STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

IVETTE RIVERA, Charging Party, v. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 444, Respondent.	Case No. SF-CO-338-M PERB Decision No. 2470-M February 10, 2016

Appearances: Ivette Rivera, on her own behalf; Weinberg, Roger & Rosenfeld, by Kerianne R. Steele and Robert E. Szykowny, Attorneys, for American Federation of State, County and Municipal Employees, Local 444.

Before Martinez, Chair; Banks and Gregersen, Members.

DECISION[1]

GREGERSEN, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Ivette Rivera (Rivera) of a dismissal of Rivera's unfair practice charge by PERB's Office of the General Counsel (OGC) (attached). The charge, as amended, alleged that American Federation of State, County and Municipal Employees, Local 444 (AFSCME) violated the Meyers-Milias-Brown Act (MMBA)[2] by: (1) fraudulently claiming in a memorandum of understanding (MOU) with the East Bay Municipal Utility

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

District (District) that AFSCME was the majority representative for Rivera's bargaining unit, and attempting to conceal the mistake by making AFSCME an exclusive representative in a later MOU; (2) agreeing to an MOU that eliminated an employee's right to file a grievance over the terms and conditions of employment; (3) entering into an MOU that mentions a District complaint procedure that doesn't exist; (4) refusing to process her complaints about her classification and complaints that the District was depriving her of due process, individual representation, free speech, and free association rights, and denying her the rights and privileges of District supervisors; (5) obtaining exclusive recognition for its members through unlawful means; (6) secretly agreeing with the District to convince Rivera to file a grievance and to bind Rivera's grievance to arbitration as an exclusive remedy; (7) colluding with the District by attempting to conceal Rivera's classification complaints; and (8) violating Rivera's right to petition the government and be free of discrimination in the workplace. Rivera alleged that this conduct violated MMBA sections 3502, 3507, PERB Regulation 32604, subdivisions (a), (b) and (e), and the District's Employer-Employee Relations Policy (EERP) sections 4, 12(a), 15, and 20.

The OGC dismissed Rivera's unfair practice charge for failure to state a prima facie case and untimeliness. Rivera timely filed an appeal, and AFSCME timely filed its opposition.

The Board has reviewed the case file in its entirety and has fully considered the relevant issues and contentions on appeal. Based on this review, the Board finds the warning and dismissal letters accurately describe the allegations included in the unfair practice charge, as amended, and are well-reasoned and in accordance with applicable law.

The appeal raises no issues warranting the Board's further consideration. We therefore deny the appeal and adopt the warning and dismissal letters as the decision of the Board itself, as supplemented by the discussion below.

DISCUSSION

Rivera's appeal fails to comply with PERB Regulation 32635, subdivision (a), "Review of Dismissals," which states in relevant part:

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

In Rivera's appeal, she alleges that the Board agents at the Oakland PERB office conspired with the District and AFSCME to deny Rivera her constitutional right to due process and a hearing. Rivera alleges that PERB wrongfully bifurcated her charges against AFSCME and the District to dilute the magnitude of their concerted actions in denying Rivera's rights under MMBA section 3502, and that the PERB Board agents disregarded relevant facts in Rivera's favor.

Rivera also requests that all of her unfair practice charges against the District and AFSCME[3] be consolidated to reduce the hardship on Rivera of having to present the same evidence multiple times, which AFSCME opposes.

Rivera merely reiterates facts alleged in the unfair practice charge and restates arguments made to the OGC, failing to state "the specific issues of procedure, fact, law or

[3] Rivera lists the following unfair practice case numbers: SF-CO-349-M, SF-CO-338-M, SF-CE-1310-M, SF-CE-1309-M, SF-CE-1292-M, SF-CE-1227-M, and SF-CE-1208-M.

rationale to which the appeal is taken." This failure to comply with PERB Regulation 32635, subdivision (a) subjects the appeal to denial on that ground alone. (*State of California (Department of Mental Health, Department of Developmental Services)* (2012) PERB Decision No. 2305-S, p. 4.)

