STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BLAINE DREWES, Charging Party, v. CITY OF LIVERMORE, Respondent.	Case No. SF-CE-1177-M PERB Decision No. 2435-M June 22, 2015

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Blaine Drewes; E. Kevin Young, Assistant City Attorney, for City of Livermore.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION[1]

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by charging party Blaine Drewes (Drewes) of a partial dismissal (attached) of his unfair practice charge by the PERB Office of the General Counsel. Drewes' first amended charge alleged that the City of Livermore (City) violated the Meyers-Milias-Brown Act (MMBA)[2] by applying an unreasonable requirement in its Employer-Employee Relations Resolution No. 9-77 (EERR) permitting only employee organizations to file a petition to modify an existing bargaining unit (thereby effectively prohibiting individual

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

employees from filing such petitions).[3] Drewes alleged that this conduct constituted a violation of sections 3502, 3507, 3507.1(a) and (c), and 3505.4(b) and (d) of the MMBA.

The Board has reviewed the case file in its entirety in its consideration of Drewes' appeal. Based on that review, the Board finds that the partial dismissal letter correctly describes the factual allegations contained in the charge. The partial dismissal letter is well-reasoned and in accordance with applicable law. Accordingly, the Board hereby affirms the partial dismissal of the charge and adopts the partial dismissal letter as the decision of the Board itself, subject to the discussion below.

ALLEGED FACTS AND ALLEGATIONS IN FIRST AMENDED CHARGE

In his first amended charge filed on or about November 18, 2014, Drewes alleges the following relevant facts:

The City's EERR provides that an employee organization may request a modification of an established representation unit. Section 8 of the EERR (Section 8) states, in relevant part:

> An employee organization may request the modification of an established representation unit by submitting to the City Manager a petition accompanied by proof of employee approval of the proposed modification signed by no less than 60% of those employees who, if the proposed modification should be granted, would be moved from one representation unit to another.

[3] The first amended charge also included allegations that: (1) the City's application and enforcement of its EERR was contrary to the MMBA because the EERR required a supermajority of 60 percent of employees encompassed by a petition for unit modification to support the petition before the petition would be considered, and the City rejected the petition for failing to meet the 60 percent threshold; and (2) the City's determination of the appropriate unit to be considered for separation from the exiting bargaining unit was inconsistent with the criteria enumerated in the EERR. The Office of the General Counsel issued a complaint on January 22, 2015, encompassing both of these allegations. On the same day, the Office of the General Counsel also issued a partial dismissal of the allegation described in the main body of this memo.

Pursuant to the EERR, a group of employees joined together and drafted a petition for modification of representation (also referred to as a "petition for separation"), which was submitted to City of Livermore City Manager Marc Roberts (Roberts) on November 21, 2013. (Exh. 3 and 4.) The cover letter to the petition was signed by City employees Drewes and Shelby Anderson, who identified themselves as "representatives of the clerical, professional, technical, maintenance, and operations staff of the City of Livermore Public Works Department." The letter stated that "[a]n overwhelming majority of the employees are requesting the modification of an established representation unit by separating from the Association of Livermore Employees (ALE), and joining a new bargaining unit."

Attached to the first amended charge is a purported "Master Memorandum of Understanding" (MOU) between Municipal Employees' Agency for Negotiations (MEAN) and City of Livermore with an effective date of April 1, 2012 through March 31, 2014. (Exh. 2.) According to the first amended charge, the MOU "is the Memorandum of Understanding between the City of Livermore and the current organization that represents employees who joined together to modify the bargaining unit." From this information and statements made in the exhibits attached to the first amended charge, it is presumed that ALE is the current name of the employee organization formerly known as MEAN.

On or about January 7, 2014, Roberts issued an interoffice memorandum to "Employees Employed in the Airport and Water Resources Division of the Public Works Department; Mike Pato, President of A.L.E.; Employees In Classifications Affected By Unit Modification" regarding "Petition for Modification of Association of Livermore Employee Group." (Exh. 5.) This memorandum noted that the request for unit modification was inclusive of 50 employees in 28 job classifications, and that the EERR states that an appropriate unit is the broadest feasible grouping of positions that have a "community of

interest" as determined by the City Manager. The memorandum determined that a different unit, larger than the petitioned-for unit, was "a more appropriately formed unit for purposes of Unit Modification," and listed the classifications to be included in the unit. The memorandum also noted that "[i]n accordance with Section 8C of the [EERR] as stated below, the City Manger's decision shall be final . . . ."

On or about February 5, 2014, Roberts issued a follow-up memorandum regarding "Final Determination Regarding Modification of ALE Bargaining Unit." (Exh. 7.) After noting he had received written protests to his proposed unit, Roberts indicated that on January 9, 2014, he had received a petition from 32 maintenance employees in various classifications stating that it was their wish to remain in the ALE unit. According to Roberts, "[t]he petition submitted on behalf of the employees within the Airport and Water Resources Divisions includes 41 names of employees determined to be interested within the meaning of classification meeting the criteria for affiliation."[4]

Roberts then stated:

> In accordance with Section 8A of the EERR, 60 percent of the affected employees would need to sign a petition affecting the proposed unit modification. Based on the classifications which I have determined that [sic] should be included in the proposed new bargaining unit and on the numbers above, only 56 percent of employees having signed a petition would be in favor of such unit modification.
>
> Using the 60 percent representation support rule contained in Section 8 of the EERR "Modification of Representation Units" as a guide, I now find that there is insufficient support among the classes of employees which would be included in the new bargaining unit.
>
> Therefore, I am modifying my original draft determination and denying the petition filed on behalf of the Airport and Water Resources employees. My denial of the petition is based on the fact that the petitioners for unit modification seek to exclude

[4] The petition contains a total of 47 signed names.

> employee classifications I have determined to be appropriately assigned to the proposed new bargaining unit, and once these classifications are included, there is insufficient support for the new bargaining unit. This is my final determination regarding the November 21, 2013 petition for modification of the ALE Bargaining Unit. . .

In the first amended charge, Drewes alleges, in relevant part, that:

> the requirement that a modification can only be submitted by an employee organization and not a member of the bargaining unit is unreasonable, notwithstanding that it mirrors the Meyers-Milias-Brown Act regulation 32781. The employer, through its agent Marc Roberts, rejected the Petition for reasons that are not consistent with the Meyers-Milias-Brown Act, or the regulations defining appropriate standards for unit modification or, for that matter, the establishment of representation units.

PARTIAL DISMISSAL LETTER

In its partial dismissal letter, the Office of the General Counsel stated, in relevant part:

> The First Amended Charge does not allege that the City applied Section 8's rule that employee organizations must request a unit modification in order to reject Charging Party's petition. Rather, in spite of Section 8, the City appears to have initially accepted the petition and then rejected it for a different reason.
>
> Because the First Amended Charge neither alleges the City adopted Section 8 or applied this rule to reject Charging Party's petition within the 6 months before the filing of the original charge, this particular challenge to the City's local rule is not timely.[5]

[5] We note that in footnote 7 of the partial dismissal on page 4, the Office of the General Counsel states: "Although the City now claims in its unverified position statement that Section 8 does not grant Charging Party standing to petition for a unit modification, neither party has presented verified evidence indicating that the City rejected Charging Party's petition because he was an individual employee. Therefore, any review by PERB of this component of Section 8 would constitute an advisory opinion." (Citation omitted.) We adopt this statement only insofar as the reference to "verified evidence" of an allegation in this context includes allegations made in an unfair practice charge duly signed under penalty of perjury.

DREWES' APPEAL AND CITY'S RESPONSE

Drewes appealed the Office of the General Counsel's partial dismissal of his charge on February 9, 2015. Drewes argues that in Roberts' February 5, 2014, "Final Determination Regarding Modification of ALE Bargaining Unit" (Exh. 7), the City "adopted and applied Section 8 . . . well within the six months statute of limitations."

The City responded on March 11, 2015, contending that the partial dismissal by PERB was appropriate, but that a full dismissal of all claims filed by Drewes was warranted.[6]

DISCUSSION

Drewes seems to be making a technical appeal of the Office of the General Counsel's statement in the dismissal letter that "the First Amended Charge neither alleges the City adopted Section 8 or applied *this rule* to reject Charging Party's petition . . ." (Emphasis added.) Out of context, that sentence could be construed to imply that the first amended charge did not allege that Roberts applied any portion of Section 8 (including the 60 percent rule) in rejecting the petition. However, in context of the entire dismissal letter, it is clear that "this rule" refers to Section 8's requirement that an employee organization request a unit modification.

None of Roberts' memos or any other exhibits to the first amended charge indicate that the City rejected the petition for unit modification because it was filed by individual employees, rather than an employee organization. Nowhere in Drewes' first amended charge does he specifically allege that the City rejected the petition on this or other standing grounds.

[6] We note that a decision by the Office of the General Counsel to issue a complaint is not appealable under PERB Regulation 32640(c), which states in relevant part: "The decision of a Board agent to issue a complaint is not appealable to the Board itself except in accordance with Section 32200." The only exception, as noted in PERB Regulation 32200, are objections to a Board agent's interlocutory order or ruling on a motion, neither of which pertains to this case.

The Office of the General Counsel's statement that Drewes' allegation is untimely, because at no time during the six-month limitations period did the City reject Drewes' petition on standing grounds, taken in context, is therefore correct.

Even if the City had rejected Drewes' petition on the grounds that he lacked standing as a petitioner under Section 8 within the six-month statute of limitations, we would still affirm the dismissal of that allegation. Such standing requirement is reasonable and consistent with PERB's regulations that are applicable to representation matters under MMBA and the other collective bargaining acts. PERB Regulation 32781 states, in relevant part:

> Absent agreement of the parties to modify a unit, *an exclusive representative,* an employer, or both must file a petition for unit modification in accordance with this section. Parties who wish to obtain Board approval of a unit modification may file a petition in accordance with the provisions of this section.
>
> (a) *A recognized or certified employee organization* may file with the regional office a petition for modification of its units:
>
> [¶]
>
> (2) To divide an existing unit into two or more appropriate units;

(Emphasis added.)

