STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RUEBEN GARCIA, et al., Charging Party, v. COUNTY OF SANTA CLARA, Respondent.	Case No. SF-CE-1388-M PERB Decision No. 2554-M February 27, 2018

Appearances: Banys by Christopher D. Banys, Attorney, for Rueben Garcia, et al.; Cheryl A. Stevens, Deputy County Counsel, for County of Santa Clara.

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 from the dismissal (attached) by PERB's Office of the General Counsel of an unfair practice charge brought by Rueben Garcia and 70 other employees (collectively, Charging Parties) of the County of Santa Clara (County). The charge, as amended, alleged that the County violated the Meyers-Milias-Brown Act (MMBA)[2] by complying with an arbitrator's opinion and award to distribute $3.2 million to approximately 1,100 employees in equal shares of $3,000, rather than to fully compensate Charging Parties for their unpaid overtime hours, as determined in the liability phase of a grievance brought by Charging

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

Parties' exclusive representative, Service Employees International Union Local 521 (Local 521).[3]

The Board has reviewed the entire case file and has fully considered the relevant issues and contentions on appeal in light of applicable law. The warning and dismissal letters accurately describe the factual allegations included in the unfair practice charge, as amended, and the Office of the General Counsel's legal conclusions are well reasoned and in accordance with applicable law. Charging Parties' appeal raises no issues which were not already adequately addressed in the Office of the General Counsel's warning and dismissal letters. Charging Parties lack standing to allege unilateral change violations affecting the applicable collective bargaining agreement and/or established practice; PERB lacks jurisdiction over contractual disputes; and, the charge, as amended, fails to allege sufficient facts to state a prima facie case of any violation of the MMBA. The Board therefore adopts the warning and dismissal letters as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CE-1388-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Gregersen and Member Winslow joined in this Decision.

[3] Local 521's conduct in prosecuting and settling the grievance is the subject of a separate unfair practice charge by Charging Parties.

PUBLIC EMPLOYMENT RELATIONS BOARD

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May 26, 2017

Christopher D. Banys, Attorney
Banys, P.C.
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Re: *Rueben Garcia, et al. v. County of Santa Clara*
Unfair Practice Charge No. SF-CE-1388-M
DISMISSAL LETTER

Dear Mr. Banys:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 13, 2016. Rueben Garcia, et al. (Charging Parties) alleges that the County of Santa Clara (County or Respondent) violated section 3507 of the Meyers-Milias-Brown Act (MMBA or Act)[1] with respect to its settlement of a grievance and arbitration brought by Service Employees International Union Local 521 (SEIU).

The County filed verified position statements on May 20, 2016 and June 22, 2016.

Charging Parties were informed in the attached Warning Letter dated March 9, 2017, that the above-referenced charge did not state a prima facie case. Charging Parties were 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 Parties were further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to March 30, 2017, the charge would be dismissed.

On March 30, 2017, Charging Parties filed an amended charge. On April 27, 2017, the County filed a further verified position statement. The amended charge does not cure the defects discussed in the Warning Letter, and it does not state a prima facie case. Therefore, the charge is hereby dismissed based on the facts and reasons set forth herein and in the March 9, 2017 Warning Letter.

[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.

Summary of Facts[2]

The initial charge identified 45 individuals to be included as the Charging Party. The amended charge increases the number of individuals identified as the Charging Party to 71.

As discussed in the Warning Letter, the underlying dispute involves a grievance filed by SEIU against the County pursuant to a grievance procedure under the applicable Memorandum of Understanding (MOU). The grievance concerned mispayment of Special Project Overtime (SPOT) to Eligibility Workers. The grievance proceeded to binding arbitration before Arbitrator Morris Davis. On July 23, 2014, Arbitrator Davis issued an Opinion and Award in favor of SEIU, told the County and SEIU to meet and confer over the amount of the remedy, and retained jurisdiction over the remedy. Subsequently, the County and SEIU met to discuss the amount and apportionment of the remedy.

SEIU wanted money apportioned equally amongst all employees who had been eligible for SPOT during a relevant time period. Charging Parties believe that the money should be apportioned only to those who actually worked SPOT. On August 27, 2015, the County and SEIU had a further hearing before Arbitrator Davis regarding the remedy.

