STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 790, Charging Party, v. CITY & COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-22-M PERB Decision No. 1664-M July 27, 2004

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Vincent A. Harrington, Jr., Attorney, for Service Employees International Union, Local 790; Office of the City Attorney by Philip A. Ginsburg, Deputy City Attorney, for City & County of San Francisco.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Service Employees International Union (SEIU), Local 790 (Local 790) of a Board agent's partial dismissal (attached). The unfair practice charge alleged that the City and County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by discriminating and retaliating against Sin Yee Poon (Poon), job steward and Local 790 chapter president, for protected activities, interfering with Poon and other employees' protected rights, and unilaterally changing terms and conditions of employment without providing prior notice or opportunity to bargain to Local 790. Local 790 alleged that this conduct constituted a violation of MMBA sections 3502, 3502, 3504, 3504.5, 3505 and 3506.

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

After review of the record, including the unfair practice charge, the City's response, the Board agent's warning and dismissal letter, Local 790's appeal and the City's response to Local 790's appeal, the Board finds the Board agent's warning and dismissal letters to be free of prejudicial error and adopts the Board agent's partial dismissal as a decision of the Board itself consistent with the discussion below.

BACKGROUND

On January 7, 2002, Local 790 filed its charge. The City asserted that PERB lacked jurisdiction over the charge since all allegations occurred before July 1, 2001. In response, by letter dated September 20, 2002, the Board agent asserted the Board's jurisdiction over the charge. The Board agent issued a partial warning letter on September 3, 2002, and since Local 790 did not file an amended charge, issued a partial dismissal on September 20, 2002.

According to the charge, Poon is employed by the City as an 1822 Administrative Analyst with the Department of Health Services (DHS). Poon also serves as the Local 790 DHS chapter president and as a job steward. During November and December 2000, Poon took union leave to participate in representation activities.

In February 2001, DHS Executive Director, Trent Rhorer (Rhorer) called a meeting of management staff involved in monitoring a DHS contract with the OMI Family Resource Center. Poon was the only person involved in the project who was not informed of the time and location of the meeting. On February 20, 2001, Poon sent an e-mail message protesting her exclusion from the meeting. On February 26, 2001, Poon's Supervisor, Robin Love (Love), sent Poon an e-mail message instructing her to "cease all correspondence" concerning the OMI Family Resource issue. Poon was further informed that all of her correspondence to outside agencies and management was to be reviewed by Love prior to being sent. Love also indicated that she would meet with Poon on February 28 to discuss her concerns. After the

February 28, meeting, Love modified her original directive to allow Poon to initiate conversations and e-mails regarding her assigned tasks.

In late February or early March 2001, Love suspended various staff meetings. Love also asked employees to e-mail their schedules, rather than verbally provide the information. Poon was directed to submit a weekly schedule which included her schedule of union appointments. The charge also states that Love placed restrictions on granting union release time to Poon.

On March 30, 2001, Poon and Local 790 Field Representative, Faye Roe (Roe) approached Love seeking to schedule a meeting to discuss the suspension of staff meetings and restrictions on union release time. Love indicated to Roe that it was not a good time to discuss these matters and asked that they schedule a meeting at a later date. Roe insisted that Love schedule a meeting at that time. Love became extremely agitated and would not discuss a meeting. Later the same day, Love took a medical leave of absence of unknown duration. The charge alleges that thereafter Love effectively cut off communication with Poon.

During February, March and April 2001, the City refused to send its responses to grievances filed by Poon on behalf of Local 790 to Poon's work site address. Instead, the City's grievance responses were sent to Local 790's official mailing address at 1390 Market Street. The charge alleges that this action "has created timeliness issues, confusion and uncertainty with respect to the status and processing of numerous grievances initiated by Poon."

This issue has previously arisen between the parties. On June 26, 2000, DHS Departmental Personnel Officer, Eugene Freeman sent a letter to SEIU Field Representative, Daz Lamparas which stated, in part:

> The Department of Human Services has received another letter from Sin Yee Poon, Chapter President for Local 790 at DHS, using a DHS location as a return address on SEIU Union stationary (See Attached). We believe it is inappropriate for Ms. Poon to use an address belonging to a DHS building as an official return address for SEIU.
>
> The Department agreed to send responses to grievances filed by Ms. Poon to her DHS work location at 1800 Oakdale Avenue, as a convenience to her. However, we did not agree to the use of the 1800 Oakdale address on official Union stationary. We believe Ms. Poon should use the San Francisco SEIU Local 790 address on all Union stationary.
>
> We believe it is in the best interest of the Department and SEIU to maintain consistent and separate mailing addresses for all correspondence between the two parties. Therefore, we are requesting you to instruct Ms. Poon to remove the 1800 Oakdale Avenue address from the SEIU Local 790 letterhead.

