STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN FRANCISCO FIREFIGHTERS UNION, LOCAL 798, IAFF, AFL-CIO, Charging Party, v. CITY & COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-53-M PERB Decision No. 1611-M April 2, 2004

Appearance: McCarthy, Johnson & Miller by Diane Sidd-Champion, Attorney, for San Francisco Firefighters Union, Local 798, IAFF, AFL-CIO.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on appeal by the San Francisco Firefighters Union, Local 798, IAFF, AFL-CIO (Union) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the City & County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally changing the discipline imposed for first-time violations of the City's alcohol and drug use policy.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charges, the warning and dismissal letters and the Union's appeal.

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

The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself, subject to the following discussion of the Union's appeal.

DISCUSSION

The Union alleges that prior to 2002, firefighters who violated the City's policy on alcohol and drug use for the first time were offered the opportunity to enter into a "last chance" agreement. In 2002, a firefighter charged with a first offense relating to the use of alcohol was terminated, without the opportunity to enter into a "last chance" agreement. The Union argues that the City's refusal to offer a "last chance" agreement to this firefighter constituted an unlawful unilateral change in violation of the MMBA.

In order to demonstrate an unlawful unilateral change, the Union must first establish a change in policy or practice. Here, it is undisputed that the City's policies governing the discipline of employees does not require, or even discuss, the use of "last chance" agreements. The Union argues, however, that the City had an established practice of allowing first-time offenders to enter into such agreements. In support, the Union asserts that in the last five years only two firefighters have been charged with first-time violations of the alcohol and drug use policy and that both were offered "last chance" agreements.

The City does not dispute the two examples cited by the Union. However, the City argues that those two examples cannot be used to establish a past practice. Specifically, the City notes that the settlement agreements in both those cases expressly stated that they were not precedent setting. As an example, one settlement contained the following clause:

> 10. [Employee] and the Union acknowledges that this agreement is a stand-alone agreement, meaning that the terms are unique to this case and are to be interpreted by the Fire Commission without reference to extraneous information not provided herein. <u>This Last Chance Agreement is not to be considered precedent setting in any other grievance or litigation</u>.

> 11. The Union agrees to the terms of this agreement and waives any and all rights to challenge the terms and conditions of this agreement. Specifically, the Union agrees that it shall make no challenge that urinalysis is not a valid testing method and shall make no challenge . . . under the Meyers-Milias-Brown Act or similar statutes that this last change agreement and the terms contained herein are subject to a meet and confer requirement. (Emphasis added.)

On appeal, the Union presents a strained argument that the non-precedent setting nature of the settlement agreement applies only to that individual employee. In other words, the settlement agreement may not be used as precedent if the same employee is disciplined again. However, the Union contends the agreements set a past practice for cases involving other employees.

The Union's argument flies in the face of the plain meaning of a "last chance" agreement. By definition, "last chance" agreements are only offered once. If the same employee violated the City's alcohol and drug policy later, they would not qualify for such an agreement regardless of any precedent.

By its plain language, the two settlement agreements declare that they are "not to be considered precedent setting in any other grievance or litigation." Accordingly, the Union may not use the examples of the two employees to establish a past practice. Since the Union has provided no other evidence of a past practice, it has failed to establish an unlawful unilateral change. Accordingly, the charge must be dismissed.

ORDER

The unfair practice charge in Case No. SF-CE-53-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027

December 10, 2002

Diane Sidd-Champion, Attorney
595 Market Street, Suite 2200
San Francisco, CA 94105

Re: San Francisco Firefighters Union, Local 798, Iaff, AFL-CIO v. City & County of San Francisco
Unfair Practice Charge No. SF-CE-53-M; First Amended Charge
DISMISSAL LETTER

Dear Ms. Sidd-Champion:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 11, 2002. The San Francisco Firefighters Union, Local 798, Iaff, AFL-CIO alleges that the City & County of San Francisco violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally changing the discipline policy for alcohol and drug use.

I indicated to you in my attached letter dated October 18, 2002, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to October 28, 2002, the charge would be dismissed.

On November 1, 2002, Charging Party filed a first amended charge. The amended charge contends the use of "last chance agreements" constitute a past practice, and further contend the union has a right to request bargaining over the use of last chance agreements. As these arguments require an understanding of the parties' rights and obligations, I shall reiterate the applicable facts below.

The City and Local 798 are parties to a collective bargaining agreement which expires on June 30, 2003. Article 52 of the Agreement provides that the terms and conditions of employment contained in the Agreement are subject to negotiation only upon mutual agreement of the parties. The Agreement further states the following regarding disciplinary procedures:

[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.

> 48.8: Notwithstanding any other provision of this Agreement, disciplinary or punitive actions described in Charter Section A8.343 cannot be grieved or arbitrated.