With regard to Rivera's request to consolidate her unfair practice charges, PERB Regulation 32612, subdivision (d) states in relevant part: "The Board may consolidate charges as it deems appropriate." In determining whether to consolidate unfair practice charges for disposition by a single decision, the Board considers both fairness and administrative economy (See, e.g., *Los Angeles Unified School District* (1984) PERB Decision No. 473), and whether the charges involve the same issue. (See, e.g., *Los Angeles Community College District* (1981) PERB Decision No. 167.) Rivera has provided no evidence that consolidation of her charges would promote fairness or administrative economy, nor has she alleged that the charges involve the same issue. We therefore deny Rivera's request.

ORDER

The unfair practice charge in Case No. SF-CO-338-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1025
Fax: (510) 622-1027

August 12, 2015

Ivette Rivera

Re: *Ivette Rivera v. AFSCME Local 444*
Unfair Practice Charge No. SF-CO-338-M
DISMISSAL LETTER

Dear Ms. Rivera:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 8, 2014. An amended unfair practice charge was filed on June 19, 2014. In this amended charge, Ivette Rivera (Rivera or Charging Party) alleges that AFSCME District Council 57, Local 444 (Local 444 or Respondent) violated its duty of fair representation under the Meyers-Milias-Brown Act (MMBA or Act),[1] by negotiating a grievance procedure, contained in Local 444's MOU with the East Bay Municipal Utility District (EBMUD or District), under which Charging Party cannot individually file "classification complaints," as such complaints can only be filed by Local 444.

Charging Party was informed in the attached Warning Letter dated March 25, 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, 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 April 17, 2015, the charge would be dismissed.

Charging Party was granted an extension of time to file a Second Amended Charge to May 1, 2015. On April 29, 2015, Charging Party filed a Second Amended Charge.

Facts Alleged and the Warning Letter[2]

As summarized in the Warning Letter, Charging Party alleges that from the first day of her employment to the present, she has performed duties covered by higher-level supervisory

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[2] The discussion contained in the attached Warning Letter is detailed, and for the sake of brevity is not fully recounted herein.

positions. Charging Party complains that under the MOU between Local 444 and EBMUD, individual employees cannot file "classification complaints." Charging Party alleges that this denies her "due process rights."

The Warning Letter advised Charging Party that, pursuant to the grievance procedure in the MOU, individual employees may file grievances without Local 444's involvement. It even appears that individual employees may request arbitration of their grievances without Local 444's involvement. Furthermore, section 6.4 of the MOU governs out of class work, and could be the basis of a grievance filed by an individual employee.

The Warning Letter observed that a specified category of grievances, labeled "limited civil service examination grievances," could only be filed by Local 444. However, this category of grievances appears to be irrelevant to the type of out-of-class dispute raised by Charging Party.

The Warning Letter also noted that it appears that the District maintains a non-contractual process for the resolution of classification disputes as part of its Civil Service Rules. This too does not require initiation by Local 444.

Finally, the Warning Letter noted that, insofar as Charging Party intended to allege that she had requested Local 444 file a grievance on her behalf, the charge lacked information as to the nature of any such request, when it was made, how it was conveyed, and to whom it was directed. Absent such information, Charging Party has not carried her burden under PERB Regulation 32615(a)(5).

In summary, the Warning Letter concluded:

> Charging Party appears to have the right, as an individual, to file a grievance under the MOU, for compensation for the performance of out-of-class work, and also, the right to file a request for a classification study under the District's civil service rules. Local 444's consent or participation is not required for Charging Party to initiate these procedures. Regardless of whether Local 444 failed to initiate some other unspecified contractually-based procedure regarding Charging Party's misclassification claim, there appears to be no breach of the duty of fair representation in that the union does not have exclusive control over the remedies that are available to Charging Party.
>
> The charge fails to allege any facts showing how Local 444 abused its discretion, or how it acted arbitrarily, discriminatorily, or in bad faith. Also, the charge lacks facts as to how Charging Party was harmed by anything Local 444 did or did not do.

The Second Amended Charge

In response to the Warning Letter, Charging Party filed the Second Amended Charge. The Second Amended Charge contains 62 numbered paragraphs that are almost exclusively legal conclusions or inflammatory and unfounded accusations. Topics range from unsupported allegations that Local 444 and EBMUD have "colluded" in schemes to "fraudulently" describe Local 444 as "Majority Representative," to disregard "the material fact that [Rivera] is a supervisor," and to deny Rivera's "right to be free from government oppression." As Charging Party was advised in the Warning Letter, bare assertions and legal conclusions fail to satisfy Charging Party's burden. (*Santa Maria Joint Union High School District* (2015) PERB Decision No. 2445; *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.)

The only factual allegations contained in the Second Amended Charge concern Rivera's appearances before the EBMUD Board of Directors on December 10, 2013 and January 14, 2014. During these meetings, Rivera complained that she was performing supervisory work, and reiterated her belief that only Local 444 could remedy the matter. Charging Party alleges that she "hoped" that Local 444 representatives would address the situation with EBMUD after her comments to the Board of Directors.

Nowhere in the Second Amended Charge does Charging Party describe a time when she asked Local 444 for assistance.

Charging Party has Failed to Correct Deficiencies Described in the Warning Letter

As discussed in further detail in the Warning Letter, it does not appear that the MOU between Local 444 and EBMUD restricts individual employees from filing grievances over out-of-class work. Even assuming that it did, Charging Party has failed to allege facts showing how this would be a violation of the duty of fair representation, rather than a proper exercise of Local 444's wide bargaining latitude. (*California School Employees Association (Chacon)* (1995) PERB Decision No. 1108.)

Nor does the charge describe any time that Charging Party actually requested assistance from Local 444 in this matter. For this reason, as discussed in the Warning Letter, Charging Party has not met her burden to show that the charge is timely. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359.)[3] Even assuming that Charging Party did request Local 444's assistance, and that Local 444 refused for the first time sometime during the six-month

[3] Moreover, Charging Party alleges that she has been in this dispute concerning her purported out-of-class work since she was hired in 2005. Assuming she ever requested Local 444's assistance in the matter, the statute of limitations would begin to run from the time she knew or should have known that further assistance from the union was unlikely. (*California Media Workers Guild/CWA/Local 3921 (Zhang)* (2012) PERB Decision No. 2245-I.) Charging Party cannot cause the statute of limitations to begin anew by making the same request over and over again. (*California State Employees Association, Local 1000, SEIU, AFL-CIO, CLC (Sutton)* (2003) PERB Decision No. 1553-S.)

period preceding the filing of the charge, Charging Party had multiple avenues at her disposal to remedy the situation without Local 444's involvement. Charging Party could even seek arbitration over a contractual grievance, and so Local 444 in no way possessed the exclusive means by which Charging Party could obtain a remedy. (*Service Employees International Union, Local 1021 (Horan)* (2011) PERB Decision No. 2204-M.) The same is true of the non-contractual processes available to Charging Party. (*Ibid.*) For this reason, it does not appear that the duty of fair representation even applied to these hypothetical requests for assistance.

Finally, even assuming further that Charging Party made a request for assistance to Local 444, and that the union owed a duty of fair representation to Charging Party with respect to this request, the charge contains no facts which would establish that such a refusal was without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M.)