In a letter dated July 27, 2000, DHS Employee Relations Representative, Cynthia Hamada (Hamada) responded to Poon's request to send grievance responses to her at her work site address. Hamada reiterated DHS's position stated in its June 26, 2000 letter that it would use the SEIU office address on Market Street to forward grievance responses to Poon. DHS Employee Relations Representative, Elaine Leeming (Leeming) addressed this issue again in an April 24, 2001 letter to Poon. Leeming referenced the two prior letters and stated that it would continue to send grievance responses to Local 790's Market Street address in conformance with its position that Local 790 and DHS maintain "separate and consistent mailing addresses for all correspondence."

The charge further alleges that the City made the following unilateral changes without notice to Local 790 or affording them the opportunity to meet and confer. In late March 2001, the City formed a temporary Emergency Response Unit for a period of 90 days to cover for employees on vacation and other leaves and asked unit members to volunteer to serve on the Emergency Response Team. The charge alleges that this conduct violates existing seniority

rules and reassignment procedures. Also in late March 2001, the City relocated a number of work units and their respective employees to various locations without notice to Local 709 and an opportunity to meet and confer. The City also plans to move the Adult Protective Services Program from DHS to the jurisdiction of the Commission on Aging. The City has not consulted with or informed Local 790 of this decision, nor has the City provided Local 790 with information concerning timelines, plans for implementation or impacts on bargaining unit employees. On April 5, 2001, Local 790 protested the City's failure to consult with and notify Local 790 of the changes to the Adult Protective Services Program. The charge alleges that the City "failed and refused to respond effectively to the union protests."

On May 10, 2001, Acting Director, Janice Anderson-Santos, Family and Children's Division, and Deputy Director, Sally Kipper (Kipper), Administration Division, sent a memo to Poon notifying her that effective May 29, she was being involuntarily transferred from the FPSP[2] Program in the Family and Children's Division to the Contracts Unit in the Administration Division. The memo stated that there was insufficient work in the FPSP Program and that there was currently a large workload in the Contracts Division.

The charge alleges that as a personnel action, the involuntary transfer should have been maintained as confidential. The charge alleges that non-management personnel in DHS were informed of Poon's transfer before she was and also, that the relocation of Poon to a different work unit was for the purpose of limiting and restricting Poon's accessibility as a steward and chapter president. The charge further alleges that Love refused to schedule a meeting to discuss Poon's involuntary transfer on any of the following days, May 16, 17, 18 or 21. Rhorer refused to schedule a meeting on either May 22 or 23. Rhorer referred Local 790 to

[2]The acronym FPSP is not spelled out or identified in the charge.

Employee/Labor Relations Manager, Patricia Burns who agreed to meet with its representatives.

Prior to August 2000, DHS had an informal Labor/Management Health and Safety Committee. In September 2000, Kipper invited union representatives from SEIU Locals 250, 535 and 790, and Local 21 and Local 39 to a meeting to discuss restructuring the committee. In June 2001, after consulting with other departments about their health and safety committee structures, DHS prepared an Injury and Illness Prevention Program (IIPP) which described the composition and role of the DHS Health and Safety Committee. The IIPP was submitted to the unions and comments were requested by June 19, 2001. No comments were received. At the June 21, 2001 committee meeting, Kipper informed the group that she was going to reconvene a meeting of SEIU field representatives to finalize the committee structure and invite them to make appointments to the committee. The charge alleges that DHS failed or refused to meet and confer with Local 790 concerning the DHS Labor/Management Health and Safety Committee.

Finally, on an unidentified date, DHS requested the availability of a job steward at a particular location during an investigation so that those employees who requested union representation would have the option of representation without delaying the investigation. The charge alleges that the department arranged for the job steward without consulting with the affected employees and without notifying either the employees or the steward of the purpose of the meeting. The charge alleges that this conduct interfered with the employees' right to a representative of their own choosing.

