STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PUBLIC EMPLOYEES UNION LOCAL 1, Charging Party, v. COUNTY OF CONTRA COSTA, Respondent.	Case No. SF-CE-1278-M PERB Decision No. 2467-M December 30, 2015

Appearances: Eileen M. Bissen, Business Agent, for Public Employees Union Local 1; Sharon L. Anderson, County Counsel, and Cynthia A. Schwerin, Deputy County Counsel, for County of Contra Costa.

Before Winslow, Banks, and Gregersen, Members.

DECISION[1]

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Public Employees Union Local 1 (Local 1) of PERB's Office of the General Counsel's dismissal of its first amended unfair practice charge. The charge, as amended, alleged that the County of Contra Costa (County) violated the Meyers-Milias-Brown

[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 regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

Act (MMBA)[2] by unilaterally changing a past practice concerning the calculation of overtime eligibility. The County's conduct was alleged to constitute a violation of MMBA sections 3505 and 3506.5, subdivisions (b) and (c); PERB Regulation 32603, subdivisions (b) and (c); and the County's Employer-Employee Relations Ordinance (EERO) sections 34-22.002(4) and 34-4.048.

The Office of the General Counsel dismissed the charge, as amended, having determined that Local 1 had failed to state a prima facie case for a unilateral change in past practice concerning overtime eligibility and that the charge was untimely filed.

The Board has reviewed the record in its entirety and has fully considered the appeal and the response thereto. Based on this review, we find that the warning and dismissal letters (attached) accurately summarize the allegations and are well-reasoned and in accordance with applicable law regarding the merits of the unfair practice charge, as amended. However, we conclude that the charge, as amended, was timely filed, contrary to the finding in the warning letter and incorporated in the dismissal letter. Accordingly, the Board adopts the warning and dismissal letters as the decision of the Board itself, with the exception of the Office of the General Counsel's conclusion regarding the timeliness of the charge.

SUMMARY OF FACTS AS ALLEGED[3]

Nearly a year before the events that prompted the filing of this unfair practice, Ted Cwiek (Cwiek), the County's director of human resources, wrote to Rollie Katz (Katz), a

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

[3] This summary includes alleged facts stated in the warning and dismissal letters, as well as those supplied by the County in its verified position statement, where those alleged facts do not conflict with Local 1's allegations. (*Chula Vista Elementary School District* (2003) PERB Decision No. 1557.) None of these facts have been challenged by Local 1 or the County.

Union representative, noting a discrepancy in the way certain County departments applied Section 7 of the current memorandum of understanding (MOU) regarding payment of overtime. Section 7 defined "overtime" as "any authorized work performed in excess of forty (40) hours per week or eight (8) hours per day." Cwiek also noted that some County departments calculated overtime based on hours in paid status, which included "vacation, jury duty, etc.," rather than hours "actually worked," which, in his view was contrary to the "clear language" of Section 7 of the MOU. Accordingly, Cwiek stated that effective August 1, 2013, the County would begin calculating overtime based only on hours actually worked, but offered to meet and confer with Local 1 regarding this change in practice, if requested.

The parties later agreed to address the overtime issue in negotiations for a successor MOU. On October 10, 2013, the County made a proposal to add the following statement to Section 7 of the MOU: "Work performed does not include non-worked hours."

On March 13, 2014, Local 1 submitted a package proposal to settle the remaining issues in the MOU, which included the term, "Overtime – hours worked, not hours paid."

This term was accepted by the County, and on April 22, 2014, the County's Board of Supervisors ratified a successor MOU, with effective dates from July 1, 2013 through June 30, 2016. Section 7.1, "Overtime" states, in relevant part:

> A. Permanent full-time and part-time employees will be paid overtime pay or overtime compensatory time off for any authorized work performed:
>
> 1) in excess of forty (40) hours per week; or
>
> 2) in excess of eight (8) hours per day and that exceed the employees' daily number of scheduled hours. For example, an employee who is scheduled to work ten (10) hours per day and

who works eleven (11) hours on a particular day will be paid one (1) hour of overtime.

Work performed does not include non-worked hours.

(Emphasis added.)

