STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 721, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	Case No. LA-CE-1037-M PERB Decision No. 2535-M June 29, 2017

Appearances: Rothner, Segall & Greenstone by Jonathan Cohen, Attorney, for Service Employees International Union Local 721; Zappia Law Firm by Brett M. Ehman, Attorney, for County of Riverside.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION[1]

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Service Employees International Union Local 721 (Local 721) from a partial dismissal (attached) of an unfair practice charge. The charge, as amended, alleged that the County of Riverside (County) violated the Meyers-Milias-Brown Act (MMBA)[2] and PERB Regulations by unilaterally changing the grievance-arbitration procedures established by Article 12 of the parties' Memorandum of Understanding (MOU) and past practice. The Office of the General Counsel determined that the allegation was

[1] PERB Regulation 32320, subdivision (d), provides: "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, this decision has not been designated as precedential. (PERB Regs. are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.)

[2] The MMBA is codified at Government Code sections 3500 et seq.

untimely because Local 721's charge was filed on October 23, 2015, more than six months after Local 721 had actual or constructive knowledge that the County intended to engage in the same course of conduct that later made up the substance of Local 721's unfair practice charge. Specifically, in a letter dated January 12, 2015, counsel for Local 721 Jonathan Cohen (Cohen) objected to the County's refusal to accept a so-called 90-day list of pending grievances, allegedly in violation of the language of Article 12 and the parties' past practice.

With some elaboration and clarification, Local 721's appeal reiterates essentially the same argument presented to, and rejected by, the Office of the General Counsel during its investigation of the charge. Local 721's appeal contends that due to various circumstances, including the County's failure to respond to correspondence objecting to the County's conduct until May 2015, Local 721 was unaware whether the County was aware of and intended to comply with an arbitrator's opinion and award vindicating Local 721's position, or whether the County intended to persist in the same course of conduct that later made up the substance of Local 721's charge.

The Board has reviewed the entire case file and has fully considered the relevant issues and contentions raised by Local 1021's appeal and the County's opposition thereto. Based on this review, the Board concludes that the Office of the General Counsel's warning and dismissal letters accurately describe the factual allegations included in the unfair practice charge, as amended. Except as noted below, the Board concludes that the warning and dismissal letters are well-reasoned and in accordance with applicable law. Accordingly, the Board adopts the warning and dismissal letters as a decision of the Board itself, subject to the following discussion of Local 721's appeal.

BACKGROUND

As described in the amended charge and the County's position statement,[3] Article 12, section 6 of the parties' grievance-arbitration procedure provides, in part, that, "after an appeal is filed if the employee, or his/her representative, fails to take the next step to advance the appeal at any point in the process for ninety (90) days the appeal is deemed to be withdrawn and the right to review is waived." The underlying dispute in this case turns on the County's refusal, allegedly in violation of longstanding practice, to accept lists of open grievances sent by Local 721 to the County every 90 days to indicate which grievances Local 721 wishes to continue pursuing. The parties submitted this dispute to binding arbitration, which resulted in an opinion and award vindicating Local 721's position that, pursuant to longstanding practice, the County must accept the so-called 90-day lists as advancing the grievances identified therein to the "next step" within the meaning of the above language and as sufficient to preserve Local 721's right to pursue those appeals. The arbitrator issued his opinion and award on December 27, 2014 and served it by e-mail on the parties' designated representatives in the arbitration proceedings.

[3] On review of a dismissal without hearing, we treat the charging party's factual allegations as true and consider them in the light most favorable to the charging party. (*San Juan Unified School District* (1977) EERB* Decision No. 12, p. 4; *Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6; *California School Employees Association & its Chapter 244 (Gutierrez)* (2004) PERB Decision No. 1606, pp. 3-4.) We may also consider information provided by the respondent, provided it is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Reg. 32620, subd. (c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M, adopting dismissal letter at p. 1; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994, pp. 12-13; *Riverside Unified School District* (1986) PERB Decision No. 562a, p. 8.) The Office of the General Counsel relied on portions of County's position statement and supporting materials for its investigation, and Local 721's appeal does not assert that such reliance was in error. (*Prior to 1978, PERB was known as the Educational Employment Relations Board or EERB.)

At approximately the same time, Local 721 sent a 90-day list to the County, which the County's human resources official rejected via e-mail on January 5, 2015. The County's response stated that "the County's position has not changed on this matter," and, more specifically, explained that, because "the lists provided by [Local 721] do nothing to 'advance' the appeal to the next steps pursuant to the MOU," the County's position "continues to be that the union will waive any appeal that does not advance within the timeframe stated in the MOU." Although the County's e-mail message made no reference to the arbitrator's recent opinion and award, the message indicated that it was forwarded to various individuals, including Stephanie Vaudreuil (Vaudreuil), the attorney who had represented the County in the arbitration proceedings and who had been served with the arbitrator's opinion and award only nine days earlier.