The City responded that PERB lacks jurisdiction over MMBA allegations occurring before July 1, 2001. Poon had filed a nearly identical charge with the City's Civil Service Commission (CSC) on May 24, 2001, which has been stayed pending resolution of these

proceedings. All allegations involve incidents occurring up through May 2001. Although Local 790 argues that these charges are "ongoing," the City asserts that whatever is "ongoing" was not specifically asserted. (See PERB Reg. 32615(a)(5)[3]; Savanna School District (1982) PERB Decision No. 276; Fielder v. UAL Corporation (9th Cir. 2000) 218 F. 3d 973, 983 [83 Fair Empl. Prac. Cas. (BNA) 493.])

The City also asserts that the substantive charges are without merit. In its response, the City refers to an Attachment D, which contains responses to the charge filed by Poon with the CSC, however, some of these responses address issues not contained in the charge. Its responses are simple denials that it discriminated against Poon, interfered with employee rights, made unilateral changes without notice to Local 790 or opportunity to bargain, and refused to meet and confer with Local 790. In some cases the City asserts that it did not refuse to meet or confer and in others, that decisions to reorganize or relocate employees were not subject to negotiations. With regard to the reorganization of Labor Management Health and Safety Committee, the City states that it has held ongoing meetings with all unions involved to discuss these issues; in fact Local 790 did not attend a September 2000 meeting.

BOARD AGENT'S PARTIAL DISMISSAL

Statute of Limitations

Local 790 alleged that the City interfered with employee rights when it arranged for a union steward to be available during an investigation without first consulting with Local 790 or the employees. The Board agent found this allegation to be untimely because Local 790 did not specify a date when the City issued this directive.

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

Discrimination Claims

Local 790 alleged that the City failed to notify Poon of the time and location of the OMI Family Resource Center management staff meeting. The Board agent found that Poon did not identify adverse consequences to her employment or show that she had a reasonable expectation of attending the meeting. Regarding the involuntary transfer to the Contracts Division, the Board agent determined that she was transferred due to lack of work. The charge further does not identify a policy requiring confidentiality in the transfer to a new assignment or which staff were informed of the reassignment.

Interference Claims

The Board agent found that the requirement that Poon submit her weekly schedule, including union appointments, did not demonstrate interference since other employees were required to submit weekly schedules. Poon also did not allege facts showing specific restrictions on her representation activities or union release time by the City. The Board agent further did not find interference with Poon's rights in the City's insistence on mailing grievance responses to the Local 790's address. Local 790 did not identify any theory to support this allegation. In addition, citing State of California (Department of Transportation) (1994) PERB Decision No. 1049-S, the Board agent found that directing a job steward to be available during an investigation did not demonstrate interference since employees have a right to representation.

Unilateral Change Allegations

1. Emergency Response Unit. In March 2001, the City formed a temporary Emergency Response Unit to cover for absent employees and asked for employee volunteers to serve in the unit. The charge alleges that this violates seniority rules and reassignment procedures.

However, the Board agent found that the charge did not identify the specific rules and procedures allegedly violated and so dismissed the allegation.

2. Relocation of Work Units. In March 2001, the City relocated work units and their employees to other locations. The charge alleged that the City took the action without notice to Local 790 or opportunity to bargain. The Board agent held that Local 790 did not state a prima facie case because it did not describe the work units, identify the affected bargaining unit employees, or how Local 790 learned of the relocations.

3. Adult Protective Services Program. In April 2001, the City planned to move this program from DHS to the Commission on Aging. Local 790 alleged that the City did not inform it of the planned move, negotiate impacts on unit employees, or respond effectively to Local 790's protests. The Board agent found that the charge does not provide any specifics with regard to these allegations and so failed to state a prima facie case.

4. Labor/Management Health and Safety Committee. The charge alleges that the City restructured the Health and Safety Committee without notice to Local 790 or opportunity to bargain. However, according to the Board agent, the facts suggest otherwise, since in September 2000 and in June 2001, the City invited union representatives to a meeting and provided a proposal to the unions for comment, respectively. There is also no allegation that Local 790 made a demand to bargain. The Board agent consequently dismissed this allegation.

DISCUSSION

As a preliminary matter, the City had challenged PERB's jurisdiction over this matter because most of the events had occurred before July 1, 2001. However, the City did not appeal the Board agent's ruling assuming jurisdiction over the charge. Therefore, we affirm the Board agent's finding of PERB authority to adjudicate this charge. (MMBA sec. 3509; City of Anaheim (2003) PERB Order No. Ad-321.)