After the Board of Supervisors approved the MOU, the parties met twice, on June 10, 2014 and June 24, 2014, to discuss how the County's new overtime policy would work. At the June 10, 2014 meeting, Local 1 asked the County whether employees would accrue overtime while they were on jury duty, attending worker's compensation follow-up appointments, or taking compensatory time off. The County did not provide an answer to these questions until the June 24, 2014 meeting, at which time it informed Local 1 that none of these types of time would be treated as "work performed."

At some point, the County implemented the terms of Section 7.1 of the MOU. The unfair practice charge was filed on December 22, 2014.

THE DISMISSAL

The Office of the General Counsel determined that the MOU's definition of "work performed" for purposes of overtime eligibility, as added by the parties in April 2014, was clear and unambiguous, and declined to give effect to an alleged past practice of calculating overtime based on compensatory ("comp") time, jury duty, worker's compensation appointments, and other time when the employees were not performing their regular duties but were in paid status. Because Local 1 agreed to the language in the successor MOU that clearly exempted paid but unworked time from the overtime calculation, the Office of the General Counsel deemed whatever practice that occurred before the agreement irrelevant.

The Office of the General Counsel also declined Local 1's invitation to interpret "work performed" or "hours worked" using California Industrial Wage Order No. 4-2001, which

defines "hours worked" to include the time during which an employee is subject to the control of the employer, including all time the employee is suffered or permitted to work, whether or not required to do so. The Office of the General Counsel also concluded in its warning letter that the charge was untimely filed, a conclusion that was incorporated with the other reasons for dismissal by the statement in the dismissal letter: "Therefore, for the reasons explained above and in the April 23, 2015, Warning Letter, the charge is hereby dismissed." (Dismissal Ltr., p. 4.)

UNION'S APPEAL AND COUNTY'S RESPONSE

Local 1 urges the Board to reverse the dismissal, asserting that the conclusion by the Office of the General Counsel that the April 2014 MOU was clear and unambiguous is undermined by the fact that: (1) questions remained after the April 2014 approval of the MOU as to what types of time did or did not constitute "work performed" for purposes of overtime compensation; (2) the parties held two meet-and-confer sessions (on June 10 and 24) to decide which types of time constituted work performed and which did not; and (3) at the June 10, 2014, session the County was unable to articulate which types of time it considered "work performed" or "hours worked," and only did so at the parties' June 24, 2014 meeting when it unilaterally implemented its understanding.

Local 1 asserts that since the language is not clear and unambiguous, the Office of the General Counsel erred by not giving effect to the alleged long-standing past practice of calculating overtime based on comp time, jury duty, worker's compensation appointments, and other time when the employees were not performing their regular duties but were in paid status. According to Local 1, this practice continued after the parties had ratified the MOU in

April 2014 up through June 24, 2014, when the County unilaterally implemented its new policy in contravention of past practice.

Local 1 also reasserts on appeal its argument that PERB should follow the California Industrial Wage Order No. 4-2001, defining "hours worked." Local 1 argues that comp time, jury duty, and worker's compensation appointments fall under the Industrial Wage Commission's "hours worked" definition.

Local 1 also avers that the Office of the General Counsel incorrectly concluded that the charge was untimely filed, and that the Office of the General Counsel erred in concluding the charge did not include "facts suggesting that the County wavered in its attempt to implement the policy following the June 10, 2014 meeting . . . ." According to Local 1, the County lacked a "clear intent to implement a unilateral change of policy" until the June 24, 2014, meeting when it "informed Local 1 that none of these types of time [comp time, jury duty, and worker's compensation appointments] would be treated as 'work performed.'"

The County disputes Local 1's arguments and asserts that its appeal was untimely filed.

DISCUSSION

Timeliness of Local 1's Appeal

The County asserts that Local 1's appeal was untimely filed. As the County points out, according to PERB Regulation 32135,[4] documents are considered "filed" when the originals

[4] PERB Regulation 32135 states, in relevant part:

> (a) All documents shall be considered "filed" when the originals, and the required number of copies, if any, are actually received by the appropriate PERB office during a regular PERB business day. All documents, except for proof of support as described in sections 32700, 61020, 81020 and 91020, must also be accompanied by proof of service pursuant to Section 32140.

