STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RICARDO PAEZ, Charging Party, v. SEIU LOCAL 790, Respondent.	Case No. SF-CO-90-M PERB Decision No. 1774-M August 10, 2005

Appearances: Ricardo Paez, on his own behalf; Weinberg, Roger & Rosenfeld by Anne I. Yen, Attorney, for SEIU Local 790

Before Shek, McKeag and Neuwald, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Ricardo Paez (Paez) of a Board agent's dismissal (attached) of his unfair practice charge. The unfair practice charge alleges that SEIU Local 790 (SEIU) violated the Meyers-Milias-Brown Act (MMBA)[1] by its failure to meet its duty of fair representation.

The Board has reviewed the unfair practice charge, the amended unfair practice charge and attached documents, the warning and dismissal letters, Paez's appeal and SEIU's response. The Board finds the Board agent's dismissal to be free of prejudicial error and adopts it as a decision of the Board itself.

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

On appeal, Paez submits voluminous additional documentation in support of the allegations he made in his charge. PERB Regulation 32635(b)[2] provides, "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." Paez has failed to show good cause for acceptance of the additional documents on appeal, as they simply add detail to the allegations in his original charge and there is no indication that the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge.

ORDER

The unfair practice charge in Case No. SF-CO-90-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shek and McKeag joined in this Decision.

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

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, 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

June 13, 2005

Ricardo Paez

Re: Ricardo Paez v. SEIU Local 790
Unfair Practice Charge No. SF-CO-90-M; First Amended Charge
DISMISSAL LETTER

Dear Mr. Paez:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 27, 2005. Ricardo Paez alleges that the SEIU Local 790 violated the Meyers-Milias-Brown Act (MMBA)[1] by breaching their duty of fair representation.

I indicated to you in my attached letter dated June 2, 2005, 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 June 9, 2005, the charge would be dismissed.

On June 9, 2005, you filed a first amended charge. The first amended charge disputes many of the arbitrator's findings and again asserts the union breached its duty of fair representation by failing to call certain witnesses and by failing to represent you at the Civil Service hearing.

Additionally, the amended charge attempts to explain why many of the uncontroverted allegations against you, i.e. watching pornographic video tapes on City equipment in your City-provided office, holding a part-time job, and requesting a co-worker remove evidence from your office, should not be held against you. However, as these all these allegations were admitted to at the arbitration hearing, there appears to be no reason to review them herein.

Based on the facts provided in the original and amended charges, the charge still fails to state a prima facie violation of the MMBA.

[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.

Herein, you contend the union did not call certain witnesses on your behalf and did not present sufficient evidence to support your case. However, facts provided demonstrate the union provided you with an attorney, who presented witnesses and evidence on your behalf, and who vigorously cross-examined the City's witnesses. In fact, the arbitrator's decision notes the amount of evidence the union presented on your behalf.[2] Moreover, the union's failure to introduce every document you deem favorable or raise every argument you deem significant is not a breach of the duty of fair representation. (United Teachers – Los Angeles (1990) PERB Decision No. 797.) Additionally, the union is not required to call every witness the grievant asserts is important to their case. (California Assn. of Professional Scientists (1998) PERB Decision No. 1288-S; California Faculty Assn. (Pomerantsev) (1988) PERB Decision No. 698-H.) As the union called most, if not all of your witnesses, and presented a large amount of evidence in support of your claim, you allegations fail to state a prima facie violation of the MMBA.

Additionally, you contend the union breached its duty of fair representation by refusing to represent you at the Civil Service hearing. However, an exclusive representative does not owe a duty of fair representation to unit members in a forum over which the union does not exclusively control the means to a particular remedy. (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) Accordingly, the duty of fair representation does not attach to an exclusive representative in extra-contractual proceedings before agencies such as the State Personnel Board or the Civil Service Commission. (California Union of Safety Employees (John) (1994) PERB Decision No. 1064-S; California State Employees Association (Carrillo) (1997) PERB Decision No. 1199-S.) As the union is not required to represent you at Civil Service hearings, Local 790's failure to do so does not violate the MMBA.