For these reasons, incorporating the discussion in the attached Warning Letter, the charge is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations,[4] 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

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

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 _____
Daniel Trump
Regional Attorney

Attachment

cc: Kerianne R. Steele, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

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March 25, 2015

Ivette Rivera

Re: *Ivette Rivera v. AFSCME Local 444*
Unfair Practice Charge No. SF-CO-338-M
WARNING LETTER

Dear Ms. Rivera:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 8, 2014. An amended unfair practice charge was filed on June 19, 2014. In this amended charge, Ivette Rivera (Rivera or Charging Party) alleges that AFSCME District Council 57, Local 444 (Local 444 or Respondent) violated its duty of fair representation under the Meyers-Milias-Brown Act (MMBA or the Act),[1] by negotiating a grievance procedure, contained in Local 444's MOU with the East Bay Municipal Utility District (EBMUD or the District), under which Charging Party cannot individually file "classification complaints," as such complaints can only be filed by Local 444.

Facts Alleged By Charging Party

Charging Party states that she has been employed by the District since 2005 as a "gardener foreman," and that throughout her employment, she has been a member of a bargaining unit that is represented by Local 444. She alleges that from her first day of employment to the present, she has performed the duties covered by the higher paid "Supervisors, Assistant Supervisors and General Grounds Crew" classifications. She asserts that "despite my complaints ... [Local] 444 refused to provide me a means for remedy...." Charging Party further alleges that on January 28, 2014, she discovered that at all times since 2005, the MOU between Local 444 and EBMUD provided for a means of filing "classification complaints," but that under the MOU, such complaints can only be filed by Local 444. She states that the current MOU, executed by Local 444 on December 10, 2013, failed to make any changes to this procedure, thereby precluding individual bargaining unit members from filing classification complaints. She asserts that this was "the exclusive means" by which she could obtain her "due process rights," and that Local 444 instead "colluded with the District's [directors and managers] to deny [these] due process rights," thereby violating its duty of fair representation.

[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.

Respondent's Position

Respondent filed a verified position statement on July 22, 2014. Respondent contends that there are four separate reasons that require dismissal of the charge, as follows: 1) The charge is untimely, as the claim arose outside the six month limitations period, 2) The charge fails to state a prima facie case in that it does not clearly allege any wrongdoing by Local 444, 3) The District's civil service rules[2] provide the Charging Party with a means by which she can seek reclassification of her position without any action by Local 444, and the duty of fair representation does not apply if the union does not control the exclusive means by which the individual employee can obtain relief, and 4) The charge fails to state a prima facie violation of the MMBA because there is no showing that Local 444 abused its discretion, or acted arbitrarily, discriminatorily, or in bad faith.

Relevant Provisions of the MOU Between Local 444 and the District

As a member of the bargaining unit represented by Local 444, Charging Party is covered by the MOU between Local 444 and the District. Under section 6.4 of the MOU, "an employee [who] is assigned by a District supervisor to ... perform the full range of duties required for a particular assignment of a higher classification ... shall be paid the lowest step of the higher classification or at least 5% whichever is greater for such work. Assignments to perform the work of a higher classification ... shall not exceed 480 hours in a payroll year." It appears that this section of the MOU creates a right under which Charging Party could potentially be entitled to payment for the performance of out-of-class work.

Under the MOU, a grievance is defined as "any dispute between the District and an employee or group of employees concerning the interpretation or application of this [MOU], or the interpretation or application of rules or regulations governing personnel practices or working conditions." (MOU section 22.2.1.1.) There is a three step grievance procedure, commencing with the filing of a written grievance through use of a specified form, which may be filed by an employee without the union's participation or consent. (MOU section 22.5.1.1.) The first step results in a written decision by the employee's immediate supervisor. (MOU section 22.5.1.1.2.) An employee who is not satisfied with the Step 1 written response from his or her immediate supervisor can escalate the grievance to Step 2, without the union's participation or consent, by timely filing the specified form with the Manager of Employee Relations. (MOU section 22.5.2.1.) Step 2 proceedings are held before a Board of Adjustment, consisting of two representatives of management and two labor representatives. (MOU section 22.5.2.2.) If the grievance remains unresolved after the conclusion of Step 2 proceedings, the grievant may submit the grievance to binding arbitration before a neutral arbitrator, by filing a timely written