On December 21, 2105, SEIU notified some members, via e-mail message, that a settlement in principle had been reached for $3.2 million. However, the e-mail stated that SEIU and the County were still working on the details of the agreement. Under the proposed settlement, the money would be distributed evenly amongst all employees who were eligible for SPOT.

The County alleges that "the parties were in the process of finalizing a settlement agreement when Charging Parties filed their original Unfair Practice Charge" on May 13, 2016. In May 2016, SEIU and the County asked Arbitrator Davis to convene a second day of hearing over the remedy as settlement discussions had broken down.[3]

Arbitrator Davis conducted a further remedial hearing on September 22, 2016. During the hearing he received a written position statement from Charging Parties' attorney, Christopher Banys, although Charging Parties were not parties to the arbitration.[4] The County had rerun its calculations and argued that it owed only $2.6 million. However, the County agreed to pay

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[2] Where allegations contained in the County's verified position statement do not conflict with the allegations in the charge, they have been included herein. Nothing in PERB case law requires a Board agent to ignore undisputed facts provided by the Respondent and consider only the facts provided by the Charging Party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.) PERB also may take official notice of its own records. (*West Contra Costa County Healthcare District* (2011) PERB Decision No. 2164-M, at fn. 4.) Charging Parties filed a separate charge against SEIU, case number SF-CO-387-M. Official notice is taken of the documents in that file.

[3] Remedial Order, page 4.

[4] Remedial Order, page 5.

$3.2 million, which is the amount it had previously agreed to. The County and SEIU asked Arbitrator Davis to decide which Eligibility Workers should be awarded a portion of the remedy.[5]

Arbitrator Davis issued an Opinion and Award Regarding the Remedy (Remedial Order) on October 8, 2016. He concluded:

> The Arbitrator is persuaded that the appropriate remedy for this award be distributed to all the Eligibility Workers who could have volunteered for this overtime … The Arbitrator has considered the arguments raised by Mr. Banys as well as the County … The Arbitrator is persuaded that the County's alternative method of distribution, that the whole award will be divided among all eligible Eligibility Workers II and III who worked at any time during the statutory period, is the most appropriate remedy.

Charging Parties allege that on January 27, 2017, "the settlement" was distributed equally to approximately 1,100 workers, most of whom never worked any SPOT. Charging Parties allege they were undercompensated by the distribution and have not been paid for the hours they actually worked.

Discussion

As discussed in the Warning Letter, there is no basis for PERB's jurisdiction over Charging Parties' claims against the County.

PERB does not have jurisdiction to resolve pure contract disputes under the MMBA. (*County of Sonoma* (2012) PERB Decision No. 2242-M, at p. 15.; *City of Santa Monica* (2012) PERB Decision No. 2246-M.) To the extent that Charging Parties seek to enforce the MOU, allege that the County breached the MOU, and/or disagree with the proposed remedy for a breach, these are matters not within PERB's jurisdiction.

Charging Parties also lack standing to allege that the County's conduct constituted an unlawful unilateral change to terms and conditions of employment. (*Regents of the University of California* (2010) PERB Decision No. 2153-H; *City of Long Beach* (2008) PERB Decision No. 1977-M.)

Charging Parties appear to challenge the Arbitrator's Remedial Order, which distributed a lump sum amount equally to all Eligibility Workers rather than paying only those employees who worked SPOT. PERB does not have independent authority to review a third-party arbitration award. (*Ventura County Community College District* (2009) PERB Decision No. 2082 [*Ventura CCD*].) In *Ventura CCD*, an unfair practice charge alleging an unlawful

[5] Remedial Order, page 5.

unilateral change was deferred to the parties' binding grievance and arbitration process. The union prevailed in the arbitration, and the school district asked PERB to review the arbitration award under a repugnancy standard, pursuant to Government Code section 3541.5(a)(2).[6] The Board held that the school district had not alleged any wrongful conduct by the union, and therefore it had no basis for a repugnancy review. The school district could not seek an independent review of the arbitrator's decision so as to re-litigate before PERB the matters dealt with in arbitration. (*Ventura CCD* at p. 4.)[7] Here, the Charging Parties have not alleged any wrongful conduct by the County—indeed it is unclear if they have standing to do so—apart from, evidently, complying with the Arbitrator's Remedial Order. PERB lacks any authority, under the grounds alleged by Charging Parties, to independently review the Remedial Order.