On January 12, 2015, Cohen, who had represented Local 721 in the arbitration proceedings, sent a letter to Vaudreuil, which began by asserting that the parties' dispute over the 90-day lists had been resolved by the arbitrator's December 27, 2014 opinion and award. The letter then objected that, despite the arbitrator's decision, "the County of Riverside continues to take the position that Local 721's practice of forwarding the County a list of pending disciplinary appeals every 90 days does not satisfy Article 12, Section 6 of the parties' [MOU]." Cohen's letter then referenced the County's January 5, 2015 e-mail message and its contents, described the parties' agreement that arbitration awards are "final and binding," and closed by advising Vaudreuil that "the Union will consider any further attempts by the County to unilaterally repudiate the practice a breach of the MOU." Notably, Local 721's correspondence did not request information or ask that the County respond to clarify its

position. According to the allegations in the amended charge, neither Vaudreuil nor anyone else acting on behalf of the County responded to Cohen's January 12, 2015 letter.

The dispute did not surface again until after March 20, 2015, when Local 721 sent another 90-day list of pending disciplinary appeals to the County. Local 721's correspondence indicated that the list was being provided "pursuant to the [MOU] and the [arbitrator's] Opinion." The County did not respond until May 7, 2015, when it again advised Local 721 that it "does not recognize the 90-day list as satisfying Article 12, Section 6 of the MOU."

Local 721 then filed its charge on October 23, 2015, within six months of the County's May 7, 2015 correspondence refusing to accept a 90-day list, but more than nine months after the County's January 5, 2015 e-mail message, in which it had refused to accept a 90-day list with the explanation that "the lists provided by [Local 721] do nothing to 'advance' the appeal to the next steps pursuant to the MOU," and that "the County's position has not changed on this matter."

Following its investigation, on March 22, 2017, the Office of the General Counsel dismissed the charge as untimely and, after being granted an extension of time, Local 721's appeal followed on May 4, 2017.

DISCUSSION

The appeal argues that the charge was timely filed within six months of when Local 721 knew or reasonably should have known of the County's clear intent to maintain its previous position in apparent defiance of the arbitrator's December 27, 2014 opinion and award, which had clarified or reset the parties' status quo to permit Local 721 to submit 90-day appeals pursuant to Article 12, section 6 of the MOU.

Local 721 contends that because the arbitrator's opinion and award were served on the parties' representatives on December 27, 2014, "during a peak holiday period when many employees take vacations," it was reasonable for Local 721 to question whether, as of January 5, 2015 when the County's human resources official rejected Local 721's December 24, 2014 90-day list, she had yet been apprised of the arbitrator's decision. Because Local 721's December 24, 2014 90-day list pre-dated the arbitrator's decision by three days, there was also the possibility that the County considered it subject to the pre-Opinion status quo, rather than the new status quo established by the arbitrator's decision. In sum, Local 721 contends that, under the circumstances, the County's January 5, 2015 e-mail "failed to clearly evince the County's intent to reject the status quo established by [the arbitrator's] December 27, 2014 Opinion," and that the County's failure to respond to Cohen's January 12, 2015 correspondence perpetuated the uncertainty until May 7, 2015, when the County rejected Local 721's next periodic 90-day list. We are not persuaded.

As noted above, and discussed in the warning and dismissal letters, Cohen's January 12, 2015 letter indicates Local 721's knowledge that the County intended to persist in the same course of conduct that, more than nine months later, formed the substance of Local 721's unilateral change allegation. PERB is generally prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months before the charge was filed. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1090; *Gavilan Joint Community College District* (1996) PERB Decision No. 1177 (*Gavilan*), p. 4.) Because Local 721 had knowledge of the conduct at issue more than six months before the charge was filed, and because Local 721 has alleged no facts implicating statutory or equitable tolling, or

any other exception to the six-month limitations period, the charge was properly dismissed as untimely.

Although the appeal argues that Local 721 "attempted to clarify the County's intent" regarding the arbitrator's decision, Cohen's January 12, 2015 letter did not in fact ask for clarification of the County's position or request any specific information. It asserted Local 721's position and advised the County that if it persisted in the same course of conduct, Local 721 would regard it as a repudiation of the MOU. In the absence of a request for information or clarification of the County's position, we can find no authority and Local 721 has pointed us to none obligating the County to state, explain or clarify its position, particularly after it has already stated in its January 5, 2015 correspondence that its position had not changed and, specifically, that it considered the period 90-day lists inadequate to preserve Local 721's right to appeal the grievances identified therein.