(and required number of copies), facsimile or e-mail transmission are received in the proper PERB office on a regular PERB business day. Here, a request for an extension of time for Local 1 to file its appeal by July 1, 2015, was granted by PERB. According to the letter from PERB granting the extension, the "new due date for filing an appeal will be July 1, 2015." The proof of service that accompanied Local 1's appeal shows that it was deposited in the U.S. mail on July 1, 2015, and no other method of filing was used. Thus, the appeal could not have arrived at PERB headquarters on July 1, the same day it was mailed. The County argues without citation to authority that because the "parties agreed to an extended filing date," PERB Regulation 32130(c)[5] does not apply.

We reject this assertion. The five-day extension of the time provided for in PERB Regulation 32130(c) applies when a filing is made in response to documents served by mail, even when PERB gives a specific calendar date as the filing deadline. PERB's notice of the extension of time was served by mail. The County provides no basis, and we discern none, for departing from this rule simply because a new filing date was established when PERB granted a request to extend the filing date.

> (b) All documents, except proof of support as described in sections 32700, 61020, 81020 and 91020, shall also be considered "filed" when received during a regular PERB business day by facsimile transmission at the appropriate PERB office together with a Facsimile Transmission Cover Sheet, or when received by electronic mail in accordance with Section 32091.

[5] PERB Regulation 32130(c) states, in relevant part:

> A five day extension of time shall apply to any filing made in response to documents served by mail if the place of address is within the State of California . . . No extension of time applies in the case of documents served in person, or by facsimile transmission as defined in Section 32090.

The Timeliness of the Unfair Practice Charge

Where a unilateral change is alleged, the statute of limitations begins to run "on the date that the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequent to that date evinces a wavering of that intent." (*City of Livermore* (2014) PERB Decision No. 2396-M, p. 6.)

Local 1's initial charge alleged that the County had responded to its questions about the scope of "hours worked" and "work performed" both on June 10 and 24, 2014. The Office of the General Counsel concluded in its warning letter that as of June 10, 2014, Local 1 had actual or constructive notice of the County's clear intent to implement a unilateral change in policy, and therefore the statute of limitation began to run as of June 10, 2014. Since Local 1 filed its charge on December 22, 2014, the Office of the General Counsel concluded that Local 1 had filed its charge more than six months after the June 10 date.

However, in its first amended charge, Local 1 alleged that on June 10, 2014, the County was unable to answer Local 1's questions about the scope of "hours worked" and "work performed," and said it would have to get back to Local 1 at a later time. According to the first amended charge, the County changed its overtime policy as of June 24, 2014, when it responded definitively to Local 1's queries. Read liberally, the facts alleged in the first amended charge indicate that it was not until June 24 that the County's unwavering position regarding the application of the April MOU terms became clear. The delay in responding to Local 1 manifested a lack of clear intent to implement on the part of the County. Therefore, because this charge was filed within six months of the date of alleged implementation, we consider it timely.

MOU Language and Past Practice

We agree with the Office of the General Counsel that the language of the April 2014 MOU established a new term and condition of employment, viz., that only "work performed," and not "hours paid," should count towards overtime eligibility. Thus, when the County clarified on June 24, 2014, that neither jury duty, comp time, nor worker's compensation appointments would count as "work performed," it did not change a past practice. If anything changed the past practice, it was the April 2014 MOU, which obviously does not violate the MMBA's duty to bargain because it was mutually agreed to.

Local 1 states in its appeal that:

> the past practice [of counting non-worked paid time towards overtime accrual] continued, even after the MOU had been ratified and approved by the County's Board of Supervisors, in or around April 2014. At the time the parties met in June 2014 to meet and confer regarding which types of time would be considered "hours worked" and which would not, the past practice was very much present and still in effect.

However, Local 1 did not include this allegation in its unfair practice charge, as amended,[6] nor has it provided facts supporting this conclusory statement or provided good cause for us to consider it. We therefore have disregarded it in our analysis. (See PERB Regulation 32635(b) ["Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence"].)

[6] The amended unfair practice charge alleged that the County's general services department was one department that calculated overtime based on hours in paid status, regardless of whether or not work was performed. The charge cited to Cwiek's June 2013 letter as an admission of different practices in different County departments. What the amended charge failed to allege was that such disparities in overtime calculation persisted after Section 7.1 was changed in April 2014 to add the language clarifying that non-worked time would not count toward the calculation of overtime eligibility.