In this case, EERR Section 8 mirrors the provisions of PERB Regulation 32781 that specify that unit modification petitions may be brought only by employee organizations, not individuals or "groups of employees." Drewes cites to no authority for the proposition that a local regulation may be deemed to be unreasonable when it mirrors the analogous PERB regulation.

The Board has confirmed that individuals lack the statutory right under the Educational Employment Relations Act (EERA)[7] to present a unit composition question to the Board (*Riverside Unified School District (Petrich)* (1985) PERB Order No. Ad-148a, pp. 3-4), noting

[7] EERA is codified at Government Code section 3540 et seq.

that "individuals acting alone have standing to file unfair practice charges, but not to initiate or to participate as parties in representation proceedings." (*Id.* at p. 4.) See also *Riverside Unified School District* (1985) PERB Decision No. 512 (individual employees lack standing to challenge unit configuration). The Board recognized the same standing rule applies to the Higher Education Employer-Employee Relations Act (HEERA)[8] in *State Employees Trades Council-United (Chemello)* (2006) PERB Decision No. 1867-H. The Board also held in *County of Riverside* (2012) PERB Decision No. 2280-M that "[n]either represented nor unrepresented employees have standing to contest placement of their position or job classification in a particular bargaining unit." (*Id.* at p. 9; underline in original.) As these cases show, PERB has firmly established an individual's lack of standing to file a unit modification petition with PERB.

We therefore affirm the Board agent's dismissal of the allegation.

ORDER

The unfair practice charge in Case No. SF-CE-1177-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Huguenin joined in this Decision.

[8] HEERA is codified at Government Code section 3560 et seq.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1019
Fax: (510) 622-1027

January 22, 2015

Stewart Weinberg, Attorney
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091

Re: *Blaine Drewes v. City of Livermore*
Unfair Practice Charge No. SF-CE-1177-M
PARTIAL DISMISSAL

Dear Mr. Weinberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 25, 2014. In this charge, Blaine Drewes (Drewes or Charging Party) alleged that the City of Livermore (City or Respondent) violated sections 3502, 3507, 3507.1(a) & (c), and 3506.5(b) & (d) of the Meyers-Milias-Brown Act (MMBA or Act)[1] and PERB regulations 32603(a), 32603(b), 32603(d) and 32603(f) by failing to explain how and why it applied its local rules within Employer-Employee Relations Resolution No. 9-77 (EERR) when determining the composition of a bargaining unit. Charging Party also alleged that the City's actions violated Section 8 of the EERR.

Charging Party was informed, in the attached Warning Letter dated October 29, 2014, that the above-referenced charge did not state a prima facie case. The letter advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in the letter, then the charge should be amended. Charging Party was further advised that unless the charge was amended to state a prima facie case or withdrawn on or before November 12, 2014, the charge would be dismissed.[2]

On November 19, 2014, Charging Party filed a First Amended Charge.

THE INITIAL CHARGE AND PERB'S WARNING LETTER

As explained in more detail in the attached Warning Letter, Charging Party's initial charge alleged that the City violated the MMBA by not explaining how and why it applied its local

[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] Charging Party was given an extension to file the First Amended Charge upon a showing of good cause.

rules to determine the composition of a bargaining unit. The City made this determination in response to a petition from Charging Party and other employees in the Airport Division and Water Resources Division to modify the existing Association of Livermore Employees bargaining unit (A.L.E. bargaining unit).[3] Charging Party and the other employees in the Airport and Water Resources Divisions wished to create a new unit composed exclusively of their own classifications. According to Section 8, an employee organization may request the modification of an existing unit by submitting a petition signed by no less than 60 percent of those employees who would be moved to a new unit if the petition were granted. From among the 50 classifications that would comprise the new unit initially proposed by Charging Party, 42 of the current employees (92 percent) affirmed their support by signing the petition.

After reviewing Charging Party's petition and considering the objections of A.L.E. as well as other affected employees, City Manager Marc Roberts (Roberts) eventually denied Charging Party's request. Under Section 7, the City Manager determines the appropriate composition of a bargaining unit. This local rule mandates that the unit be the broadest feasible grouping of positions sharing a community of interest. Section 7 also sets forth eight criteria for ascertaining which classifications share a community of interest. After allegedly applying these criteria, Roberts found that the majority of the classifications within the Airport and Water Resources Divisions shared a community of interest with classifications from other divisions that had originally been in the 1977 Public Works Unit and also other maintenance-related classifications. Roberts also found that four classifications from within the Airport Division and Water Resources Division shared a community of interest with the remainder of the classifications in the A.L.E. bargaining unit and therefore needed to be excluded from the unit Charging Party requested to create.

With the identity of the constituent classifications determined, Roberts next concluded that the new bargaining unit would include 73 employees. These employees were the 32 maintenance-related employees from other divisions who did not wish to join the new bargaining unit, and 41 of the original petitioning employees from the Airport and Water Resources Divisions. Roberts then found that because only 41 of these 73 employees (56 percent) supported the creation of a new bargaining unit, the level of support for modification fell below the 60 percent threshold required by the City. With the petition failing to meet the minimum level of support, Roberts consequently denied it.

The attached October 29, 2014 Warning Letter informed Charging Party that the charge did not allege a prima facie violation of the MMBA or of the City's local rules. In brief, the Warning Letter stated that PERB may review whether a local rule is reasonable in itself, and also whether the public agency applied this rule reasonably when determining the composition of a bargaining unit. (*County of Riverside* (2010) PERB Decision No. 2119-M; *County of*

[3] The A.L.E. bargaining unit is represented by the Association of Livermore Employees (A.L.E.). As stated in the warning letter, it does not appear that Charging Party's petition to create a new bargaining unit was accompanied by any effort to replace A.L.E. as the exclusive representative of the petitioning employees from the Airport and Water Resources Divisions.

Monterey (2004) PERB Decision No. 1663-M.) A local government agency may not adopt rules and regulations which "would frustrate the declared policies and purposes of the [MMBA]. . . . [T]he power reserved to local agencies was intended to permit supplementary regulations which are consistent with, and effectuate the declared purposes of, the statute as a whole." (*Huntington Beach Police Officers Association v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 502.) When a local rule or its application is challenged, the burden of proof is on the challenging party to show how the public agency acted unreasonably. (*Organization of Deputy Sheriff's v. County of San Mateo* (1975) 48 Cal. App. 3d 331, 338.) Because Charging Party did not allege sufficient facts to demonstrate that any of the City's local rules were in themselves unreasonable or applied unreasonably, the original charge did not state a prima facie violation of the MMBA.

THE FIRST AMENDED CHARGE

In the First Amended Charge, Charging Party makes several factual clarifications and presents and explains new legal theories.[4]

Charging Party now contends that Section 8 is a per se unreasonable local rule because it both: (1) requires a showing of 60 percent support from employees who would be moved into a new unit; and, (2) mandates that only employee organizations, and not individual employees, may file a petition for modification. The First Amended Charge further alleges that the City unreasonably or failed to apply the criteria in Section 7 for determining which classifications shared a community of interest and would accordingly comprise the bargaining unit Charging Party petitioned to form. This Partial Dismissal will only address Charging Party's allegation that Section 8 is a per se unreasonable rule because it requires an employee organization to submit a petition for unit modification. All other claims in the First Amended Charge will be addressed in a separate document.

DISCUSSION

Charging Party's claim that Section 8 violates the MMBA, because it requires an employee organization to file a petition for unit modification, is not timely.

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

[4] The First Amended Charge clarifies that Charging Party's request was a "Petition for Modification," despite the contrary reference to the moniker "Petition for Separation" in documents Charging Party submitted. As such, this partial dismissal will refer to the Charging Party's request as a "Petition for Modification." The First Amended charge also clarified that Charging Party submitted the Petition for Modification on November 21, 2013, and not on January 7, 2014. In addition, the First Amended Charge alleges that the City violated MMBA sections 3502, 3505.4(b) & (d), 3506.5, 3507 and 3507.1(a) & (c).

Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)[5] The charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

A party may not challenge a local rule as unreasonable under the MMBA, when the employer has neither adopted the local rule nor enforced it to the party's detriment within six months prior to the filing of the relevant charge. (*County of Orange* (2006) PERB Decision No. 1868-M; PERB Regulation 32603(f)). The mere fact that an arguably unreasonable rule exists does not trigger PERB jurisdiction and PERB cannot issue advisory opinions. (*County of Amador* (2013) PERB Decision No. 1868.)

It appears that the City adopted the EERR, and by extension Section 8, on January 17, 1997.[6] The First Amended Charge does not allege that the City applied Section 8's rule that employee organizations must request a unit modification in order to reject Charging Party's petition.[7] Rather, in spite of Section 8, the City appears to have initially accepted the petition and then rejected it for a different reason.

Because the First Amended Charge neither alleges the City adopted Section 8 or applied this rule to reject Charging Party's petition within the 6 months before the filing of the original charge,[8] this particular challenge to the City's local rule is not timely.

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

---

[5] 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.)

[6] See Exhibit 1 to Charging Party's First Amended Charge.

[7] Although the City now claims in its unverified position statement that Section 8 does not grant Charging Party standing to petition for a unit modification, neither party has presented verified evidence indicating that the City rejected Charging Party's petition because he was an individual employee. Therefore, any review by PERB of this component of Section 8 would constitute an advisory opinion. (*County of Amador*, *supra*, PERB Decision No. 1868.)

[8] An amended charge relates back to the original charge for the purposes of meeting the statute of limitation when it adds a new legal theory like Charging Party's First Amended Charge does here. (*City of Santa Monica* (2012) PERB Decision 2235-M.)

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).)

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,

WENDI L. ROSS
Acting General Counsel

By _____
Jeremy Zeitlin
Regional Attorney

JGZ:jz
Attachment

cc: [E. Kevin Young]

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1019
Fax: (510) 622-1027

October 29, 2014

Stewart Weinberg, Attorney
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091

Re: *Blaine Drewes v. City of Livermore*
Unfair Practice Charge No. SF-CE-1177-M
WARNING LETTER

Dear Mr. Weinberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 25, 2014. Blaine Drewes (Drewes or Charging Party) alleges that the City of Livermore (City or Respondent) violated sections 3502, 3507, 3507.1(a) & (c), and 3506.5(b) & (d) of the Meyers-Milias-Brown Act (MMBA or Act)[1] and PERB regulations 32603(a), 32603(b), 32603(d) and 32603(f) by failing to explain how and why it applied its local rules within Employer-Employee Relations Resolution No. 9-77 (EERR) when determining the composition of a bargaining unit. Drewes also alleges that the City's actions constituted a violation of Section 8 of the EERR.

Facts Alleged by Charging Party

I. Applicable Local Rules

Section 8 of the EERR sets forth the procedure for modifying an established bargaining unit.[2] This section provides in relevant part that:

> Modification of Representation Units
>
> A. An employee organization may request the modification of an established representation unit by submitting to the City Manager a petition accompanied by proof of employee approval of the proposed modification signed by no less than 60% of those employees, who, if the proposed modification should be granted, would be moved from one representation unit to another. A unit modification

[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] See Exhibit 1 of the charge.

request may not be submitted until at least 36 months have elapsed from the most recent date of certification of the unit from which positions would be removed should the modification request be granted. No such request shall be processed unless it is filed no sooner than 150 calendar days and no later than 90 calendar days before the expiration of the then current memorandum of understanding or agreement between the City and the employee organization which is then presently certified as the representative of the unit from which one or more positions would be removed if the request were granted. . . .

C. The City Manager shall make the final determination of the appropriateness of all units after consultation with employee organizations who request such consultation. In making such a determination, the City Manager shall not be limited to consideration of the unit or units requested.

Section 3(F) defines an "Employee Organization" as being "any lawful organization which includes as members employees of the City and which has as one of its primary purposes representation of such employees in their relations with the City; . . ."

Section 7 contains the criteria the City Manager applies when determining which job classifications will comprise a bargaining unit.

Establishment of Representation Units

A. An appropriate unit shall be that unit determined by the City Manager to be the broadest feasible grouping of positions that have a community of interest.

B. The following factors, among others, are to be considered in making such determination:

1. Which unit will assure employees the fullest freedom in the exercise of rights set forth under the Resolution.

2. The history of employer-employee relations in the unit, among other employees of the City, and in similar public employment; provided, however, that no unit shall be established solely on the basis of the extent to which employees in the proposed unit have organized.

3. The effect of the unit on the efficient operation of the City and sound employer-employee relations.

4. The extent of which employees have common skills, working conditions, and job duties.

5. Management and confidential employees shall not be included in a representation unit with non-management and non-confidential employees.

6. No classification and no employee shall be included in more than one representation unit.

II. Background Facts

The City employs Drewes as a Water Resources Source Control Inspector.

The Association of Livermore Employees (A.L.E.)[3] is currently the exclusive representative for a large bargaining unit of City employees (A.L.E. bargaining unit). The A.L.E. bargaining unit includes most, if not all, of the City's clerical, technical, professional and public service employees.[4] A.L.E. and the City are parties to a memorandum of understanding (MOU), effective from April 1, 2012 to March 31, 2014. As a Water Resources Control Inspector, Drewes works in a classification within the A.L.E. bargaining unit.

On November 21, 2013,[5] Drewes[6] submitted a Petition for Separation to City Manager Marc Roberts (Roberts) as the representative of other clerical, professional, technical maintenance and operations staff in the Airport Division and the Water Resources Division within the City's public works department. In the petition, Drewes requested that the City separate the clerical, technical, professional and public service staff within the Airport Division and the Water Resources Division from the A.L.E. bargaining unit, and place these classifications into a new unit.

Drewes's efforts to create a new bargaining unit for the clerical, technical, professional and public service employees within the Airport Division and the Water Resources Division do not

---

[3] This employee organization was formerly known as the Municipal Employees' Agency for Negotiations (MEAN). For the purposes of this letter and simplicity's sake, all references to MEAN shall be replaced with A.L.E.

[4] See Exhibit 2 of the charge at Appendix A for a list of the City's clerical, technical, professional and public service employee classifications within the A.L.E. bargaining unit.

[5] The Statement of the Charge also states that the Petition for Separation was dated January 7, 2014. This reference to a contradictory date appears to be a typographical error as the cover letter accompanying the Petition for Separation (Exhibit 3) is dated November 19, 2013. Any amended charge filed with PERB should clarify which date the Petition for Separation was actually submitted.