Timeliness

This involves the allegation regarding the City's requirement that a Local 790 steward be available to employees during an investigation. In its charge, Local 790 did not specify a date for which the City issued this directive. Under PERB Regulation 32615(a)(5), a charge must contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." This means the charging party must allege the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S; United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) The charge thus did not provide this information. Local 790 was advised of this fact in the warning letter but did not file an amended charge. However, on appeal Local 790 seeks to provide a time element to this allegation. Under PERB Regulation 32635(b), "a charging party may not present on appeal new charge allegations or new supporting evidence" without good cause. Here, Local 790 has not provided facts showing good cause to add information regarding the timing of this allegation. This allegation should therefore be dismissed.

Discrimination

To establish a prima facie case of discrimination in violation of MMBA section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employee because of the exercise of those rights. (Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416 [182 Cal.Rptr. 461] (Campbell); San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 [127 Cal.Rptr. 856] (San Leandro).)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action in protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following nexus factors should be present: (1) the employer's disparate treatment of the employee (Campbell, supra); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro, supra); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro, supra); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) employer animosity towards union activists (San Leandro, supra; Los Angeles County Employees Assn. v. County of Los Angeles (1985) 168 Cal.App.3d 683 [214 Cal.Rptr. 350].).

With regard to adverse action, the Court of Appeal in Campbell held that if the employer's conduct is "inherently destructive" of important employee rights, proof of unlawful intent is not required under the MMBA, even if the employer's conduct was motivated by business considerations. (Campbell, at p. 423.) However, if the adverse effect on employee rights is "comparatively slight," unlawful intent must be proved if the employer produces evidence of legitimate and substantial business justifications. (Campbell, at p. 424.)

SEIU Local 790 alleges that the series of incidents directed toward Poon state a prima facie case of discrimination on the basis of protected conduct. Certainly, Poon's status as Local 790 chapter president and union steward and her taking union leave to participate in union activities in November and December 2000 demonstrate protected conduct. As adverse action, Local 790 cites various incidents: Poon as the only employee assigned to management

of the OMI Family Resource Center contract not invited to the Family Resource Center management staff meeting; the email directive from Love to cease all correspondence concerning the OMI family resource issue and Love's monitoring of her outside correspondence; the directive to provide her schedule, including her union appointments, to Love; and, Poon's involuntary transfer and the disclosure of her transfer to other employees when it should have remained confidential.[4] The charge has not provided sufficient information to show that the City's conduct, particularly the involuntary transfer, comprises adverse action. The adverse action must involve actual and not merely speculative harm. The inquiry is whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. (Regents of the University of California (1998) PERB Decision No. 1263-H; Palo Verde Unified School District (1988) PERB Decision No. 689; Newark Unified School District (1991) PERB Decision No. 864.)

We also find that these same allegations do not state a prima facie case of interference. The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons. (Public Employees Assn. v. Board of Supervisors (1985) 167 Cal.App.3d 797, 807 [213 Cal.Rptr. 491].

[4]Local 790's allegation regarding the placement of restrictions on her union leave time lack any detail about specific restrictions or when they occurred and therefore, under PERB Regulation 32615(a)(5), is dismissed.

Under this test, we have established that Poon has engaged in protected conduct. Poon's involuntary transfer interferes with the rights of Poon to perform her job steward duties and her coworkers to be represented by Poon in that capacity. The City in its response however stated that Poon's involuntary transfer was due to lack of work in the Family and Children's Division FPSP Program. Local 790 was advised of this allegation in the warning letter but did not file an amended charge to dispute this fact. Therefore, Local 790 did not meet the third prong for a finding of interference.

Local 790 disputes the Board agent's conclusion that it is unlawful for the City to insist upon mailing grievance responses to Local 790's address and not to Poon's work address. Local 790 has not cited any authority to support such an allegation. We find that this conduct also does not state a prima facie case for interference.

Unilateral Change Allegations

Local 790 asserts that it is inappropriate to cite cases under the Educational Employment Relations Act[5] (EERA) regarding whether issues are within scope. Local 790 thus argues that under the MMBA, reorganization and relocation of services are within scope and thus the City has a duty to meet and confer with Local 790 regarding these issues. Local 790 further disputes the Board agent's citation to Building Material & Construction Teamster's Union v. Farrell (1986) 41 Cal. 3d 651 [224 Cal.Rptr. 688] (Farrell) in support of her conclusion that this issue is not within scope.

