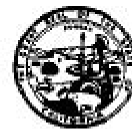
STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



BUILDING TRADES COUNCIL,	
Charging Party,	Case No. SF-CE-225-M
v.	PERB Decision No. 1739-M
OAKLAND HOUSING AUTHORITY,	January 26, 2005
Respondent.	

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Building Trades Council; The Stevens Law Firm by Cheryl A. Stevens, Attorney, for Oakland Housing Authority.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

SHEK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Building Trades Council (Council) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the Oakland Housing Authority (Authority) violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally assigning the work of regular employees to project employees.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the Authority's position statement, the warning and dismissal letters, the Council's appeal and the Authority's opposition to the appeal. The Board hereby dismisses the charge based on the following discussion.

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

BACKGROUND

The Authority is responsible for maintaining and repairing public housing located within the City of Oakland. The Council represents individuals employed by the Authority in certain classifications, including carpenters, plumbers, painters and floor layers. The Authority employs several different categories of employees in these classifications, including regular, project and temporary employees. Regular and project employees are members of the bargaining unit exclusively represented by the Council.

During a bargaining session held on July 14, 2004, the Council learned that the Authority was assigning work to project employees which it believed should have been assigned to regular employees. The Council provided examples of project employees employed as plumbers, painters and floor layers, who were working alongside regular employees in the same classifications.

In a letter to the Authority dated July 23, 2004, the Council claimed the Authority had unilaterally changed existing policy when project workers began performing the work of regular employees. The Council demanded to bargain the impact of this decision. The Authority refused to meet and confer on this matter.

The Authority's Employee Manual defines a project employee as:

> an employee whose position is funded by a special grant or through contract arrangements with other agencies, or temporarily funded by regular funds for a specific duration.

This definition is also reflected in Section XIX of the parties' memorandum of understanding (MOU).

The Authority has utilized project employees for more than 20 years and they have been included in the bargaining unit for more than 10 years. Project employees receive the

same pay and benefits as regular employees. The only distinction between regular and project employees is that project employees are hired for a specified duration of time. Before a project employee is hired, he or she is required to sign employment papers acknowledging the limited duration of the position.

A temporary employee is defined in the Authority's Employee Manual, in relevant part, as:

> an employee who has been appointed to a position on a temporary basis; or an employee who has been appointed to fill a temporary need and/or whose position is budgeted from temporary funds. Temporary appointments may be granted for a period of up to six months.

Section XIX of the parties' MOU covers contracting out and states, in relevant part:

> With regard to contracting out, it is agreed that the Oakland Housing Authority will, as far in advance as possible, inform the Union of such matters that may effect employees in the bargaining unit. No such contract for service shall result in the loss of employment for those employees who are, at the point of the contract for services, regular (non-probationary) employees. Should a regular employee be assigned to a different position with a lower corresponding salary than his/her former salary, the former/higher salary shall remain intact until the salary of the current position catches up with the former salary.
>
> This provision does not apply to employees who occupy project or temporary positions. Specifically, a project position is funded by a special grant or other special funds, or temporarily funded by regular funds for a specific duration. An employee who is in a temporary position holds temporary status. A temporary appointment may be terminated at any time, without the Authority stating a reason for the termination. Temporary appointments shall not exceed six months. The Authority shall provide the Union with a monthly printout of temporary employees by department, date of hire and position. Temporary employee [s] shall be exempt from the Agency Shop provision of the MOU. [Emphasis added.]

BOARD AGENT'S DISMISSAL

As originally filed, the charge alleged that the Authority had contracted out the work of regular employees to project employees. In her warning letter, the Board agent reviewed the parties' contracting out provision and, applying a "clear and unmistakable" waiver analysis, determined that the Council had waived its right to negotiate this matter. (Long Beach Community College District (2003) PERB Decision No. 1568.)

In its amended charge, the Council acknowledged that project workers were employees of the Authority and members of the bargaining unit, not independent contractors. However, the Council incorrectly described project employees as individuals employed for a specific period not to exceed six months, and who were exempt from having to pay agency fees. This description meets the definition of a temporary employee, not a project employee. The charge alleged that project employees were performing work which was ordinarily done by regular employees and the Authority refused to negotiate the impact of this decision.

In dismissing the charge, the Board agent clarified that project workers were employees of the Authority and members of the bargaining unit. She found no evidence that project employees were limited as to the type of work they could perform. The only limitations on project employees were how they were funded and that they were hired for limited terms. The Board agent concluded that there was no evidence that the Authority made a unilateral change in policy concerning the type of work performed by project employees, how they were funded, or the duration of their employment.

COUNCIL'S APPEAL

On appeal, the Council asserts that the language of Section XIX limits the kind of work project employees can perform to special projects funded by grant monies. It also contends

that a project worker funded by regular funds can only work for a "specific duration," not to exceed six months. The Council alleges that contrary to the terms of the MOU, project employees are being assigned the work of regular employees, for periods of time exceeding six months.

The Council also contends that the Board agent erred when she applied a waiver analysis to determine that the Council waived its right to bargain matters arising under the contracting out provision. As it stated in its amended charge, the Council acknowledges that project employees are employees of the Authority, not independent contractors. Therefore, because the contracting out provision is inapplicable to employees of the Authority, the Council asserts it is unnecessary to apply a waiver analysis.

In its response to the appeal, the Authority states that the Council continues to confuse temporary workers with project employees. The MOU does not support the Council's claim that the employment of project employees is limited to six months. The Authority further asserts that project employees are not limited in the work they can perform and that project employee positions have not been funded in a manner contrary to the MOU. The" Authority contends that it has not violated the MOU in its use of project employees and it has no obligation to negotiate the decision to hire project employees.

DISCUSSION

In determining whether a party has violated MMBA 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

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

process. (Stockton Unified School District d98(T) 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 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.)

As originally filed, the charge appeared to allege that the Authority had contracted out the work of regular employees to project employees. The Board agent reviewed the parties' MOU and properly determined that under Section XIX, the contracting out provision, the Council had waived its right to negotiate contracting out bargaining unit work.

As amended, however, it becomes clear that the Council alleged that the Authority had unilaterally departed from the terms of the MOU when it assigned work performed by regular employees to project employees. The Council alleged that Section XIX provided that project employees could only be assigned to work on special projects which were funded by grant monies. It also alleged that when "regular funds" are used to pay project workers, they may only work for a period not to exceed six months.

The Council continues to incorrectly apply the limitations placed on temporary workers to project employees.

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[3]When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

Section XIX states, in relevant part:

> Specifically, a project position is funded by a special grant or other special funds, or temporarily funded by regular funds for a specific duration. [Emphasis added.]

Section XIX continues:

> An employee who is in a temporary position holds temporary status. A temporary appointment may be terminated at any time, without the Authority stating a reason for the termination. Temporary appointments shall not exceed six months. (Emphasis added.)

Clearly, the language of the MOU provides that the six-month limitation on employment applies only to temporary workers. While project workers' terms of employment are limited to "a specific duration," the length of employment is not specified in the contract. Further, there is nothing in the MOU which restricts the assignment of project employees only to "special projects." Rather, the MOU addresses only how project employees are funded, by a "special grant or other special funds" or by "regular funds." Because there are no restrictions in the MOU on the work assignment of project employees, there is no evidence that the Authority departed from the terms of the parties' agreement when project employees were assigned the work of regular employees.

Furthermore, there is no evidence that prior to July 14, 2004, the practice of the Authority was to assign project employees to work only on special projects or to limit their terms of employment to six months. The Council alleged that project employee painters, plumbers and floor layers worked alongside regular employees in the same classifications. An employer does not effect an unlawful unilateral change, however, where an action the employer takes does not alter the status quo. (Pajaro Valley Unified School District (1978) PERB Decision No. 51.) There are no facts alleged in the charge which demonstrate that prior

to July 14, 2004, project employees were restricted to work only on special projects. Thus, the charge does not demonstrate a change in practice when the Authority assigned the painters, plumbers and floor layers to work on the same projects with regular employees.

There is no evidence that the Authority unilaterally departed from the provisions of the MOU or unilaterally changed the past practice when project employees were assigned the work of regular employees and their term of employment exceeded six months. Therefore, the charge does not state a prima facie case of an unlawful unilateral change in policy.

ORDER

The unfair practice charge in Case No. SF-CE-225-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.