[6] City Water Resources Operator Shelby Anderson also signed the letter presenting the Petition for Separation to the City. Because the charge was filed in Drewes's name, this letter will refer solely to Drewes when referring to the actions of the City employees from the Airport Division and the Water Resources Division who petitioned to separate their classifications from the A.L.E. bargaining unit.

appear to have been accompanied by any employee organization's attempt to replace A.L.E. as the exclusive representative of the classifications within the new bargaining unit.

The new bargaining unit proposed in this petition would include 28 job classifications drawing only from the Airport Division[7] and the Water Resources Division.[8] From among the 50 current employees in the classifications that would comprise the new bargaining unit, 46 signed the petition affirming their support for the split.

On January 7, 2014, Roberts sent out his initial response to the Petition for Separation to Drewes, the president of A.L.E., and all City employees potentially affected by the unit modification.[9] At this point in time, Roberts stated he would tentatively approve of Drewes's request to modify the A.L.E bargaining unit, but, simultaneously also proposed a series of alterations to the classifications comprising the new bargaining unit.

Roberts first proposed to exclude from the new bargaining unit four of the jobs classifications from within the Airport Division and the Water Resources Division that had been originally included in Drewes's Petition for Separation. These classifications were: Accounting Technician, Division Clerk, Senior Clerk and Typist Clerk. Roberts justified the exclusion of these four classifications on the ground they did not "sufficiently lack a community of interest with comparable classifications currently represented by A.L.E."

Next, Roberts proposed to expand the new bargaining unit to include classifications outside of the Airport Division and the Water Resources Division. Roberts opined that because the rest of the classifications within the Airport Division and the Water Resources Division were

---

[7] The classifications from the Airport Division that Drewes petitioned to be included in the new bargaining unit were: Accounting Technician (Airport); Senior Airport Services Attendant; Airport Services Attendant; and, Division Clerk (Airport).

[8] The classifications from the Water Resources Division that Drewes petitioned to be included in the new bargaining unit were: Division Clerk (Water Resources), Senior Clerk (Water Resources); Typist Clerk (Water Resources); Laboratory Technician; Water Resources Coordinator – Source Control; Water Resources Coordinator – Instrumentation; Water Resources Coordinator – Recycled Water; Source Control Inspector; Water Resources Supervising Operator; Senior Operator; Water Resource Operator Grade I; Water Resources Operator Grade II; Water Resources Operator Grade III; Mechanic II (Water Resources); Instrument Technician (Water Resources); Electrician (Water Resources); Wastewater Collections System Coordinator; Wastewater Collections System Worker I; Wastewater Collections Systems Worker II; Water Distribution Operator III; Water Distribution Operator II; and, Water Distribution Operator I.

[9] Roberts's response was composed of two documents; a Draft Decision Regarding the Proposed Unit Modification Request and an explanatory e-mail message. See Exhibit 5 and Exhibit 6 of the charge.

maintenance-related and had been originally included in the 1977 Public Works Unit, it would thus be appropriate to include the other classifications (from different divisions) that had also once been in the 1977 Public Works Unit. Roberts further proposed that any maintenance-related classifications not included in the 1977 Public Works Unit, should also be assigned to the new bargaining unit.[10] Roberts's justification for this alteration to the bargaining unit was that "it is in the interest of the City to have its bargaining units formed as similarly interested as possible."[11]

On February 5, 2014, Roberts sent out a memorandum stating his final determination about the composition of the new bargaining unit.[12] Reaffirming his proposed decision, Roberts concluded that the new unit should be simultaneously expanded to include maintenance-related classifications in other divisions, and contracted to exclude the Accounting Technician, Division Clerk, Senior Clerk and Typist classifications from the Airport Division and the Water Resources Division.

---

[10] The classifications Roberts proposed for the new bargaining unit were: Airport Services Attendant, Senior; Auto Parts Worker; Electrician; Facilities Maintenance Trainee; Facilities Maintenance Worker I; Facilities Maintenance Worker II; Facilities Maintenance Worker; Senior Facilities Maintenance Worker, Supervising; Fleet Service Worker; Groundkeeper I; Groundkeeper II; Groundkeeper III; Groundkeeper Trainee; Groundkeeper, Supervising; Landscape Maintenance Specialist; Lighting and Landscape Inspector Maintenance Trainee; Maintenance Worker I; Maintenance Worker II; Maintenance Worker III; Mechanic, Senior; Mechanic; Traffic Signal Technician, Trainee; Traffic Signal Technician; Waste Water Collections Systems Trainee; Wastewater Collections System Worker I; Wastewater Collections Systems Worker II; Wastewater Collections Systems Worker III; Water Distribution Operator I; Water Distribution Operator II; Water Distribution Operator III; Water Distribution Operator Trainee; Water Resources Coordinator; Water Resources Instrument Control Technician; Water Resources Laboratory Technician; Water Resources Mechanic I; Water Resources Mechanic II; Water Resources – Operator Grade I; Water Resources – Operator Grade II; Water Resources – Operator Trainee; Water Resources Senior Operator; Water Resources Senior Control Inspector; Water Resources Senior Control Technician; and, Water Resources Supervising Operator.