Right to Appeal

Pursuant to PERB Regulations,[3] 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,

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[2] The arbitrator appears to base his decision in large part on the credibility of you and Mrs. H, finding that Mrs. H's testimony was more credible. It is unclear how the union could be at fault in such a case.

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

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 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: Anne Yen

PUBLIC EMPLOYMENT RELATIONS BOARD

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

June 2, 2005

Ricardo Paez

Re: Ricardo Paez v. SEIU Local 790
Unfair Practice Charge No. SF-CO-90-M
WARNING LETTER

Dear Mr. Paez:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 27, 2005. Ricardo Paez alleges that the SEIU Local 790 violated the Meyers-Milias-Brown Act (MMBA)[1] by breaching their duty of fair representation.

Investigation of the charge revealed the following. You were employed by the City and County of San Francisco's Department of Public Works as a Custodial Supervisor I. As such, you were exclusively represented by Local 790. The City and Local 790 are parties to a collective bargaining agreement that expired on June 30, 2006.

On October 23, 2003, you were terminated from your employment with the City for (1) violating the City's sexual harassment policy; (2) violating the part-time employment policies; (3) acting inappropriately and unprofessionally; (4) engaging in conduct unbecoming of a supervisor; (5) mistreating persons; and (6) attempting to interfere with an investigation. You do not deny that you engaged in outside, part-time employment in violation of City policy. Additionally, there is no dispute that you misused employer resources by using your office television to view pornographic video tapes on several occasions. Additionally, you acknowledge that while watching these video tapes, you masturbated in your office. Lastly, there is no dispute that you attempted to have a co-worker remove the pornographic video tapes from your office after you were placed on administrative leave and instructed not to enter your office.

Facts surrounding the sexual harassment allegations are as follows.[2] In 2002, one of the custodial workers under your supervision was Mrs. H, a Chinese woman.[3] Mrs. H. was an "as

[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] The facts recited herein are those presented during official interviews with both Mr. Paez and Mrs. H., as well as those provided at the arbitration hearing.

needed" custodian, which meant that she did not work full-time and could not work more than 1040 hours per fiscal year.

In October or November 2002, you and Mrs. H. began discussing the possibility of having Mrs. H. clean one of the apartment units that you managed. In November 2002, in the evening, you and Mrs. H. traveled to the apartment building to view the vacant apartment. After viewing one vacant apartment, you took Mrs. H. to another vacant apartment that did not have electricity. Mrs. H. asserts that while in this apartment, which was pitch black, you sexually assaulted her and forced her to have intercourse with you. You contend the sexual encounter was consensual. Mrs. H. further indicated that you apologized for the assault and indicated it would not happen again.

Mrs. H. also testified that a few days later you called her into your office and again attempted to assault her. While in the midst of the assault, Mrs. H. testified that you reached into your desk drawer and pulled out a condom. You deny this and all other encounters with Mrs. H. However a search of your office by City officials found 36 unused condoms in the drawer described by Mrs. H. You provided two contrary explanations for the presence of the condoms, neither of which the arbitrator found compelling.

Mrs. H. also stated under oath that you forcibly raped her on three other occasions; twice in your office and once more at the apartment building you managed. During her interviews and at the arbitration, Mrs. H. was able to accurately describe your genitalia, including a mole on the side of your penis. You deny all of these encounters but have no explanation for Mrs. H.'s accurate description of your genitalia.

In March 2003, Mrs. H. reported the above incidents to City officials. Shortly after Mrs. H.'s allegations, you were placed on administrative leave by the City. At that point, you contacted Local 790 representative Michael Haberberger. On March 28, 2003, Mr. Haberberger represented you at a "mini-Skelly" hearing.

In April 2003, you hired attorney Douglas Warrick to represent your during your investigatory interviews with the City and the San Francisco Police Department. On May 23, 2003, the City terminated your employment for the reasons provided above. On June 5, 2003, Mr. Haberberger appealed your termination. After the appeal, you provided Mr. Haberberger with statements from a number of employees who stated you were a good co-worker and had not sexually harassed them. However, none of the witness statements directly contradicted any of Mrs. H's testimony.