In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c), 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

[5]EERA is codified at Government Code section 3540, et seq.

process. (Stockton Unified School District (1980) PERB Decision No. 143.)[6] 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 Assn. v. City of Stockton (1984) 161 Cal.App.3d 813 [207 Cal.Rptr. 876]; Grant Joint Union High School District (1982) PERB Decision No. 196.)

We agree with Local 790 that Farrell is inapposite. That case stands for the proposition that an employer's decision to transfer work outside of the bargaining unit is a matter within the scope of representation. However, we agree with the Board agent that with regard to the allegations regarding the Emergency Response Unit, the relocation of work units, and the Adult Protective Services Program, Local 790 did not provide any specifics regarding any impacts of these changes on terms and conditions of employment and any attempts by Local 790 to demand bargaining over the impacts.

In addition, with regard to the labor/management health and safety committee, in its response, the City stated that in August and September 2000, it had invited the various unions to discuss the development of the committee and that a proposed structure was ultimately submitted to the unions for review. According to the City, Local 790 did not attend the September 2000 meeting and did not provide feedback on the proposed committee structure.

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[6]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 [116 Cal.Rptr. 507].)

Local 790 was advised of these facts in the warning letter but did not file an amended charge to dispute them. This allegation must also be dismissed.

In light of the above, we find that Local 790 has failed to state a violation of the MMBA.

ORDER

The partial dismissal of the unfair practice charge in Case No. SF-CE-22-M is hereby AFFIRMED.

Chairman Duncan and Member Neima joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 322-3198
Fax: (916) 327-6377

September 20, 2002

Vincent A. Harrington, Jr., Attorney
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Ave., Suite 1400
Oakland, CA 94612

Re: Service Employees International Union, Local 790 v. City & County of San Francisco
Unfair Practice Charge No. SF-CE-22-M
PARTIAL DISMISSAL

Dear Mr. Harrington:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 7, 2002. The Service Employees International Union, Local 790 alleges that the City & County of San Francisco and County of San Francisco violated the Meyers-Milias-Brown Act (MMBA)[1] when it discriminated against Sin Yee Poon, interfered with employee rights and unilaterally changed several policies. This letter does not address the alleged unilateral implementation of a policy denying union representation during counseling meetings.

I indicated to you in the attached letter dated September 3, 2002, that certain allegations contained in the 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 these allegations to state a prima facie case or withdrew them prior to September 16, 2002, the allegations would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing those allegations which fail to state a prima facie case based on the facts and reasons contained in my September 3, 2002 letter.

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

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

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

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. (Regulation 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).)

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 _____
Robin W. Wesley
Regional Attorney

Attachment

cc: Philip A. Ginsburg

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
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September 3, 2002

Vincent A. Harrington, Jr., Attorney
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Ave., Suite 1400
Oakland, CA 94612

Re: Service Employees International Union, Local 790 v. City and County of San Francisco
Unfair Practice Charge No. SF-CE-22-M
PARTIAL WARNING LETTER

Dear Mr. Harrington:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 7, 2002. The Service Employees International Union, Local 790 alleges that the City and County of San Francisco violated the Meyers-Milias-Brown Act (MMBA)[1] when it discriminated against Sin Yee Poon, interfered with employee rights and unilaterally changed several policies. This letter does not address the alleged unilateral implementation of a policy denying union representation during counseling meetings.

On September 3, 2002, I called and left you a message indicating that I needed additional information concerning several allegations in the charge. I indicated that I would send you a letter which set out the factual allegations and described the deficiencies in the charge. I invited you to call if you had questions about the warning letter.

Investigation of the charge revealed the following information. Sin Yee Poon is employed by the City as an 1822 Administrative Analyst with the Department of Health Services. Ms. Poon also serves as the Local 790 DHS Chapter President and is a job steward. During November and December 2000, Ms. Poon took union leave to participate in representation activities.

In February 2001, DHS Executive Director Trent Rhorer called a meeting of management staff involved in monitoring a DHS contract with OMI Family Resource Center. Ms. Poon was the only person involved in the project who was not informed of the time and location of the meeting.

On February 20, 2001, Ms. Poon sent an e-mail message protesting her exclusion from the meeting.

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On February 26, 2001, Ms. Poon's supervisor, Robin Love, sent Ms. Poon an e-mail message instructing her to "cease all correspondence" concerning the OMI Family Resource issue. Ms. Poon was further informed that all of her correspondence to outside agencies and management was to be reviewed by Ms. Love prior to being sent. Ms. Love also indicated that she would meet with Ms. Poon on February 28 to discuss her concerns.

After the February 28, 2001 meeting, Ms. Love modified her original directive to allow Ms. Poon to initiate conversations and e-mails regarding her assigned tasks.

In late February or early March 2001, Ms. Love suspended various staff meetings. Ms. Love also asked employees to e-mail their schedules, rather than verbally provide the information. Ms. Poon was directed to submit a weekly schedule which included her schedule of union appointments. The charge also states that Ms. Love placed restrictions on granting union release time to Ms. Poon.

On March 30, 2001, Ms. Poon and Local 790 Field Representative Faye Roe approached Ms. Love seeking to schedule a meeting to discuss the suspension of staff meetings and restrictions on union release time. Ms. Love indicated to Ms. Roe that it was not a good time to discuss these matters and asked that they schedule a meeting at a later date. Ms. Roe insisted that Ms. Love schedule a meeting at that time. Ms. Love became extremely agitated and would not discuss a meeting. Later the same day, Ms. Love took a medical leave of absence of unknown duration. The charge alleges that thereafter Ms. Love effectively cut off communication with Ms. Poon.

During February, March and April 2001, the City refused to send its responses to grievances filed by Ms. Poon on behalf of Local 790 to her work site address. Instead, the City's grievance responses were sent to the Union's official mailing address at 1390 Market Street. The charge alleges that this action "has created timeliness issues, confusion and uncertainty with respect to the status and processing of numerous grievances initiated by [Ms.] Poon."

This issue has previously arisen between the parties. On June 26, 2000, DHS Departmental Personnel Officer Eugene Freeman sent a letter to SEIU Field Representative Daz Lamparas which stated, in part:

> The Department of Human Services has received another letter from the Sin Yee Poon, Chapter President for Local 790 at DHS, using a DHS location as a return address on SEIU Union stationary (See Attached). We believe it is inappropriate for Ms. Poon to use an address belonging to a DHS building as an official return address for SEIU.
>
> The Department agreed to send responses to grievances filed by Ms. Poon to her DHS work location at 1800 Oakdale Avenue, as a convenience to her. However, we did not agree to the use of the 1800 Oakdale address on official Union stationary. We believe

> Ms. Poon should use the San Francisco SEIU Local 790 address on all Union stationary.
>
> We believe it is in the best interest of the Department and SEIU to maintain consistent and separate mailing addresses for all correspondence between the two parties. Therefore, we are requesting you to instruct Ms. Poon to remove the 1800 Oakdale Avenue address from the SEIU Local 790 letterhead.

In a letter dated July 27, 2000, DHS Employee Relations Representative Cynthia Hamada responded to Ms. Poon's request to send grievance responses to her at her work site address. Ms. Hamada reiterated the Department's position stated in its June 26, 2000 letter that it would use the SEIU office address on Market Street to forward grievance responses to Ms. Poon.

DHS Employee Relations Representative Elaine Leeming addressed this issue again in an April 24, 2001 letter to Ms. Poon. Ms. Leeming referenced the two prior letters and stated that it would continue to send grievance responses to SEIU's Market Street address in conformance with its position that the Union and Department maintain "separate and consistent mailing addresses for all correspondence."

In late March 2001, the City formed a temporary Emergency Response Unit for a period of 90 days to cover for employees on vacation and other leaves and asked unit members to volunteer to serve on the Emergency Response Team. The charge alleges that this conduct violates existing seniority rules and reassignment procedures.

Also in late March 2001, the City relocated a number of work units and their respective employees to various locations without notice to the Union and an opportunity to meet and confer.

The City plans to move the Adult Protective Services Program from DHS to the jurisdiction of the Commission on Aging. The City has not consulted with or informed Local 790 of this decision; nor has the City provided the Union with information concerning timelines, plans for implementation or impacts on bargaining unit employees.

On April 5, 2001, Local 790 protested the City's failure to consult with and notify the Union of the changes to the Adult Protective Services Program. The charge alleges that the City "failed and refused to respond effectively to the union protests."

On May 10, 2001, Janice Anderson-Santos, Acting Deputy Director, Family and Children's Division, and Sally Kipper, Deputy Director, Administration Division, sent a memo to Ms. Poon notifying her that effective May 29 she was being involuntarily transferred from the FPSP Program in the Family and Children's Division to the Contracts Unit in the Administration Division. The memo stated that there was insufficient work in the FPSP Program and that there was currently a large workload in the Contracts Division.

The charge alleges that as a personnel action the involuntary transfer should have been maintained as confidential. The charge alleges that non-management personnel in DHS were informed of Ms. Poon's transfer before she was. The charge also alleges that the relocation of Ms. Poon to a different work unit was for the purpose of limiting and restricting Ms. Poon's accessibility as a steward and Chapter President.

The charge alleges that Ms. Love refused to schedule a meeting to discuss Ms. Poon's involuntary transfer on any of the following days, May 16, 17, 18 or 21. Mr. Rhorer refused to schedule a meeting on either May 22 or 23. Mr. Rhorer referred the Union to Employee/Labor Relations Manager Patricia Burns who agreed to meet with the Union.

Prior to August 2000, DHS had an informal Labor/Management Health and Safety Committee. In September 2000, Ms. Kipper invited union representatives from SEIU Locals 250, 535 and 790, and Local 21 and Local 39 to a meeting to discuss restructuring the committee. In June 2001, after consulting with other departments about their health and safety committee structures, DHS prepared an Injury and Illness Prevention Program (IIPP) which described the composition and role of the DHS Health and Safety Committee. The IIPP was submitted to the unions and comments were requested by June 19, 2001. No comments were received. At the June 21, 2001 committee meeting, Ms. Kipper informed the group that she was going to reconvene a meeting of the Union field representatives to finalize the committee structure and invite the Unions to make appointments to the committee. The charge alleges that DHS failed or refused to meet and confer with the Union concerning the DHS Labor/Management Health and Safety Committee.

Finally, on an unknown date, DHS requested the availability of a job steward at a particular location during an investigation so that those employees who requested union representation would have the option without delaying the investigation. The charge alleges that the Department arranged for the job steward without consulting with the affected employees and without notifying either the employees or the steward of the purpose of the meeting. The charge alleges that this conduct interfered with the employees' right to a representative of their own choosing.

With the exception of the allegation concerning union representation during counseling sessions, the remaining allegations fail to state a prima facie case.

Statute of Limitations

As an initial matter, the allegation that the City interfered with employee rights when it arranged for a union steward to be available to represent employees during an investigation, does not demonstrate that it was timely filed.

Code of Civil Procedure section 338 prohibits PERB from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than three years prior to the filing of the charge. 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.)[2] The 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 Insurance) (1997) PERB Decision No. 1197-S.)

The charge does not provide sufficient facts concerning this allegation including when this conduct occurred. A charging party must allege sufficient facts to determine whether an allegation is filed within the statute of limitations. This allegation fails to demonstrate that it is timely filed.

Discrimination allegations

The charge alleges that the City discriminated against Ms. Poon because of her protected activity.

To establish a prima facie case of discrimination in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employee because of the exercise of those rights. (Campbell Municipal Employees Association v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Association v. City of San Leandro (1976) 55 Cal.App.3d 553.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action in protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following nexus factors should be present: (1) the employer's disparate treatment of the employee (Campbell, supra); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro Police Officers Association, supra.); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro Police Officers Association, supra.); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) employer animosity towards union activists (San Leandro Police Officers Association, supra; Los Angeles County Employees Association v. County of Los Angeles (1985) 168 Cal.App.3d 683.).

The charge alleges that the City took adverse action against Ms. Poon in February 2001 when it excluded her from a meeting with management staff concerning the OMI Family Resource

[2] 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.)

Center. The charge alleges that Ms. Poon was the only person involved in the project who was not informed of the time and location of the meeting.

This allegation fails because it does not provide facts which demonstrate adverse consequences to Ms. Poon's employment. It is also unclear whether Ms. Poon had a reasonable expectation to be included in a meeting of management staff.

On May 10, 2001, Ms. Poon was involuntarily transferred to the Contracts Division due to lack of work. The charge alleges that the transfer should have been maintained as confidential. The charge does not identify the policy which provides that a transfer to a new work assignment is a confidential personnel action, since the transfer was not the result of disciplinary action. Further, the charge does not provide facts describing which staff were informed of the transfer and whether the information came from management representatives. This allegation also does not demonstrate the required nexus.