[11] See Exhibit 5 of the charge.

[12] See Exhibit 7 of the charge. According to Roberts's final determination memorandum, the petitioning Airport Division and Water Resources Division employees, A.L.E., and employees in the other maintenance-related classifications all filed protests to Roberts's earlier proposed decision. Also, during a later meeting attended by all interested parties, A.L.E. expressed its desire to continue representing the classifications containing the petitioning employees.

In justifying his decision about which classifications should comprise the new unit, Roberts stated that he considered the following criteria from Section 7(B) of the EERR. Roberts offered the following verbatim rationales:

1. Which unit will assure employees the fullest freedom in the exercise of rights set forth under the resolution; (My decision was considerate of similarly employed classifications relative to working conditions, type of work performed, work rules, employment category, etc..)

2. The history of employer-employee relations in the unit, among other employees of the City, and in similar public employment; provided, however, that no unit shall be established solely on the basis of the extent to which employees in the proposed unit have organized; (My decision was also based in part on the fact that at one point all maintenance related classifications were organized as a separate unit for the purpose of labor and employee relations within the City.)

3. The effect of the unit on the efficient operation of the City and sound employer-employee relations; (The operational processes with the City in addressing the very similar work issues of the maintenance related employees with one unit is efficient and a sound practice.)

4. To the extent to which employees have common skills, working conditions, and job duties. (This distinguishes the maintenance related classes from ALE's traditional support, technical and professional classes.)

   These items which define "community of interest" within City of Livermore's EERR were factors I used in issuing my draft decision. Bullet numbers 5 and 6 in Section 7B of the EERR were not factors in my decision.

The final determination memorandum also stated that Roberts previously received a petition from 32 City employees in maintenance-orientated classifications outside of the Airport and the Water Resources Divisions. The 32 employees all wished to stay within the A.L.E. bargaining unit, and not join the new bargaining unit with the petitioning Airport Division and Water Resources Division employees.

With the identity of the constituent classifications determined, Roberts next concluded that the new bargaining unit separate from A.L.E. would include 73 employees. These employees were the 32 maintenance-related employees who did not request to join the new bargaining unit, and 41 of the original petitioning employees from the Airport Division and the Water Resources Division.[13] Roberts next found that because only 41 of these 73 employees (56%) supported

[13] Because the final bargaining unit determined by Roberts did not include the Accounting Technician, Division Clerk, Senior Clerk, and Typist Clerk classifications from the Airport Divisions and the Water Resources Division, the five employees in these

the creation of a new bargaining unit, the level of support for modification fell below the 60% minimum EERR Section 8 requires for an employee organization to request a unit modification. With the Petition for Separation now failing to meet the EERR's threshold for bargaining unit member support, Roberts changed his proposed decision and denied the petition to create a new bargaining unit separate from the A.L.E. bargaining unit.

Position of Respondent

On March 27, 2014, the City filed an unverified position statement and therefore no facts referenced in this Position Statement have been considered during PERB's investigation. (PERB Regulation 32620(c).) The City's position statement does, however, advance two legal arguments: (1) an unfair practice charge cannot be used to circumvent the unit modification process; and (2) Drewes does not have standing to file a unit modification petition with PERB.

Discussion

I. Charging Party's 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." The charging party should include sufficient facts alleging 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.)

II. The City's Application of Section 7 of the EERR

The MMBA permits local public agencies to "adopt reasonable rules and regulations" for the administration of employer-employee relations, including procedures for determining exclusive recognition of employee organizations and "appropriate" units of employees for collective bargaining purposes. (MMBA, § 3507(a).) MMBA section 3509(c) empowers PERB to "enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections." Both employees and employee organizations may challenge a local rule or regulation as a violation of the MMBA. (MMBA, § 3507(d).) The charging party may bring this challenge to PERB under an unfair practice charge. (MMBA, § 3509(b).) PERB may review both whether a local rule is reasonable in itself, and whether the public agency applied this rule unreasonably when determining the composition of a bargaining unit. (*County of Riverside* (2010) PERB Decision No. 2119-M; *County of Monterey* (2004) PERB Decision No. 1663-M.)

---

classifications who originally petitioned for the modification were no longer included in the calculation of whether employee support equaled 60% or more of the affected employees.

A local government agency may not adopt rules and regulations which "would frustrate the declared policies and purposes of the [MMBA]. . . . [T]he power reserved to local agencies was intended to permit supplementary regulations which are consistent with, and effectuate the declared purposes of, the statute as a whole." (*Huntington Beach Police Officers Association v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 502.) The inquiry does not concern whether PERB would find a different local rule or different application of a local rule more reasonable, or whether the existing local rule or its application is unreasonable measured against an arbitrary standard. Instead, the inquiry is whether a disputed local rule or its application is consistent with and effectuates the purposes of the express provisions of the MMBA. (*International Brotherhood of Electrical Workers, Local 1245 v. City of Gridley* (1983) 34 Cal.3d 191, 198; *City of San Rafael* (2004) PERB Decision No. 1698-M; *County of Monterey*, *supra*, PERB Decision No. 1663-M; *Westlands Water District* (2004) PERB Decision No. 1622-M.)