Charter Section A8.343 provides in relevant part:

> Members of the uniformed ranks of the fire or police department guilty of any offense or violations of the rules and regulations of their respective departments, shall be liable to be punished by reprimand, or by fine not exceeding one month's salary, for any offense, or by suspension for not to exceed three months, or by dismissal, after trial and hearing by the commissioners of their respective departments; provided however that the chief of each respective department for disciplinary purposes may suspend such member for a period not to exceed 10 days for a violation of the rules and regulations of his department. Any such member shall have the right to appeal such suspension to the fire commission or to the police commission, as the case may be, and have a trial and hearing on such suspension.

Finally, Department Rules and Regulations state the following regarding drug and alcohol use:

> 3912: (1) Members shall at no time bring into or keep in or about the stations or premises of the Department any intoxicating liquor, drug, substance or compound.
>
> (4) When there is reasonable and probable cause to believe that a member is under the influence of any intoxicating liquor, drug, substance or compound while on duty, or while in uniform while off duty, or that a member is in possession or using illegal drugs at any time, the suspected member shall be required to submit to physical examination or appropriate chemical tests administered by the Department Physician, an officer from the Investigative Services Bureau, or other qualified representative of the department, or other authorized agency when ordered to do so by the Chief of Department or Deputy Chief, Operations.

In the past five years, two other employees have been terminated for drug and/or alcohol use. Both employees were offered "last chance agreements" which allowed for their continued employment pursuant to the terms of the agreements. Each agreement contained language regarding the precedential nature of last chance agreements. For example, the agreement for Mr. Mulhair states:

> 10. Mulhair and the Union acknowledge that this agreement is a stand-alone agreement, meaning that the terms are unique to this

> case and are to be interpreted by the Fire Commission without reference to extraneous information not provided herein. This Last Chance Agreement is not to be considered precedent setting in any other grievance or litigation.
>
> 11. The Union agrees to the terms of this agreement and waives any and all rights to challenge the terms and conditions of this agreement. Specifically, the Union agrees that it shall make no challenge that urinalysis is not a valid testing method and shall make no challenge under the Meyers-Milias-Brown Act or similar statutes that this last change agreement and the terms contained herein are subject to a meet and confer requirement.

Charging Party contends the above stated language applies only to each specific employee. More specifically, Charging Party asserts the agreement's language means the agreement will not be precedent setting for the employee in the future, but remains precedent setting for all other employees. Such an argument is not however supported by the language of the last chance agreements.

Herein, the Department's policy regarding drug and alcohol use and discipline are clearly stated both in the Department's Rules and Regulations and in Section A8.343. Neither of those provisions provides for "last chance agreements," and both provide the Department with the right to terminate an employee for drug or alcohol use. While the Department may have provided other employees with such agreements, Local 798 was well aware that those agreements did not set a new disciplinary standard. Each agreement, signed by a Local 798 representative, stated unequivocally that "last chance agreements" were not within the scope of meet and confer and were not precedential. Moreover, even assuming a past practice within scope existed, an employer does not commit an unlawful unilateral change when it alters a past practice, provided the change is consistent with the prior agreement. (Poway Unified School District (1994) PERB Decision No. 1050.) As the Department's Rules and Regulations were followed, and as Local 798 acknowledged that no precedent was established, the charge fails to state a prima facie case.

Charging Party further asserts that the City must meet and confer over disciplinary procedures, including last chance agreements. While disciplinary procedures are within the scope of representation, the City and Local 798 are parties to a collective bargaining agreement which states unequivocally that disciplinary matters pursuant to Charter Provision A8.343 are neither grievable nor arbitrable. As such, it is clear Local 798 may not challenge the discipline of employees when such discipline arises out of a rule or regulation violation, except in accordance with Charter Provision A8.343. Moreover, as Article 52 of the Agreement states terms and conditions of employment are negotiable only upon mutual agreement of the parties, the City is not obligated to renegotiate its disciplinary procedures during the term of the Agreement.

Right to Appeal

Pursuant to PERB Regulations,[2] you 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. (Regulation 32635(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 before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of 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. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
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. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Martin Gran

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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October 18, 2002

Diane Sidd-Champion, Attorney
595 Market Street, Suite 2200
San Francisco, CA 94105

Re: San Francisco Firefighters Union, Local 798, Iaff, AFL-CIO v. City & County of San Francisco
Unfair Practice Charge No. SF-CE-53-M
WARNING LETTER

Dear Ms. Sidd-Champion:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 11, 2002. The San Francisco Firefighters Union, Local 798, Iaff, AFL-CIO alleges that the City & County of San Francisco violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally changing the discipline policy for alcohol and drug use.