Local 721's appeal also argues that the Office of the General Counsel's dismissal letter confuses two distinct issues: whether the County's intent is relevant to establishing a prima facie case that the County repudiated the MOU or established practice, and whether the County's intent to do so is relevant to the running of the statute of limitations. Local 721 points out that, while PERB and private-sector precedents are clear that a unilateral change to a negotiable matter is a per se violation of the duty to bargain, irrespective of the offending party's intent (see, e.g., *City of Montebello* (2016) PERB Decision No. 2491-M, p. 9; *County of San Luis Obispo* (2015) PERB Decision No. 2427-M, p. 26 and cases cited therein), our cases are equally clear that, until an employer's clear intent to change policy is evident, i.e., until the union has actual or constructive knowledge of a firm decision to change policy, the statute of limitations on a unilateral change allegation does not begin to run. (*Gavilan, supra*,

PERB Decision No. 1177, p. 4; *City of Sacramento* (2013) PERB Decision No. 2351-M, p. 29; *City of Livermore* (2014) PERB Decision No. 2396-M, p. 6.)

While we agree with Local 721 that the dismissal letter appears to conflate these two lines of cases, which are concerned with distinctly different issues, this observation does not alter the analysis or the result in this case. As of early January 2015, the best information available indicated that the County fully intended to refuse to accept the periodic 90-day lists and thus to repudiate Article 12 of the MOU and established practice as interpreted by the arbitrator's recent decision. The County's next statement on the issue, its May 7, 2015 rejection of the 90-day list, effectively confirmed its previous statement that it disagreed with Local 721's interpretation of the MOU, despite the arbitrator's opinion and award. Between January 5 and May 7, the County took no affirmative act evincing a wavering of its intent to repudiate the MOU and the arbitrator's opinion. To the extent the County's silence on the subject created any doubt, the means for resolving that uncertainty, including a request for information, were available to Local 721, but never invoked.

Because the charge was not filed until October 23, 2015, we agree with the Office of the General Counsel that Local 721's unilateral change allegation was untimely and that the charge was properly dismissed.

ORDER

The unfair practice charge, as amended, in Case No. LA-CE-1037-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Gregersen and Member Winslow joined in this Decision.

STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1019
Fax: (510) 622-1027

March 22, 2017

Jonathan Cohen, Attorney
Rothner, Segall & Greenstone
510 South Marengo Avenue
Pasadena, CA 91101-3115

Re: *Service Employees International Union Local 721 v. County of Riverside*
Unfair Practice Charge No. LA-CE-1037-M
DISMISSAL LETTER

Dear Mr. Cohen:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 23, 2015. Service Employees International Union, Local 721 (Local 721 or Charging Party) alleges that the County of Riverside (County or Respondent) violated sections 3503, 3504, 3504.5, 3505 of the Meyers-Milias-Brown Act (MMBA or Act),[1] PERB Regulation 32603(c), and Employee Relations Resolution rule 14(a) by unilaterally changing its grievance procedure.

Local 721 was informed in the attached Warning Letter dated December 9, 2016 (Warning Letter), that the above-referenced charge did not state a prima facie case. Local 721 was further 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. Local 721 was further advised that, unless it amended the charge to state a prima facie case or withdrew it on or before December 23, 2016, the charge would be dismissed.

After being granted an extension of time, Local 721 filed a timely Amended Charge on January 20, 2017.

THE INITIAL CHARGE AND PERB'S WARNING LETTER

At all times relevant, Local 721 and the County were parties to a memorandum of understanding (MOU) covering the terms and conditions of various County workers'

[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.

employment.[2] MOU Article 12 sets forth a process for filing grievances, and, if necessary, elevating them to final and binding arbitration. Section 6 of this Article is entitled "Waiver," and provides, in relevant part, that "after an appeal is filed if the employee, or his/her representative, fails to take the next step to advance the appeal at any point in the process for ninety (90) days the appeal is deemed to be withdrawn and the right to review is waived." The charge alleged that it was a "longstanding practice" for Local 721 to send the County a list of all open disciplinary appeals every 90 days (90-day list) to satisfy the waiver provision in Article 12, Section 6.

Around April 12, 2012, the County demoted employee Ken Joyce (Joyce). Local 721 filed a grievance on his behalf soon afterward. On August 8, 2012, the County informed Local 721 that it considered this grievance to be timely. Thereafter, at regular intervals of 90 days, Local 721 provided the County with a list of "open disciplinary appeals," which included Joyce's.

