under the MMBA. (*Ibid.*) The fact that Charging Party alleges that her payroll deduction authorization was authorized "without her consent" does not change the fact that she was required to pay some monetary amount to SEIU. (See *San Jose Unified School District* (1984) PERB Decision No. 463; *King City High School District Association, CTA/NEA; King City Joint Union High School District; et al. (Cumero)* (1982) PERB Decision

No. 197 [written authorization is not required before an employer may withhold agency fee deductions from nonmember paychecks].)

Citing *Harris v. Quinn*, Charging Party states that the SEIU contract is “unenforceable due to nondisclosure, misrepresentation, duress, and unconscionability.” In *Harris v. Quinn*, the United States Supreme Court held that “personal assistants” under the Illinois’ Home Services Program may not be required to pay agency fees to their exclusive bargaining representative as a condition of their employment. Since MMBA section 3502.5(a) authorizes a public agency and a recognized exclusive representative to enter into an agency shop agreement, it appears that Charging Party is essentially arguing that MMBA section 3502.5(a) is unconstitutional pursuant to the *Harris v. Quinn* holding. However, it is well-settled that PERB does not have the authority to declare a statute unconstitutional. (*The Regents of the University of California* (1999) PERB Order No. Ad-293-H [PERB has no power: (1) to refuse to enforce a statute on the ground that it is unconstitutional unless an appellate court has made a determination that it is unconstitutional; (2) to declare a statute unconstitutional; or (3) to declare a statute unenforceable on the basis that federal law or regulations prohibit enforcement, unless an appellate court has determined that enforcement of such statute is prohibited by federal law or regulation].) Therefore, PERB does not have the authority to find MMBA section 3502.5(a) unconstitutional, despite the holding of *Harris v. Quinn*.

For these reasons the charge, as presently written, does not state a prima facie case.³ 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 March 17, 2015,⁴ PERB

³ 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.*)

⁴ A document is “filed” on the date the document is **actually received** by PERB, including if transmitted via facsimile or electronic mail. (PERB Regulation 32135.)

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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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