Accordingly, Charging Parties do not state a prima facie case.

Right to Appeal

Pursuant to PERB Regulations, Charging Parties 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.)

[6] Section 3541.5, under the Educational Employment Relations Act (EERA) is parallel to MMBA section 3505.8.

[7] See also *State of California (Department of Corrections)* (1997) PERB Decision No. 1204-S,holding that PERB will not find an arbitrator's award to be repugnant simply because the Board would have provided a different remedy.

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 _____
Laura Z. Davis
Supervising Regional Attorney

Attachment

cc: Cheryl A. Stevens, Deputy County Counsel
Kerianne R. Steele, Attorney (non-party)

PUBLIC EMPLOYMENT RELATIONS BOARD

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March 9, 2017

Christopher D. Banys, Attorney
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Palo Alto, CA 94303

Re: *Rueben Garcia, et al. v. County of Santa Clara*
Unfair Practice Charge No. SF-CE-1388-M
WARNING LETTER

Dear Mr. Banys:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 13, 2016. Rueben Garcia, et al. (Charging Parties) alleges that the County of Santa Clara (County or Respondent) violated section 3507 of the Meyers-Milias-Brown Act (MMBA or Act)[1] with respect to its settlement of a grievance and arbitration brought by Service Employees International Union Local 521 (SEIU).

The County filed verified position statements on May 20, 2016 and June 22, 2016.

Summary of Facts[2]

Charging Parties are 45 employees of the County; it is presumed herein that all 45 are members of the bargaining unit exclusively represented by SEIU.

In 2006, the County and SEIU negotiated an agreement regarding a certain type of overtime, known as Special Project Overtime (SPOT). The provision regarding SPOT was subsequently incorporated in the Memorandum of Understanding (MOU) between SEIU and the County.[3] It was also included in the MOU covering the term July 25, 2011 through June 23, 2013.

[1] The MMBA is codified at Government Code section 3500 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

[2] Where allegations contained in the County's verified position statement do not conflict with the allegations in the charge, they have been included herein. Nothing in PERB case law requires a Board agent to ignore undisputed facts provided by the Respondent and consider only the facts provided by the Charging Party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

[3] The term of this agreement is not provided.

On November 15, 2011, SEIU filed a grievance with the County, evidently pursuant to a grievance procedure provided in the MOU, alleging that the County had misused or miscalculated SPOT payments due to members. The County denied the grievance and the matter proceeded to arbitration. On February 18, 2014, an arbitration was held before Arbitrator Morris Davis. On July 23, 2014, Arbitrator Davis issued his Opinion and Award (Award) in favor of SEIU. The Award provided that, in order to determine the appropriate remedy, the parties (SEIU and the County) were to review records in order to calculate the correct overtime rates and amounts that should have been paid.

From December 2014 through November 2015, the County and SEIU met and conferred regarding the Award. The County took the position initially that each affected employee should be paid the individual amount of overtime he or she would have earned. SEIU took the position that a lump sum of damages should be distributed equally to all affected employees. On August 28, 2015, the SEIU and the County convened a further hearing before Arbitrator Davis on the question of remedy. The parties agreed to collect additional information and reconvene in December 2015.

On November 16, 2015, the County proposed that the parties settle the matter with a $3.2 million lump sum payment, to be equally distributed amongst affected employees (approximately 1,100 employees). SEIU considered and agreed to this proposal in principle. On December 21 and 22, 2015, SEIU notified some individuals via e-mail message of this proposed settlement.

Charging Parties contend that this intended distribution will undercompensate them. Charging Parties' compensation would be reduced by as much as 90% from what they should actually be paid for uncompensated SPOT.