Interference allegations

The charge alleges that the City interfered with employee rights when Ms. Love directed Ms. Poon to submit a weekly schedule which included her schedule of union appointments; placed restrictions on union released time; sent grievance responses to Local 790's mailing address rather than Ms. Poon's work site; and when the City arranged for a union steward to be available to represent employees during an investigation.

The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons. (Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County (1985) 167 Cal.App.3d 797, 807.

The charge alleges that Ms. Poon was required to submit a weekly schedule which included her union appointments. Other employees were also asked to provide their weekly schedules. The charge does not allege facts which demonstrate that this requirement interfered with her union representation activities. Further, the charge does not describe any restrictions on union released time imposed by the employer. Thus, these allegations do not demonstrate unlawful interference.

The charge also alleges that the City interfered with employee rights when it continued to send grievance responses to Local 790's office rather than to Ms. Poon's work site address.

Ms. Poon complained that this caused "timeliness issues, confusion and uncertainty" with respect to the grievances filed by Ms. Poon. While the receipt of grievance responses at Ms. Poon's work site may facilitate a quicker union response, the charge does not explain under what theory the Union has a right to have grievance responses delivered to the Union at the employer's work site. Accordingly, this allegation fails to state a prima facie case.

Finally, even assuming timely filed, the allegation that the City summoned a job steward to be available to represent employees during an investigation does not demonstrate interference with employee rights. An employee does not have a right to a particular union representative. (State of California (Department of Transportation) (1994) PERB Decision No. 1049-S.) Accordingly, this allegation fails to state a prima facie case and must be dismissed.

Unilateral change allegations

The charge alleges that the City unilaterally changed policies without bargaining concerning the Emergency Response Unit; relocation of a number of work units; the realignment of the Adult Protective Services Program to the Commission on Aging; and the restructuring of the Labor/Management Health and Safety Committee.

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),[3] 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.) 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.) An employer's decision to reorganize its operations and services, however, is a managerial prerogative and thus is not a negotiable subject within the scope of representation. (State of California (Department of Corrections) (2000) PERB Decision No. 1388-S; Building Material and Construction Teamster's Union v. Farrell (1986) 41 Cal.3d 651.)

In March 2001, the City formed a temporary Emergency Response Unit to cover for absent employees and asked employees to volunteer to serve in the Unit. The charge alleges that this conduct violates existing seniority rules and reassignment procedures. However, the charge does not describe the existing seniority rules and reassignment procedures and how the City's conduct in forming the temporary unit departed from these procedures. Thus, this allegation does not demonstrate an unlawful unilateral change.

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

Also in March 2001, the City relocated a number of work units and their respective employees to various locations. The charge alleges that the City took this action without providing Local 790 with notice and an opportunity to bargain. The charge does not describe the work units which were relocated, state which bargaining unit employees were affected by the relocation or explain when or how the Union learned of the unit relocations. Without this information, this allegation does not state a prima facie case.

In April 2001, the City planned to move the Adult Protective Services Program from DHS to the jurisdiction of the Commission on Aging. The charge alleges that the City did not consult with or inform Local 790 of this decision, did not provide information concerning timelines, plans for implementation or impacts on bargaining unit employees, and did not "respond effectively" to the Union's protests. The charge does not provide facts which describe the nature of the Union's protests and whether the Union requested information or demanded to bargain any impacts of the City's decision to realign the Adult Protective Services Program. The charge also does not explain how the City failed to "effectively" respond to the Union. Thus, this allegation does not establish an unlawful unilateral change.

Finally, the charge alleges that the City restructured the Labor/Management Health and Safety Committee without providing Local 790 with notice and an opportunity bargain. However, the facts do not support this allegation. In September 2000, the DHS invited union representatives to a meeting to discuss restructuring the committee. The DHS then submitted an Injury and Illness Prevention Program to affected unions in June 2001. After receiving this information, the charge does not allege that the Union made a demand to bargain the proposed changes. Accordingly, this allegation fails to demonstrate a prima facie case of an unlawful unilateral change in policy.

For these reasons, as presently written the allegations discussed above do 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 September 16, 2002, I shall dismiss your charge. If you have any questions, please call me at (916) 327-8385.

Sincerely,

Robin W. Wesley
Regional Attorney