[2] Respondent attached a memo from the District's Manager of Employee Relations to Rivera, dated January 23, 2014, in response to her concerns regarding her alleged misclassification. The memo states: "If you think that your position is not allocated to the correct job classification you may request a classification study pursuant to Civil Service Rule 4, Section 7.... I encourage you to request a classification study."

request, stating the issue to be arbitrated, with the Manager of Employee Relations. (MOU section 22.5.3.2.) The MOU appears to contemplate that an individual employee can request arbitration without the consent of the union, as the MOU expressly provides that "[t]he expenses of the arbitrator shall be shared equally by the District and the Union or employee, as appropriate." (MOU section 22.5.3.3.4.) It appears that this procedure may provide a means by which Charging Party could assert her claim for out-of-class pay and/or reclassification, without the need for Local 444's participation or consent.

The MOU also provides for a specified category of grievances, labeled "limited civil service examination grievances," which may only be filed by Local 444. However, it does not appear that this type of grievance would apply to Charging Party's out-of-class claim, as the MOU states that such "examination grievances" cover the following disputes: (1) disqualification from taking an examination, (2) examination results, (3) other grievances pertaining to recruitment, examination or selection as stated in the civil service rules. (MOU sections 22.6.1-22.6.1.3.)

Discussion

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." In doing so, 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.) Mere legal conclusions are not sufficient to state a prima facie case. (*Id.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The purpose of the Board agent's review is to determine if the charge states sufficient facts which, if proven, would constitute an unfair practice. (*SEIU – United Healthcare Workers West* (*Hayes*) (2011) (PERB Decision No. 2168-M.) At the charge processing stage, the burden to provide specific allegations of fact, which demonstrate a prima facie case that an unfair practice has been committed, is on the charging party. (*Sacramento Municipal Utility District*) (2006) (PERB Decision No. 1838-M.)

Here, the charge lacks specific factual allegations to support a prima facie showing of a violation of the duty of fair representation. Charging Party's assertion that she complained to Local 444 is not sufficient, absent information as to the exact nature of these complaints, when they were made, how they were conveyed, and to whom they were directed. Charging Party's assertion that Local 444 "refused to provide me a means for a remedy" is also insufficient, without information as to exactly what was conveyed to her by Local 444 (if anything) in

response to any request for the union's assistance, and the date that any such response was conveyed.

Timeliness

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.)[3] Belated awareness of the legal significance or potential illegality of another party's conduct does not excuse an otherwise untimely filing. (*SEIU-United Healthcare Workers West* (2011) PERB Decision No. 2172-M; *Orange County Fire Authority* (2008) PERB Decision No. 1968-M.) A charging party bears the burden of demonstrating that the charge is timely filed, as timeliness is an essential element of a prima facie case. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359; *City of Escondidio* (2013) PERB Decision No. 2311-M.)

In cases involving the duty of fair representation, the six month limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (*California Media Workers Guild/CWA/Local 39521* (2012) PERB Decision No. 2245-I.) Once the limitations period begins to run, a charging party "cannot cause it to begin anew by making the same request over and over again" because "such a result would eviscerate the purpose of the statute of limitations." (*California State Employees Association, Local 1000* (2003) PERB Decision No. 1553-S.) Repeated refusals by a union to provide assistance do not re-start the limitations period. (*SEIU Local 1021* (*DeLarge*) (2009) PERB Decision No. 2068.)

To be sure, under the "continuing violation doctrine," a violation within the six-month limitations period may revive an earlier violation of the same type that occurred outside the limitations period. But for the doctrine to apply, the violation within the limitations period must constitute an independent unfair practice without reference to the prior violation. A continuing violation is not found when the respondent's action during the limitations period merely confirms or reiterates the position it took and communicated outside the limitations period. (*County of Riverside* (2011) PERB Decision No. 2176-M; *Fresno County Office of Education* (1993) PERB Decision No. 978; *UCLA Labor Relations Division* (1989) PERB Decision No. 735-H.)