Charging Parties filed a separate charge against SEIU, case number SF-CO-387-M. PERB may take official notice of its own records. (*West Contra Costa County Healthcare District* (2011) PERB Decision No. 2164-M, at fn. 4.) On September 20, 2016, SEIU filed a letter in that case, stating that "Arbitrator Morris Davis has agreed to exercise his retained jurisdiction in the arbitration case that is factually related [to the charge]. … The matter is back before the Arbitrator and the settlement is off the table …"

Discussion

Charging Parties contend that the intended distribution: (1) will undercompensate Charging Parties as compared to their actual loss of income; (2) will not remedy the underlying breach of the MOU, (3) violates the arbitrator's decision; and (4) is not in keeping with past practice and policy.

1. PERB Does Not Resolve Contract Disputes

PERB does not have jurisdiction to resolve pure contract disputes under the MMBA. (*County of Sonoma* (2012) PERB Decision No. 2242-M, at p. 15.; *City of Santa Monica* (2012) PERB Decision No. 2246-M.) The MOU is a contract and a written agreement arising out of the

settlement of the arbitration Award would also be a contract. To the extent that Charging Parties seek to enforce the MOU, allege that the County breached the MOU, and/or disagree with the proposed remedy for a breach, these are matters not within PERB's jurisdiction.

2. Employees Lack Standing Regarding Bargaining Violations

Charging Parties allege that the County's intended distribution is not in keeping with the County's past practice and policy. An employer's unilateral deviation from a regular and historic past practice may be an unlawful unilateral change in violation of section 3505 and PERB Regulation 32603(c). (*County of Riverside* (2013) PERB Decision No. 2307-M.) However, individual employees lack standing to allege that an employer violated statutory sections that protect the collective bargaining rights of employee organizations, including unilateral change violations. (*Regents of the University of California* (2010) PERB Decision No. 2153-H; *City of Long Beach* (2008) PERB Decision No. 1977-M.) Charging Parties here are individual bargaining unit members. Therefore, to the extent that Charging Parties allege that the County's conduct constituted an unlawful unilateral change to terms and conditions of employment, Charging Parties lack standing to do so.

3. This Matter is Not Ripe for Review

A court—and by extension, a quasi-judicial agency such as PERB—may not issue rulings on matters that are not ripe for review. (*Pacific Legal Foundation v. California Coastal Comm.* (1982) 33 Cal.3d 158, 171.) PERB does not issue advisory opinions or generalized declarations of law. (*Santa Clarita Community College District (College of the Canyons)* (2003) PERB Decision No. 1506.)

For instance, in *Tustin Unified School District* (1987) PERB Decision No. 626, a school district sought an advisory opinion from PERB regarding whether it could restrict an employee organization from using the district's internal mail system. The school district in that case had not yet taken any action to restrict the usage of its mail system, therefore there was no existing controversy ripe for adjudication, and PERB declined to consider the matter. (*Id.* at fn. 1.)

As another example, in *Regents of the University of California* (1985) PERB Decision No. 531-H, the University of California proposed to make certain changes to the working conditions of student library employees. The Board held these allegations were not ripe, stating: "No change is alleged to have been implemented. At this stage it has been merely proposed." (*Ibid.*)

Here, the Award directed the County and SEIU to meet and obtain information in order to that an appropriate remedy could be determined. After more than a year of discussion, the County and SEIU reached an agreement in principle regarding a lump sum settlement, and a proposal as to how the monetary award would be distributed. According to the charge, this was an "intended distribution." There are no facts to show that this agreement was finalized or actually implemented. Indeed, according to SEIU's September 20, 2016 letter, the proposed settlement is now "off the table," and the matter has been returned to the Arbitrator for further proceedings. No actual change was made, no settlement agreement was actually reached, no

money has been paid, and it appears that this matter is still being adjudicated by an arbitrator with retained jurisdiction. The charge does not allege that any harm or violation occurred and therefore the matter is not ripe.

For these reasons the charge, as presently written, does not state a prima facie case.[4] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before **March 30, 2017**,[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Laura Z. Davis
Supervising Regional Attorney

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[4] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[5] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile or electronic mail. (PERB Regulation 32135.)