On March 28, 2013, the County's outside counsel informed Local 721 that it considered Joyce's grievance waived as a result of alleged inactivity. Then, in July 2013, the County for the first time informed Local 721 that it did not consider the 90-day lists to satisfy MOU Article 12, Section 6. The parties subsequently discussed this issue, but could not reach an agreement. As a result, on January 24, 2014, Local 721 filed a petition to compel arbitration of the Joyce grievance in the Superior Court of California, County of Riverside. On March 25, 2014, the Superior Court granted Local 721's request.

On December 15, 2014, Local 721 and the County participated in a final and binding arbitration over the County's waiver defense. On December 27, 2014, the arbitrator issued an Opinion rejecting this defense. The Opinion noted that the parties had previously established a practice in which Local 721 could fulfill Article 12, Section 6 by submitting 90-day lists. The arbitrator found that the parties' consistent and longstanding acceptance of these lists clarified the ambiguous phrase "next step" in the MOU.

On January 5, 2015, the County notified Local 721 that the "submission of 90-day lists did not satisfy Article 12, Section 6 of the MOU." On January 12, 2015, Local 721 wrote to the County to advise it that the arbitrator's ruling was final and binding, and that as a result the lists of open grievances it previously sent fulfilled the "next step" of the arbitration process. "The County did not respond to the letter, leading [Local 721] to believe that, finally, the County had acquiesced and submitted to the final and binding decision of [the arbitrator]."

On March 20, 2015, Local 721 sent a "90-day list of pending disciplinary appeals, pursuant to the [MOU] and the [arbitrator's] Opinion." On May 17, 2015, "the County notified [Local 721] that it does not recognize the 90-day list as satisfying Article 12, Section 6 of the MOU."

[2] The allegations from the initial iteration of the charge are more fully summarized in the attached Warning Letter. They are reiterated here only to the extent necessary to explain the deficiencies identified in the Warning Letter.

The Warning Letter also referenced additional and undisputed information from the verified position statement the County filed on December 28, 2015.[3] According to the position statement, Local 721 Advocate David Blanchard (Blanchard) sent County Human Resources Division Manager Lisa Piña (Piña) an e-mail message on December 24, 2014. This message included a list of grievances Local 721 wished "to pursue to arbitration on." The position statement also specified that the January 5, 2015 communication referenced in the charge was from Piña and responded to Blanchard's recent presentation of a 90-day list. Piña's e-mail message stated the following:

> As the County's position has not changed on this matter, the lists provided by SEIU do nothing to 'advance' the appeal to the next steps pursuant to the MOU. As such, we view the information as a courtesy from SEIU as to how they are keeping track of their cases but the County's position continues to be that the union will waive any appeal that does not advance the timeline stated in the MOU.

Also, according to the position statement, on March 20, 2015, Blanchard wrote: "Attached is a copy of the list of appeals the Union is interested in continuing to pursuing with the County. Let me know if you have any questions regarding the list." On May 7, 2015, Piña replied: "[a]s stated prior, we don't recognize these e-mails as satisfying the waiver in the MOU."

The Warning Letter informed Local 721 that the charge did not state a prima facie case because it was not timely. As stated in the Warning Letter, charging parties bear the burden of demonstrating a timely charge. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024.) To be timely, the charge must allege that the misconduct at issue occurred within the six-month preceding the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The general rule is that the limitations period starts 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.) More specifically, when a unilateral change is alleged to have occurred, the limitations period begins on the date the charging party obtains actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequently evinces a wavering of that intent. (*City of Livermore* (2014) PERB Decision No. 2396-M.) An employer wavers in its intent to change a policy when, for example, it retracts the proposed date of implementation and considers the union's input (*City of Livermore*, *supra*, PERB Decision No. 2396-M), or expresses its willingness to alter its position after soliciting the union's opinion about it (*Omnitrans* (2009) PERB Decision No. 2001-M).

---

[3] As stated in the Warning Letter, PERB may also consider information provided by the respondent, when such information is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Reg. 32620, subd. (c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

The Warning Letter next explained that the so far undisputed facts indicated that the County had clearly informed Local 721 of its firm decision to unilaterally alter the grievance procedure on January 5, 2015. On that date, Human Resources Division Manager Piña responded to Local 721's recent presentation of a 90-day list by stating that "[t]he County's position has not changed on this matter, the lists provided by SEIU do nothing to 'advance' the appeal to the next steps pursuant to the MOU." The Warning Letter further stated that the charge had not made sufficient specific allegations[4] to show how the County's failure to respond to Local 721's January 12, 2015 letter made it reasonable for the union to believe that this employer "had acquiesced and submitted to the final and binding decision of [the arbitrator]," and thus wavered in its intent to unilaterally change the grievance procedure.[5] Thus, because the charge was filed on October 23, 2015—more than nine months after the unilateral change apparently occurred—it was not timely. Consequently the Warning Letter informed Local 721 that without further allegations demonstrating that this unilateral change occurred at some later timely date or that the violation was somehow tolled after January 5, 2015, the charge did not state a prima facie case.[6]