Investigation of the charge revealed the following. Local 798 is the exclusive bargaining representative for the City's Firefighters. The City and Local 798 are parties to a collective bargaining agreement which states the following regarding disciplinary procedures:

> 48.8: Notwithstanding any other provision of this Agreement, disciplinary or punitive actions described in Charter Section A8.343 cannot be grieved or arbitrated.

Charter Section A8.343 provides in relevant part:

> Members of the uniformed ranks of the fire or police department guilty of any offense or violations of the rules and regulations of their respective departments, shall be liable to be punished by reprimand, or by fine not exceeding one month's salary, for any offense, or by suspension for not to exceed three months, or by dismissal, after trial and hearing by the commissioners of their respective departments; provided however that the chief of each respective department for disciplinary purposes may suspend such member for a period not to exceed 10 days for a violation of

[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.

> the rules and regulations of his department. Any such member shall have the right to appeal such suspension to the fire commission or to the police commission, as the case may be, and have a trial and hearing on such suspension.

Finally, Department Rules and Regulations state the following regarding drug and alcohol use:

> 3912: (1) Members shall at no time bring into or keep in or about the stations or premises of the Department any intoxicating liquor, drug, substance or compound.
>
> (4) When there is reasonable and probable cause to believe that a member is under the influence of any intoxicating liquor, drug, substance or compound while on duty, or while in uniform while off duty, or that a member is in possession or using illegal drugs at any time, the suspected member shall be required to submit to physical examination or appropriate chemical tests administered by the Department Physician, an officer from the Investigative Services Bureau, or other qualified representative of the department, or other authorized agency when ordered to do so by the Chief of Department or Deputy Chief, Operations.

On November 14, 2001, Firefighter Cynthia Childers was found unresponsive while on duty. Upon medical examination, it was determined that Ms. Childers had a blood-alcohol level of .45 – over ten times the Department's definition of intoxication. Ms. Childers was suspended pursuant to Section A8.343 above, and participated in an administrative hearing on January 22, and May 23, 2002. The Fire Chief's recommendation was termination.

On August 19, 2002, Local 798 President John Hanley wrote a letter to Fire Chief Mario Trevino regarding the Department's decision not to issue a "last chance agreement" to Ms. Childers. Mr. Hanley asserted the "last chance agreements" were a negotiable issue and requested to meet and confer over this issue. On August 29, 2002, Chief Trevino responded to Mr. Hanley's letter. Chief Trevino stated that Section 3912 of the Rules and Regulations permits the Department to terminate an employee for drug or alcohol use. Chief Trevino continued by stating that although other employees were offered last chance agreements, the rules governing such discipline do not require "last chance agreements."

On September 4, 2002, the Fire Commission conducted a hearing on Ms. Childers' termination. The Commission voted to uphold the termination.

Charging Party asserts the Department's termination of Ms. Childers without a "last chance agreement," alters the parties past practice, and as such constitutes a unilateral change.

Within the last five years, two other employees have been disciplined for alcohol or drug use while on duty. Both employees received "last chance agreements" from the Department.

Specifically, both employees were referred to rehabilitation and had their terminations stayed pending completion of such programs. Each agreement stated the following regarding the "last chance agreements:"

> The Union agrees to the terms of this agreement and waives any and all rights to challenge the terms and conditions of this agreement. Specifically, the Union agrees that it shall make no challenge that urinalysis is not a valid testing method and shall make no challenge under the Meyers-Milias-Brown Act or similar statutes that this last change agreement and the terms contained herein are subject to a meet and confer requirement.

Based on the above stated facts, the charge as presently written fails to state a prima facie violation of the MMBA, for the reasons provided below.

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),[2] PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.)[3] Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Association v. City of Stockton (1984) 161 Cal.App.3d 813; Grant Joint Union High School District (1982) PERB Decision No. 196.)

Herein, the Department's policy regarding drug and alcohol use and discipline are clearly stated both in the Department's Rules and Regulations and in Section A8.343. Neither of those provisions call for "last chance agreements," and both provide the Department with the right to terminate an employee for drug or alcohol use. While the Department may have provided other employees with such agreements, Local 798 was well aware that those agreements did not set a new disciplinary standard. Each agreement, signed by a Local 798 representative, stated unequivocally that "last chance agreements" were not within the scope of meet and confer. Moreover, even assuming a past practice within scope existed, an employer does not commit an unlawful unilateral change when it alters a past practice, provided the change is consistent with the prior agreement. (Poway Unified School District (1994) PERB Decision

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[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[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. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

No. 1050.) As the Department's Rules and Regulations were followed, and as Local 798 acknowledged that no precedent was established, the charge fails to state a prima facie case.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please 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 the 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 I do not receive an amended charge or withdrawal from you before October 28, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR