STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SEIU LOCAL 535, Charging Party, v. COUNTY OF FRESNO, Respondent.	Case No. SA-CE-238-M PERB Decision No. 1731-M December 27, 2004

Appearances: Law Offices of Bennett & Sharpe by Thomas M. Sharpe, Attorney, for SEIU Local 535; Catherine E. Basham, Senior Deputy County Counsel, for County of Fresno.

Before Duncan, Chairman; Neima and Shek Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by SEIU Local 535 (SEIU) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the County of Fresno (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by establishing a jail working group to compete with the exclusive representative, SEIU, in establishing working conditions in a newly designated Detention Custody Bureau.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the amended charge, the response from the County, the warning and dismissal letters, SEIU's appeal and the County's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

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

ORDER

The unfair practice charge in Case No. SA-CE-238-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Neima and Shek joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8387
Fax: (916) 327-6377

September 29, 2004

Thomas M. Sharpe, Esquire
Bennett & Sharpe
925 "N" Street, Suite 150
Fresno, CA 93721-2221

Re: SEIU Local 535 v. County of Fresno
Unfair Practice Charge No. SA-CE-238-M
DISMISSAL LETTER

Dear Mr. Sharpe:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 7, 2004. SEIU Local 535 (SEIU) alleges that the County of Fresno (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by establishing a "jail working group" to compete with the exclusive representative, SEIU, in establishing working conditions in a newly designed Detention Custody Bureau.

I indicated to you in my attached letter dated September 10, 2004, 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 September 23, 2004, the charge would be dismissed.

On September 23, 2004, you filed a First Amended Charge in which you respond to two issues I raised in my September 10th letter. No new facts are provided nor new assertions made but rather you attempt to clarify your argument as to why the County violated the MMBA by creating the "jail working group" as a competing entity to SEIU.

First, you confirm that the SEIU Chapter President, Katherine Johnson, did provide the County with names of unit members to serve as potential members for the working group. You then characterize this event as insignificant by arguing that neither Ms. Johnson nor SEIU knew at that time, December 2003, the extent of the issues that this group was going to undertake. You further assert that the 15 individuals selected from SEIU's unit to serve on this committee were chosen by the Sheriff to serve along side approximately 40 Sergeants and 7 Lieutenants as the "working group."[2] This group was thus controlled in number by non-unit employees. You

[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] I note that the list Ms. Johnson provided the County contained 20 names.

assert that SEIU "neither agreed, nor understood that, its bargaining unit members would be included in the 'jail working group.'"

Secondly, you point out that SEIU was engaged in negotiations with the County that were simultaneous and in effect duplicative, in that this "working group" provided the Sheriff with recommendations in the area of shift selection, scheduling days off, vacation selection, and "swapping" time off. This was occurring at the same time the County and SEIU were renegotiating Article 51 Assignments (Shifts) and Article 77 Shift Swapping. You point out that Article 52 was not in effect in December 2003 when the "working group" was formed and therefore SEIU had not acknowledged its existence nor acceded to its process.

You state that on June 11, 2004, SEIU received a request to meet and confer pursuant to Article 52. You contend that the County initially wanted to have SEIU unit members serve as the County's representatives in this meet and confer process but that the County backed down following SEIU objections being registered.[3]

You summarize your argument by pointing out that the "jail working group" was formed and engaged in its work while negotiations for a new agreement between SEIU and the County were still in progress. You point to Oak Grove School District (1986) PERB Decision 582 (Oak Grove) to support your argument that an employer may not establish a competing employee group in an effort to sway support or obtain employee support for changes the employer is not able to obtain at the bargaining table from the exclusive representative. You liken the conduct of the County to the conduct of the employer in Oak Grove.

One distinguishing factor in the present case from the facts in Oak Grove is that in that case, the exclusive representative was not invited to send a representative because the Superintendent wanted to keep the "Teachers Forum" "non-political" and he wanted to avoid having a "watchdog" in the group. Here, the Chapter President provided the employer with a list of 20 potential members. This is contradictory to the facts in Oak Grove.

Despite the protestations that SEIU had no knowledge of the subject matter of the "jail working group" meetings, the Charging Party acknowledged by agreeing to Article 52 on March 22, 2004, that it understood that further discussions could be forthcoming if the County intended to make any changes that resulted from the recommendations of the "jail working group." SEIU had ample opportunity to inquire of its members on the committee or of management what the scope of the committee's responsibility was.

You have not established that the County's efforts were an attempt to bypass SEIU. Therefore, I am dismissing the charge based on the facts and reasons contained in this letter and in my September 10, 2004, letter.

---

[3] You have not indicated that the County has implemented any changes based on the recommendations of the "working group."

Right to Appeal

Pursuant to PERB Regulations,[4] 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. (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).)

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

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

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 _____
Roger Smith
Labor Relations Specialist

Attachment

cc: Catherine E. Basham

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8387
Fax: (916) 327-6377

September 10, 2004

Thomas M. Sharpe, Esquire
Bennett & Sharpe
925 "N" Street, Suite 150
Fresno, CA 93721-2221

Re: SEIU Local 535 v. County of Fresno
Unfair Practice Charge No. SA-CE-238-M
WARNING LETTER

Dear Mr. Sharpe:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 7, 2004. The SEIU Local 535 (SEIU) alleges that the County of Fresno (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by establishing a "jail working group" to compete with the exclusive representative, SEIU, in establishing working conditions in a newly designed Detention Custody Bureau.

My investigation of the charge reveals that SEIU is the recognized exclusive representative of Unit 2, a unit of County Sheriff Correctional Officers, Child Support Services Department and Probation Department personnel. SEIU and the County were negotiating a successor agreement during the Winter of 2003-04. A new agreement was reached on March 22, 2004.

At the same time, December 2003, the Sheriff had requested the formation of a Jail Reorganization Work Group to design a plan to staff and operate the four jails more efficiently. The size of the group grew to more than sixty persons and included a number of Unit 2 members. The charge states that managers and supervisors far outnumbered the participants from Unit 2 and that SEIU had nothing to do with the selection of the Unit 2 participants.[2]

You indicate that despite the ongoing negotiations between SEIU and the County to reach a new memorandum of understanding, the Sheriff allowed the "working group" to discuss issues more appropriately assigned to the negotiating table. Among these items were reworking of shifts for jail employees, shift selection, changes in selection of days off, vacation useage and swapping time off.

---

[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] A copy of an e-mail from SEIU's Unit 2 President, Katherine Johnson dated December 12, 2003, provided by County Counsel did indicate that SEIU randomly named 5 officers and 2 alternates from each watch to potentially serve on the "working group."

Following the parties reaching agreement in March 2004, the Sheriff announced a plan (it is unclear to whom or how) to present changes, contrary to the negotiated language in the March 2004 agreement that focus on assignments, shift changes and flexible work schedules. You did not provide any specifics as to how the Sheriff announced his plan or whether the County intended to implement any of the Sheriff's ideas.[3]

The charge contends that the Sheriff established the "working group" in an effort to bypass its obligations to negotiate with the exclusive representative, SEIU.

An employer may not communicate directly with employees to undermine or derogate the representative's exclusive authority to represent unit members. (Muroc Unified School District (1978) PERB Decision No. 80.)[4] Similarly, the employer violates the duty to bargain in good faith when it bypasses the exclusive representative to negotiate directly with employees over matters within the scope of representation. (Walnut Valley Unified School District (1981) PERB Decision No. 160.) However, once a policy has been established by lawful means, an employer has the right to take necessary actions, including consulting with employees, to implement the policy. (Ibid.) To establish that an employer has unlawfully bypassed the union, the charging party must demonstrate that the employer dealt directly with its employees (1) to create a new policy of general application, or (2) to obtain a waiver or modification of existing policies applicable to those employees. (Ibid.)

Based on the facts as presented, Article 52 of the current MOU established a policy by "lawful means" that acknowledged the existence of the "working group." The County has invited SEIU to meet and confer regarding changes it wishes to discuss that presumably flow from recommendations made by the "working group." There is no evidence that changes have been made yet.

Finally, if the President of the SEIU Unit did provide the names of employees that she viewed as potential candidates for the committee, as the copy of the e-mail suggests, the theory that the County dominated and manipulated the recommendations of the "working groups" is questionable.

---

[3] The County provided a copy of a June 11, 2004 letter in which SEIU is invited to meet and confer over proposed changes in the Detention Custody Bureau pursuant to Article 52 of the new MOU. That Article states:

> The parties agree to engage in decision bargaining, over proposed changes if any to hours, wages, and terms and conditions of employment, including but not limited to the use of seniority, resulting from the Detention Custody Bureau work redesign effort.

[4] 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.)

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 September 23, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Roger Smith
Labor Relations Specialist

RCS