FACTS ALLEGED IN THE AMENDED CHARGE

For the most part, the Amended Charge reasserts the same basic facts about the parties' dispute. It, however, adds that the arbitration over whether the 90-day lists satisfied MOU Article 12, Section 6 was litigated "through their respective counsel," who "each presented testimony and exhibits in support of their respective positions. . . ." The Amended Charge also

---

[4] As stated in the Warning Letter, 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." 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.) When a charge does not include factual allegations to support its legal conclusions, PERB is not required to accept these conclusions as true. (*Charter Oak Unified School District* (1991) PERB Decision No. 873.) Legal conclusions are not sufficient to state a prima facie case. (*Ibid.*)

[5] The Warning Letter noted that the undisputed facts that Local 721 presented the City with a 90-day list on December 24, 2014 and those about the content of the parties' communications derived from the County's verified position statement.

[6] The Warning Letter also set forth the test PERB uses to determine if a charge has been equitably tolled under the MMBA. This doctrine applies when the parties use a dispute resolution process if: (1) the procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent. (*City of Berkeley* (2012) PERB Decision No. 2281-M.)

alleges that the arbitrator issued the Opinion recognizing the efficacy of the 90-day lists "via email directly to counsel for the parties, not the parties themselves."

The Amended Charge further adds that when Human Resources Division Manager Piña sent her January 5, 2015 e-mail message stating that the County does not accept 90-day lists "it was not apparent [to Local 721] whether she had received and/or was aware of [the arbitrator's] Opinion and had rejected it, or whether Piña was unaware of the [arbitrator's] Opinion and was continuing to maintain the County's earlier position that the 90-day lists did not satisfy Article 12, Section 6 of the MOU." The Amended Charge further points out that Piña sent this letter "only days" after the Arbitrator issued the Opinion.

Local 721 also adds that the purpose of its January 12, 2015 letter was "to clarify whether or not the County intended to follow the [arbitrator's] Opinion" and inform the County that this Opinion was final and binding on the parties with respect to Article 12, Section 6 of the MOU. This letter was sent from Local 721's counsel to the County's counsel. The Amended Charge alleges that because neither the County nor its counsel responded to this letter, Local 721 came to believe that the County "acquiesced and had agreed to submit to the . . . decision." And "[a]s a result of the County' failure to respond to the Union's January 12, 2015 letter, the Union had neither actual nor constructive knowledge that, regardless of the [arbitrator's] Opinion, the County did not intend to recognize the 90-day list as satisfying Article 12, Section 6 of the MOU."

By contrast, the Amended Charge asserts that Piña's e-mail message to Local 721 on May 7, 2015 "was the first clear notice to the Union that, regardless of the [arbitrator's] Opinion, the County did not intend to recognize the 90-day list as satisfying Article 12, Section 6 of the MOU." Consequently, Local 721 alleges that "the County's May 7, 2015 notice to the Union constituted a unilateral change..."[7]

DISCUSSION

It is settled that a unilateral change is unlawful because it is a per se violation of the employer's duty to bargain in good faith. (*National Labor Relations Board v. Katz* (1962) 369 U.S. 736, 743 (*Katz*); *California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 934 (*CSEA*); *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M (*Fresno*); *Stockton Unified School District* (1980) PERB Decision No. 143.) Making a unilateral change to otherwise negotiable matters is inherently unlawful because "the bilateral duty to negotiate is negated by the assertion of power by one party through unilateral action on a negotiable matter" just as if a party had refused to negotiate outright. (*San Mateo County Community College District* (1979) PERB Decision No. 94; see also *Pajaro Valley Unified School District* (1978) PERB Decision No. 51.) Because a unilateral change carries this great potential to frustrate statutorily mandated

[7] On February 3, 2017, the County filed a verified position statement responding to the Amended Charge. It incorporated the exhibits first presented in the County's December 28, 2015 position statement and included additional legal argument.

negotiations, PERB does not inquire into the employer's subjective intent for taking this action. (*County of Riverside* (2014) PERB Decision No. 2360-M.) A unilateral change is unlawful "*irrespective of intent*." (*City of Montebello* (2016) PERB Decision No. 2491-M emphasis in original; *Fresno*, *supra*, PERB Decision No. 2418-M.)[8] Otherwise, this per se violation would be per se no longer.