When a local agency's rule or its application is challenged as unreasonable, the burden of proof is on the challenging party. (*Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338; PERB Regulation 32178.) And where that burden has not been met, the Board has refused to disturb the unit determination. (*City of Riverside*, *supra*, PERB Decision No. 2119-M; *City of Glendale* (2007) PERB Order No. Ad-361-M.)

Here, the present charge does not appear to assert that Sections 7 of the City's EERR is in itself inconsistent with the MMBA. Therefore, to state a prima facie case in this matter, Drewes would need to allege facts demonstrating that the City's application of these sections was unreasonable in that it violated the "declared policies and purposes of the MMBA."

The charge, as presently written, is premised on the verbatim allegations that "[t]o explain his decision for the inclusion of certain classifications in the bargaining unit, [Roberts] merely identified factors that he allegedly considered, without any explanation as to how the classifications meet those standards." The charge further alleges that "because [Roberts] has not explained how and why the factors apply to his decision, it is clear that his decision was solely result oriented, and that the result was to render deficient the number of signatures submitted for unit modification." As the corresponding remedy, Drewes requests that PERB "order the [City] to reconsider its 'final determination' and to explain how and why its determination is appropriate and why the modification sought is inappropriate."

As explained above, the MMBA places the burden on the challenging party to show that a unit determination was unreasonable. Accordingly, the Act does not require the party which determined the composition of the bargaining unit to affirmatively justify its decision. Notably, the charge is currently devoid of facts showing that Roberts unreasonably applied the criteria from Section 7 when he determined that the relevant Airport Division and Water Resources Division classifications shared a community of interest that allowed them to be grouped together in a single bargaining unit with the other maintenance-related

classifications.[14] The charge also does not allege that Roberts neglected to consider factors, such as those employed by PERB in determining the composition of a bargaining unit under the MMBA, when coming to this decision. In the absence of such facts, the charge does not state a prima facie case that Roberts's determination of the bargaining unit's classifications was unreasonable and in violation of the MMBA.

III. Violation of Section 8 of the EERR

The charge also alleges that the City violated Section 8 of the EERR.

An agency commits an unfair practice when it violates "any local rule adopted pursuant to Government Code section 3507." (MMBA § 3509(b); PERB Regulation 32603(g).)[15] It is well-settled that a Board agent must accept the plain language of a contract or rule where it is clear and unambiguous. (*Glendora Unified School District* (1991) PERB Decision No. 876; *Butte Community College District* (1985) PERB Decision No. 555.) However, where the contract language or rule is unclear or ambiguous, the Board has held that the parties should be given an opportunity to offer evidence to support their differing interpretations at an evidentiary hearing. (*Long Beach Community College District* (2000) PERB Decision No. 1378.)

In brief, Section 8 of the City's EERR sets forth the procedure for an employee organization to request the modification of an established representation unit through filing a petition with the City. To be considered, this petition must be accompanied by proof of support by 60% of those employees who would be moved from one representation unit to another if the City granted the petition. Under Section 8(C), the City Manager makes the final determination about the appropriateness of a bargaining unit pursuant to the criteria in Section 7.

As presently written, the charge does not allege facts showing that the City violated Section 8 of the EERR. According to the charge, Drewes filed a petition to create a new bargaining unit separate from the A.L.E. bargaining unit. As requested by Drewes, this new bargaining unit would include only clerical, technical, professional and public service staff within the Airport Division and the Water Resources Division. Later, a dispute occurred over the composition of the unit proposed by Drewes. Eventually, Roberts determined that the appropriate composition of the bargaining unit should be different. Finally, Drewes's petition was rejected on the

---

[14] The charge also does not state facts demonstrating that Roberts unreasonably applied the criteria from Section 7 when he excluded the Airport Division and Water Resources Division's Accounting Technician, Division Clerk, Senior Clerk and Typist classifications from the new bargaining unit.

[15] As stated above, a local rule can in itself be unlawful if it is inconsistent with the provisions or purpose of the MMBA. (*City of San Rafael, supra*, PERB Decision No. 1698-M.) The present charge does not appear to assert that Section 8 is in itself in violation of the MMBA.

ground that there was not sufficient employee support from within the bargaining unit Roberts had determined was appropriate.

These facts do not show that the City's conduct in reviewing Drewes's Petition for Separation diverged from the procedures in Section 8. Therefore, the charge has not stated a prima facie case that the City violated Section 8.

For these reasons the charge, as presently written, does not state a prima facie case.[16] 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 November 12, 2014,[17] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Jeremy Zeitlin
Regional Attorney

JGZ:jz

---

[16] 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.*)

[17] 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.)