Recently, in *Pasadena Area Community College District* (2015) PERB Decision No. 2444 (*Pasadena*), the Board reaffirmed that: "PERB has always recognized *newly created, implemented or enforced policy* as subject to its unilateral action doctrine." (*Id.* at p. 12, fn. 6; emphasis in original.) From the facts alleged, we cannot discern that the County unilaterally implemented or enforced a new policy concerning overtime eligibility. Instead, the parties agreed in an MOU that time worked, not time paid, would count toward overtime accrual. There was discussion between the parties two months later regarding the status of particular paid time, such as jury duty, workers compensation appointments, etc. The County answered Local 1's questions definitively on June 24. Charging Party has failed to allege facts establishing that the County's June 24 response to its questions unilaterally changed terms and conditions of employment. When the parties agreed to a material change in the language of Section 7.1 in its new MOU in April 2014, the new language superseded the alleged overtime past practice, even if the alleged past practice had bound the parties prior to ratification of the MOU. Although "[w]here past practice has established a meaning for language that is used by the parties in a new agreement, the language will be presumed to have the meaning given it by such past practice" (*Pekar v. Local 181, Int'l Union of United Brewery, et al.* (6th Cir. 1962) 311 F.2d 628, 636, cert. denied, 373 U.S. 912 (1963)), the presumption is inapplicable in this case, because the language added to the MOU by the parties in April 2014 superseded and resolved any prior ambiguities for which the alleged past practice could be used as an interpretive tool.

Allegations of Surface Bargaining

In addition to its assertion of unilateral change, Local 1 alleged that the County adopted a "take-it-or-leave it" approach in the June 24 meeting and failed to exchange reasonable proposals.

Neither the dismissal letter nor the warning letter addresses whether Local 1 allegation concerning the County's "take-it-or-leave-it" approach constituted a surface bargaining allegation. In its appeal, Local 1 only refers to a charge of "unilateral change to a mandatory subject of bargaining." (Appeal, p. 1) Since Local 1 did not appeal the absence of any reference to a surface bargaining charge in the warning and dismissal letters, we deem that it has abandoned its claim of alleged surface bargaining. (See *Los Angeles City & County School Employees Union, Local 99, SEIU, AFL-CIO (Kimmett)* (1987) PERB Order No. Ad-167, p. 4 ["the Board will consider on appeal only those issues properly raised"].)

Whether "Work Performed" or "Hours Worked" Should be Interpreted Under California Industrial Wage Order No. 4-2001

For the reasons explained by the Office of the General Counsel, we agree that the definition of "hours worked" in California Industrial Wage Order No. 4-2001 is of no assistance to Local 1's cause. Local 1 provides no compelling reason why the wage order supersedes the clear and unambiguous MOU definition of "work performed."

ORDER

The unfair practice charge in Case No. SF-CE-1278-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Banks and Gregersen joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1139
Fax: (510) 622-1027

April 23, 2015

Eileen M. Bissen, Business Agent
Public Employees Union Local 1
5034 Blum Road
Martinez, CA 94553

Re: *Public Employees Union Local 1 v. County of Contra Costa*
Unfair Practice Charge No. SF-CE-1278-M
WARNING LETTER

Dear Ms. Bissen:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 22, 2014. Public Employees Union Local 1 (Local 1 or Charging Party) alleges that the County of Contra Costa (County or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by unilaterally changing its policy on overtime pay.

FACTS AS ALLEGED[2]

Local 1 is the exclusive representative of several County bargaining units.

On June 13, 2013, Ted Cwiek (Cwiek), the County's Director of Human Resources, sent a letter to Rollie Katz, a Local 1 representative. Cwiek's letter noted that section 7 of the current memorandum of understanding (MOU) between the parties defined "overtime" as "any authorized work performed in excess of forty (40) hours per week or eight (8) hours per day." Cwiek also noted that some County departments calculated overtime based on hours in paid status, which included "vacation, jury duty, etc.," rather than hours "actually worked." Cwiek asserted that this was contrary to the "clear language" of section 7 of the MOU. Accordingly, Cwiek stated that effective August 1, 2013, the County would begin calculating overtime based only on hours actually worked. Cwiek added, "If requested, the County will meet and confer with Local 1 regarding this change in practice."

[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 summary includes facts supplied by the County in its position statement, where those facts do not conflict with Local 1's allegations. (*Chula Vista Elementary School District* (2003) PERB Decision No. 1557.)

The parties later agreed to address the overtime issue in negotiations for a successor MOU. On October 10, 2013, the County made a proposal to add the following statement to section 7 of the MOU: "Work performed does not include non-worked hours."

On March 13, 2014, Local 1 submitted a package proposal to settle the remaining issues in the MOU, which included the term, "Overtime—hours worked, not hours paid."

This term was ultimately accepted by the County, and on April 22, 2014, the County's Board of Supervisors ratified a successor MOU, with effective dates from July 1, 2013 through June 30, containing the following section:

> 7.1 Overtime
>
> A. Permanent full-time and part-time employees will be paid overtime pay or compensatory time off for any authorized work performed:
>
> 1) in excess of forty (40) hours per week; or
> 2) in excess of eight (8) hours per day and that exceed the employee's daily number of scheduled hours. For example, an employee who is scheduled to work ten (10) hours per day and who works eleven (11) hours on a particular day will be paid one (1) hour of overtime.
>
> *Work performed does not include non-worked hours.* Overtime pay is compensated at the rate of one and one-half (1-1/2) times the employee's base rate of pay (not including shift and any other special differentials). Any special differentials that are applicable during overtime hours worked will be computed on the employee's base rate of pay, not on the overtime rate of pay.

(Emphasis added.)

After the Board of Supervisors approved the MOU, the parties met twice, on June 10, 2014, and June 24, 2014, to discuss how the County's new overtime policy would work. The County took the position that jury duty, compensatory time off, time on workers' compensation, working at polls, holidays, and service awards do not constitute "hours worked" or "work performed," while call back hours and release time for union activities and negotiations do. According to Local 1, these meetings were "'meet and confer' sessions," but no bargaining took place. At the first meeting, the County explained how its overtime policy would work. At the second meeting, the County responded to Local 1's questions and reiterated how the policy would work.

At some point, the County implemented these changes. Local 1 alleges that "employees represented by Local [1] have been negatively impacted," in that they "have been denied overtime pay to which they were previously entitled."

DISCUSSION

I. The Charging Party's Burden

PERB Regulation 32615(a)(5) requires that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." This means that a charging party should allege with specificity the particular facts giving rise to a violation. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M.) The charging party may do this by alleging sufficient facts describing 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 (*Dept. of Food and Agriculture*), citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Such allegations should focus on the elements of the prima facie case. Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

II. Statute of Limitations

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.)

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.) In a unilateral change case, the relevant date is not when the change is actually implemented. Rather, "the statute of limitations begins to run on the date that the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequent to that date evinces a wavering of that intent." (*City of Livermore* (2014) PERB Decision No. 2396-M.)

In this case, the County Board of Supervisors adopted the MOU on April 22, 2014, and on June 10, 2014, the County informed Local 1 which types of time would constitute "hours worked" or "work performed" under the new overtime policy. The charge was filed on December 22, 2014, more than six months after the June 10, 2014, meeting. Although the parties had another meeting on June 24, 2014, there is no indication that the County wavered in its intent to implement the new overtime policy. (*City of Livermore*, *supra*, PERB Decision No. 2396-M.) Local 1 does not allege any facts to support its characterization of either the June 10 or the June 24, 2014, meetings as "'meet and confer' sessions." Without facts suggesting that the County wavered in its intent to implement the policy following the June 10, 2014, meeting, the charge appears to be untimely.

III. Prima Facie Case

Even assuming the charge is timely, Local 1 has not adequately alleged a prima facie case that the County committed a unilateral change. To state a prima facie case, Local 1 must establish that: (1) the County took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving Local 1 notice or an opportunity to bargain over the change; and (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262; *County of Santa Clara* (2013) PERB Decision No. 2321-M.)

A policy may be established by written agreement or by regular and consistent past practice. For a past practice to be binding and subject to a unilateral change analysis, it must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*County of Placer* (2004) PERB Decision No. 1630-M; *Riverside Sheriffs' Association v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) PERB has also described an enforceable past practice as one that is "regular and consistent" or "historic and accepted." (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186.)