Here, the Amended Charge alleges new facts to show that Local 721 was unaware whether Human Resources Manager Piña was explicitly rejecting the recent arbitration Opinion or simply restating the County's earlier position when she stated that the County would not accept 90-day lists on January 5, 2015.

But these allegations about Local 721's confusion over Piña's intent in making this declaration of County policy are not of the moment. A unilateral change is a per se violation, and the employer's subjective intent for changing the status quo is irrelevant to the issue of whether this particular species of bad faith bargaining occurred. As established by the arbitrator's Opinion interpreting MOU Article 12, Section 6, the status quo for grievance procedures on January 5, 2015 was that 90-day lists served to advance pending disciplinary appeals.[9] It remains undisputed that on this date, Piña informed Local 721 that the County's "position has not changed on this matter, the lists provided by [Local 721] do nothing to 'advance' the appeal to the next steps pursuant to the MOU." And there have been no allegations that Piña lacked either the actual or apparent authority to change the County's policies for processing grievances to the extent necessary to be able to cause management to commit an unlawful unilateral change. The undisputed facts before PERB still indicate that Local 721 knew that the County was diverging, for whatever subjective reasons, from the status quo on January 5, 2015. (*CSEA*, *supra*, 51 Cal.App.4th at 934, citing *Katz*, *supra*, 369 U.S. at 743 [like with an outright refusal to bargain, if a unilateral change "in fact" occurs, there is a violation].)

The Amended Charge's additional allegations about the letter Local 721's counsel sent to the County's counsel on January 12, 2015 also fails to show that the union lacked actual or

---

[8] All that is necessary for a unilateral change to occur is for the employer to make a firm decision to change a policy within the scope of representation. (*City of Sacramento* (2013) PERB Decision No. 2351-M.) A charge shows this by indicating that (1) the employer 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 the exclusive representative notice or 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.)

[9] For the purpose of charge processing, it has been assumed that the status quo about the efficacy of the 90-day lists for the grievance procedure was set anew on December 27, 2014, when the arbitrator issued his Opinion interpreting MOU Article 12, Section 6.

constructive notice that the County just had unilaterally abandoned the policy of accepting 90-day lists.[10]

The Amended Charge alleges that the purpose of this letter was "to clarify whether or not the County intended to follow the [arbitrator's] Opinion" and that its failure to respond led Local 721 to believe that it "had agreed to submit to the final and binding [arbitrator's] decision." While this allegation indicates that Local 721 remained unsure of the County's regard for the arbitrator's Opinion, it falls short of showing that this employer was considering retracting Piña's recent declaration that the County would not accept 90-day lists. (Contra, *City of Livermore* (2014) PERB Decision No. 2396-M [employer wavers in intent to implement a unilateral change by retracting the proposed implementation date of a new policy, meeting with the union, and considering the union's input].) The undisputed facts before PERB continue to indicate that the statute of limitations for the County's unilateral change to its grievance policy began on January 5, 2015. Because Local 721 did not file the relevant charge until October 23, 2015, it is not timely.[11]

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.

---

[10] A purported copy of this letter was provided by the District with the verified position statement it filed in response to Local 721's initial charge. Since then, Local 721 has not provided its own version of this letter or allegations about its content that conflict with the document the District supplied.

[11] Additionally, even if it were assumed that the statute of limitations did not begin to run until Local 721 knew or should have known whether the County subjectively had rejected the arbitrator's Opinion, the undisputed facts still seem to indicate that Local 721 was aware of such an event in January 2015. The letter Local 721's counsel sent on January 12, 2015 states in relevant part that "[d]espite the [arbitrator's] Opinion, the [County] continues to take the position that Local 721's practice of forwarding the County a list of pending disciplinary appeals every 90 days does not satisfy Article 12, Section 6 of the [MOU]." It then follows by explaining that "[s]pecifically, on January 5, 2015, County Human Resources Division Manager Lisa Piña sent an email to Local 721 indicating that the 90-day list sent by Local 721 to the County on December 24, 2014, did not satisfy Article 12, Section 6 of the MOU." Thus it seems from this correspondence that the "specific" reason Local 721 believed that the County had rejected the arbitrator's Opinion was that it had received Piña's January 5, 2015 e-mail message declaring that the County did not accept 90-day lists.