[3] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

As alleged in the charge, Local 444 negotiated the challenged procedures in 2005, if not earlier. No facts were alleged to show the commission of any independent unfair practice within the six month limitations period.

The Duty of Fair Representation

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, courts have held that this duty is implied under the law. "Unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213.) In *Hussey*, the court further held that the duty of fair representation is not breached by mere negligence, and that a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union's power." (*Ibid.*)

PERB has similarly concluded that an exclusive bargaining agent under the MMBA owes a duty of fair representation to bargaining unit members. (*SEIU Local 1021* (*Horan*) (2011) PERB Decision No. 2204-M.) However, this duty of fair representation extends only to contractually-based remedies that are under the union's exclusive control. (*Ibid.*; *Bay Area Quality Management District Employees Association* (*Mauriello*) (2006) PERB Decision No. 1808-M.) There is no duty of fair representation owed to a bargaining unit member unless the exclusive representative possesses the exclusive means by which such member can obtain a particular remedy. (*Ibid.*) The duty of fair representation does not apply in cases involving a forum that concerns an individual right unconnected with negotiating or administering a collective bargaining agreement. (*International Union of Operating Engineers, Local 501* (*Huff*) (2000) PERB Decision No. 1382-S.)

In *International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M, an MMBA duty of fair representation case, the Board held that in order to state a prima facie violation of the duty of fair representation, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (*United Teachers – Los Angeles (Wyler)* (1993) PERB Decision No. 970.)

As a general rule, an exclusive representative enjoys a wide range of bargaining latitude. As the United States Supreme Court stated in *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 338:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining

> representative in serving the unit it represents, subject always to good faith and honesty of purpose in the exercise of its discretion.

PERB likewise has held that in negotiating a contract, an exclusive representative is not expected or required to satisfy all members of the unit it represents. (*California School Employees Association (Chacon)* (1995) PERB Decision No. 1108.) "A union's duty to fairly represent employees during negotiations does not encompass an obligation to negotiate any particular item." (*Rocklin Teachers Professional Association* (1980) PERB Decision No. 124.) The duty of fair representation does not mean an employee organization is barred from making an agreement which may have an unfavorable effect on some members, nor is an employee organization obligated to bargain for a particular item benefiting certain unit members. (*Los Rios College Federation of Teachers (Violett)* (1991) PERB Decision No. 889.) The mere fact that an agreement reached by an employee organization has an unfavorable effect on some members is not sufficient to establish a violation of the duty of fair representation. (*Baldwin Park Education Association (Hayek)* (2011) PERB Decision No. 2223.)

Here, Charging Party appears to have the right, as an individual, to file a grievance under the MOU, for compensation for the performance of out-of-class work, and also, the right to file a request for a classification study under the District's civil service rules. Local 444's consent or participation is not required for Charging Party to initiate these procedures. Regardless of whether Local 444 failed to initiate some other unspecified contractually-based procedure regarding Charging Party's misclassification claim, there appears to be no breach of the duty of fair representation in that the union does not have exclusive control over the remedies that are available to Charging Party.

The charge fails to allege any facts showing how Local 444 abused its discretion, or how it acted arbitrarily, discriminatorily, or in bad faith. Also, the charge lacks facts as to how Charging Party was harmed by anything Local 444 did or did not do.

Conclusion

For the reasons set out above, 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 Second Amended Charge, contain all the facts and allegations Charging Party wishes to make, and be

[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.*)

signed under penalty of perjury. 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. Alternatively, you may file a notice of withdrawal of the charge.

If an amended charge or withdrawal is not filed on or before April 17, 2015,[5] PERB will dismiss your charge. Feel free to contact me by telephone if you have any questions.

Sincerely,

Miles E. Locker
Senior Regional Attorney

[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.)