However, a past practice is relevant only if the parties' written agreement is silent or ambiguous. (*County of Riverside* (2013) PERB Decision No. 2307-M.) Where a written agreement is clear and unambiguous, its terms govern. (*Ibid.*, citing *Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville*).) An employer is not prohibited from enforcing its contractual rights merely because it has not done so in the past. (*Marysville*, *supra*.)

In this case, Local 1 appears to allege that the County had a past practice of calculating overtime pay based on the hours employees were paid, rather than the hours they worked. Local 1's allegations, however, are insufficient to establish a regular and consistent past practice by the County.[3] Even if Local 1 had adequately alleged a past practice, this practice would not be binding. This is because the MOU is not silent or ambiguous, but states that "[w]ork performed does not include non-worked hours." According to Local 1, the County announced that jury duty, compensatory time off, time on workers' compensation, working at polls, holidays, and service awards would not count as "work performed" under the MOU. Local 1 does not allege any facts demonstrating that these types of time should be considered

[3] The only specific information regarding this practice comes from Cwiek's June 13, 2013, letter to Katz, which states that it was followed by *some* County departments. This letter was provided in the County's position statement. Even the information provided by this letter does not satisfy Local 1's burden to establish a binding past practice. While there could be a past practice in some departments but not others, Local 1 has not alleged which departments or employees the practice applies to.

"work performed" or "hours worked." All of them appear to be instances where the employee is not performing work. Therefore, the charge fails to establish that the County implemented a change in policy.

CONCLUSION

For these reasons the charge, as presently written, does not state a prima facie case.[4] 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 May 1, 2015,[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Joseph Eckhart
Regional Attorney

JE

[4] 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.*)

[5] 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.)

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1139
Fax: (510) 622-1027

June 3, 2015

Eileen M. Bissen, Business Agent
Public Employees Union Local 1
5034 Blum Road
Martinez, CA 94553

Re: *Public Employees Union Local 1 v. County of Contra Costa*
Unfair Practice Charge No. SF-CE-1278-M
DISMISSAL LETTER

Dear Ms. Bissen:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 22, 2014. Public Employees Union Local 1 (Local 1 or Charging Party) alleges that the County of Contra Costa (County or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by unilaterally changing its policy on overtime pay.

Charging Party was informed in the attached Warning Letter dated April 23, 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, it should amend the charge. Charging Party was further advised that, unless it amended the charge to state a prima facie case or withdrew it on or before May 1, 2015, the charge would be dismissed. An extension of time was granted, and a timely amended charge was filed on May 15, 2015.

FACTS AS ALLEGED[2]

Local 1 is the exclusive representative of several County bargaining units.

[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 summary includes facts supplied by the County in its February 11, 2015 position statement, where those facts do not conflict with Local 1's allegations. (*Chula Vista Elementary School District* (2003) PERB Decision No. 1557.) The County filed a position statement in response to the amended charge on June 2, 2015, but did not supply any additional facts.

On June 13, 2013, Ted Cwiek (Cwiek), the County's Director of Human Resources, sent a letter to Rollie Katz, a Local 1 representative. Cwiek's letter noted that section 7 of the current memorandum of understanding (MOU) between the parties defined "overtime" as "any authorized work performed in excess of forty (40) hours per week or eight (8) hours per day." Cwiek also noted that some County departments calculated overtime based on hours in paid status, which included "vacation, jury duty, etc.," rather than hours "actually worked." Cwiek asserted that this was contrary to the "clear language" of section 7 of the MOU. Accordingly, Cwiek stated that effective August 1, 2013, the County would begin calculating overtime based only on hours actually worked. Cwiek added, "If requested, the County will meet and confer with Local 1 regarding this change in practice."

The parties later agreed to address the overtime issue in negotiations for a successor MOU. On October 10, 2013, the County made a proposal to add the following statement to section 7 of the MOU: "Work performed does not include non-worked hours."

On March 13, 2014, Local 1 submitted a package proposal to settle the remaining issues in the MOU, which included the term, "Overtime—hours worked, not hours paid."