(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 _____
Jeremy Zeitlin
Regional Attorney

Attachment

cc: Brett Ehman, Attorney

STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1019
Fax: (510) 622-1027

December 9, 2016

Jonathan Cohen, Attorney
Rothner, Segall & Greenstone
510 South Marengo Avenue
Pasadena, CA 91101-3115

Re: *Service Employees International Union, Local 721 v. County of Riverside*
Unfair Practice Charge No. LA-CE-1037-M
WARNING LETTER

Dear Mr. Cohen:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 23, 2015. Service Employees International Union, Local 721 (Local 721 or Charging Party) alleges that the County of Riverside (County or Respondent) violated sections 3503, 3504, 3504.5, 3505 of the Meyers-Milias-Brown Act (MMBA or Act),[1] PERB Regulation 32603(c), and Employee Relations Resolution rule 14(a) by unilaterally changing its grievance procedure.

FACTS AS ALLEGED

At all times relevant, Local 721 was the exclusive representative of various units of employees at the County. During this period, Local 721 and the County were parties to a memorandum of understanding (MOU).

MOU Article 12 establishes a "disciplinary appeal process that culminates in final and binding arbitration." Section 6 of this Article is entitled "Waiver". In relevant part, this section provides that "after an appeal is filed if the employee, or his/her representative, fails to take the next step to advance the appeal at any point in the process for ninety (90) days the appeal is deemed to be withdrawn and the right to review is waived."

The charge alleges that it was a "longstanding practice" for Local 721 to send the County a list of all open disciplinary appeals every 90 days (90-day list) to satisfy the 90-day provision in Article 12, Section 6. The charge further alleges that this practice of extending the time in which to pursue an appeal "preceded the current MOU."

[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.

Around April 12, 2012, the County demoted employee Ken Joyce (Joyce). Soon afterward, Local 721 filed a grievance on Joyce's behalf. The grievance subsequently advanced to arbitration. On August 8, 2012, the County informed Local 721 that it considered this grievance to be timely. Thereafter, at regular intervals of 90 days, Local 721 provided the County with a list of "open disciplinary appeals." These lists referenced Joyce's arbitration.

On March 28, 2013, the County's outside counsel "notified Local 721 that the County considered the Joyce grievance waived as a result of alleged inactivity." Local 721 disputed the County's claim of waiver and informed the County of its disagreement.

"In approximately July 2014, the County, for the first time, informed Local 721 that it did not consider the 90-day lists to satisfy the requirements of Article 12, Section 6 of the MOU." The parties then met and exchanged their views on this matter for some time, but could not reach agreement. Nonetheless, Local 721 still wished to arbitrate Joyce's demotion and believed that that it was timely because of its continual inclusion on 90-day lists.

As a result, on January 24, 2014, Local 721 filed a petition to compel arbitration of the Joyce grievance in the Superior Court of California, County of Riverside. On March 25, 2014, the Superior Court granted Local 721's petition and ordered that arbitration occur over Joyce's grievance and the County's waiver defense.

On December 15, 2014, Local 721 and the County "participated in a final and binding arbitration concerning the County's procedural defense to the Joyce grievance." On December 27, 2014, the arbitrator issued an Opinion, which rejected the County's waiver defense. The arbitrator reasoned that the parties had previously established a practice in which Local 721 could fulfill Article 12, Section 6 by submitting a 90-day list. The arbitrator found that the parties' consistent and longstanding acceptance of these lists clarified the ambiguous phrase "next step" in the MOU.

On January 5, 2015, the County notified Local 721 that its "submission of 90-day lists did not satisfy Article 12, section 6 of the MOU. The County's position was directly contrary to the [arbitrator's] final and binding ruling."

On January 12, 2015, Local 721 wrote to the County to advise it that the arbitrator's ruling was final and binding, and that as a result, the lists of open grievances it previously sent fulfilled the "next step" of the arbitration process. "The County did not respond to the letter, leading [Local 721] to believe that, finally, the County had acquiesced and submitted to the final and binding decision of [the arbitrator]."

On March 20, 2015, Local 721 sent a "90-day list of pending disciplinary appeals, pursuant to the [MOU] and the Arbitrator's Opinion." On May 17, 2015, "the County notified [Local 721] that it does not recognize the 90-day list as satisfying Article 12, Section 6 of the MOU."

POSITION OF RESPONDENT

On December 28, 2015, the County filed a verified position statement.[2] Among other things, the position statement adds that on December 24, 2014, Local 721 Advocate David Blanchard (Blanchard) sent County Human Resources Division Manager Lisa Piña (Piña) an e-mail message stating the following:

> Here is the latest list of appeal cases the Union wishes to continue to pursue to arbitration on. We have cleaned up the list, let me know if there are any changes that I may have missed. I hope you and the staff at the CAC have a happy and joyous holiday season.

Attached to Blanchard's e-mail message was a document that included "a list of outstanding appeals that the Union still desires to move forward and preserve timelines on." This list referenced Joyce's matter.

On January 5, 2015, Piña replied to Blanchard by stating that:

> As the County's position has not changed on this matter, the lists provided by SEIU do nothing to "advance" the appeal to the next steps pursuant to the MOU. As such, we view the information as a courtesy from SEIU as to how they are keeping track of their cases but the County's position continues to be that the union will waive any appeal that does not advance the timeline stated in the MOU.

The position statement also provides additional facts about Local 721's correspondence to the County on March 20, 2015, and the County's response to it on May 7, 2015.

According to the position statement, on March 20, 2015, Blanchard wrote: "Attached is a copy of the list of appeals the Union is interested in continuing to pursuing with the County. Let me know if you have any questions regarding the list." On May 7, 2015, Piña replied to him that: "As stated prior, we don't recognize these e-mails as satisfying the waiver in the MOU."

DISCUSSION

I. The MMBA's Statute of Limitations

A 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*

[2] Pursuant to PERB's Regulations and decisional law, PERB may also consider information provided by the respondent, when such information is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Reg. 32620, subd. (c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

Insurance) (1997) PERB Decision No. 1197-S.)[3] 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.)

Specifically, in a unilateral change case, the limitation period begins on the date the charging party obtains actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequently evinces a wavering of that intent. (*City of Livermore* (2014) PERB Decision No. 2396-M; *Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H; *Clovis Unified School District* (2002) PERB Decision No. 1504; see also, *City of Milpitas* (2015) PERB Decision No. 2443-M [a change in policy occurs on the date a firm decision is made even if the decision is not scheduled to take effect immediately].) A charging party that rests on its rights until actual implementation of the change bears the risk of running afoul of the statute of limitations. (*Regents of the University of California (Davis)*, *supra*, PERB Decision No. 2101-H.)

PERB has found that an employer wavered in its intent to implement a unilateral change when it retracted the proposed implementation date of a new policy, met with the union to consider changes, and then considered the union's input. (*City of Livermore* (2014) PERB Decision No. 2396-M.) An employer has also been recognized to have wavered in making a unilateral change by soliciting feedback from the affected union, and then expressing that it was amenable to altering its position based on this response. (*Omnitrans* (2009) PERB Decision No. 2001-M.)

The doctrine of equitable tolling applies to cases under the MMBA. (*City of Berkeley* (2012) PERB Decision No. 2281-M; *County of Santa Barbara* (2012) PERB Decision No. 2279-M.) Equitable tolling occurs when the parties utilize a dispute resolution procedure if: (1) the procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent. (*Ibid.*)

Here, Local 721 has not demonstrated that the instant unilateral change claim is timely. First, it appears that on January 5, 2015 the County clearly informed Local 721 of its firm decision to abandon the grievance procedure set in the arbitrator's recent decision when this employer

[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.)

responded to the union's December 24, 2014 presentation of a 90-day list[4] by stating that "[t]he County's position has not changed on this matter, the lists provided by SEIU do nothing to 'advance' the appeal to the next steps pursuant to the MOU." As such, it appears that the County committed the relevant unilateral change at a date occurring approximately 10 months before the charge was filed on October 26, 2015.

The charge does not presently demonstrate that the County subsequently wavered in its intent to make this unilateral change. Unlike in *City of Livermore* and *Omnitrans*, there are no allegations that the County ever retracted Piña's January 5, 2015 repudiation of the 90-day list, or solicited Local 721's opinion about this change. Additionally, the charge has not made any specific allegations showing how the County's failure to respond to Local 721's January 12, 2015 letter made it reasonable for the union to believe that this employer "had acquiesced and submitted to the final and binding decision of [the arbitrator]," and thus wavered in its intent to unilaterally change the grievance procedure.[5] Additionally, the allegations about the County's silence do not indicate that the parties participated in a contractual dispute procedure that would have equitably tolled the limitations period for this unilateral change. Without further allegations demonstrating that the limitations period was somehow tolled after the County's January 5, 2014 refusal to accept the 90-day list, or, alternatively, that the relevant unilateral change occurred at some later timely date, the charge fails to comply with the MMBA's statute of limitations.

For these reasons the charge, as presently written, does not state a prima facie case.[6] 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

---

[4] The currently undisputed fact that Local 721 presented the City with a 90-day list on December 24, 2014 derives from the County's verified position statement.

[5] 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." 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.) When a charge does not include factual allegations to support its legal conclusions, PERB is not required to accept these conclusions as true. (*Charter Oak Unified School District* (1991) PERB Decision No. 873.) Legal conclusions are not sufficient to state a prima facie case. (*Ibid.*)

[6] 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.*)

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 December 23, 2016,[7] 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

[7] 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.)