This term was ultimately accepted by the County, and on April 22, 2014, the County's Board of Supervisors ratified a successor MOU, with effective dates from July 1, 2013 through June 30, containing the following section:

> 7.1 Overtime
>
> A. Permanent full-time and part-time employees will be paid overtime pay or compensatory time off for any authorized work performed:
>
> 1) in excess of forty (40) hours per week; or
> 2) in excess of eight (8) hours per day and that exceed the employee's daily number of scheduled hours. For example, an employee who is scheduled to work ten (10) hours per day and who works eleven (11) hours on a particular day will be paid one (1) hour of overtime.
>
> *Work performed does not include non-worked hours.* Overtime pay is compensated at the rate of one and one-half (1-1/2) times the employee's base rate of pay (not including shift and any other special differentials). Any special differentials that are applicable during overtime hours worked will be computed on the employee's base rate of pay, not on the overtime rate of pay.

(Emphasis added.)

After the Board of Supervisors approved the MOU, the parties met twice, on June 10, 2014, and June 24, 2014, to discuss how the County's new overtime policy would work. At the June 10, 2014, meeting, Local 1 asked the County whether employees would accrue overtime while they were on jury duty, attending workers' compensation follow-up appointments, or taking

compensatory time off. The County did not provide an answer to these questions until the June 24, 2014 meeting, at which it informed Local 1 that none of these types of time would be treated as "work performed."

According to Local 1, this position conflicted with "a long-standing past practice within certain County departments of calculating overtime based on hours in paid status. Most notably, the County's General Services Department (GSD), which merged with Public Works in or around 2012 has treated certain types of time, including jury duty, workers' compensation follow-up appointments, and compensatory time, effectively as 'hours worked' for the sake of overtime for decades." (Footnote omitted.)

At some point, the County implemented the announced changes. Local 1 alleges that "employees represented by Local [1] have been negatively impacted," in that they "have been denied overtime pay to which they were previously entitled."

DISCUSSION

As explained in the Warning Letter, to establish a prima facie case that the County unilaterally changed its overtime policy, Local 1 must establish that: (1) the County took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving Local 1 notice or an opportunity to bargain over the change; and (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262; *County of Santa Clara* (2013) PERB Decision No. 2321-M.)

The Warning Letter concluded that Local 1 had not adequately alleged that there was a change in policy, because the MOU provision that "[w]ork performed does not include non-worked hours" was clear and unambiguous, and none of the types of paid time asserted by Local 1 appeared to fall within the definition of "work performed." In the amended charge, Local 1 makes two general arguments for why the MOU provision should be read to require overtime compensation for jury duty, workers' compensation appointments, and compensatory time: (1) the parties' past practice; and (2) the definition of "hours worked" under California law. Both arguments are unavailing.

As evidence of past practice, Local 1 points to the practice in the General Services Department and the acknowledgment in Cwiek's letter that some departments had paid employees overtime based on hours in paid status, rather than hours actually worked. A past practice may assist in interpreting ambiguous contract provisions. (*County of Riverside* (2013) PERB Decision No. 2307-M.) But, as stated in the Warning Letter, where a written agreement is clear and unambiguous, its terms govern. (*Ibid.*, citing *Marysville Joint Unified School District* (1983) PERB Decision No. 314.) The MOU's definition of "work performed" is clear and unambiguous. Moreover, the past practice alleged by Local 1 developed under previous MOUs, before the County proposed terminating the practice of paying overtime for all hours on paid status, and before Local 1 agreed to the County's proposal to add the following

language to the MOU: "Work performed does not include non-worked hours." As a result, the prior past practice is of no assistance to Local 1.

Local 1's reliance on the definition of "hours worked" under California law is also misplaced. Local 1 quotes the definition of "hours worked" in Industrial Welfare Commission (IWC) wage order No. 4-2001, California Code of Regulations, title 8, section 11040: "'Hours worked' means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." The relevance of this definition is unclear, however, because the MOU provision defines "work performed," not "hours worked," and Local 1 does not allege that the parties intended to incorporate, or considered, the IWC definition of "hours worked" when they agreed to the MOU definition of "work performed." It is also noted that the overtime provisions of California law do not apply to public employers. (*Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal.App.4th 729.)

Therefore, for the reasons explained above and in the April 23, 2015, Warning Letter, the charge is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (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,

J. FELIX DE LA TORRE
General Counsel

By _____
Joseph Eckhart
Regional Attorney

Attachment

cc: Cynthia Schwerin