On October 22, 2003, you and your private attorney appeared before the Civil Service Commission to appeal your termination. After hearing from you and your attorney, the Civil Service Commission upheld your termination. Despite the Commission's decision, Local 790 continued to pursue a grievance on your behalf.

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[3] Mrs. H's full name is known by all parties herein but will withheld from this letter in order to protect her privacy.

On August 19, and September 10, 2004, Local 790 presented your case to arbitrator David Nevins. On February 17, 2005, Mr. Nevins issued his decision, which states as follows regarding the Union's presentation of evidence:

> To begin with, significantly favoring the Grievant's version of his encounters with Mrs. H. is the chronology of certain interactions they had, which tend to portray that he did not forcibly pursue her. After their first visit to the apartment building he managed, which Mrs. H. dates to November 5 and portrays as involving forcible sex in Apartment 8, the record is clear that in the two weeks or so which followed the first visit she again rendezvoused, voluntarily, with him at the apartment building. . . In addition, the Union argues that even on her last visit to the apartment building, which involved taking a dining table from there to her sister's house, after which Mrs. H. testified to being forced into sex a second time, she made no effort to avoid being alone with the Grievant, which she easily could have, and even says she willingly accompanied him back into a vacant apartment after the dining table had been left at her sister's. As the Union contends, "If he had raped her previously at the apartment as she claims, it is incredible that she would go back alone with him without any reason at all to go there."
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> The Union also points to a number of other, more objective factors which purportedly detract from any view that the Grievant was guilty of forcible misconduct. Unfortunately, while certainly worthy of noting, the factors all contain uncertainties. . .
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> In addition, while the Union understandably argues that the Grievant would not have been so unintelligent as to have committed a violent crime in Apartment 8, it is difficult to put strategic stock in that view. . .
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> There are still other factors the Union raises in attacking the charges against the Grievant. Some of these factors also provide support for the Grievant. Thus, there are no co-workers brought forward to corroborate either of the two sex encounters purportedly occurring in the Grievant's office, or their aftermath. But, the Union's use of Gilbert Hernandez's testimony about normally being in the area of the Grievant's office at and around 5 p.m. misses the true mark. Mrs. H. indicated the two encounters happened at 3 p.m., not around the quitting time of 5

> p.m., or, in other words, before Mr. Hernandez even came to work.

In denying your grievance and upholding your termination, the arbitrator notes that Mrs. H. had explicit knowledge of where you kept the condoms in your office, could accurately describe your genitalia, and was visibly upset during her testimony. In short, the arbitrator found:

> Mrs. H's testimonial accounts were significantly more believable and convincing than were the Grievant's rendition of events and denials.

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.

You contend the union violated the MMBA by failing to call witnesses you suggested and by failing to provide the arbitrator with all the evidence available.[4]

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (Hussey v. Operating Engineers (1995) 35 Cal.App.4th 1213 [42 Cal.Rptr.2d 389].) In Hussey, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union's power."

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting Dutrisac v. Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270 [113 LRRM 3532], at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082 [98 LRRM 2090].)

In International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M, the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions in such cases, including Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332 and American Federation of State, County and Municipal Employees, Local 2620 (Moore) (1988) PERB Decision No. 683-S, are consistent with the approach of both Hussey and federal precedent (Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369]).

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[4] You also contends you were not granted sufficient time at the Civil Service Commission to present your case. However, Local 790 did not represent you at that hearing and thus is not liable for any malfeasance at that hearing.

Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (United Teachers – Los Angeles (Wyler) (1993) PERB Decision No. 970.)

Herein, you contend the union did not call sufficient witnesses on your behalf and did not present sufficient evidence to support your case. However, facts provided demonstrate the union provided you with an attorney, who presented witnesses and evidence on your behalf, and who vigorously cross-examined the City's witnesses. In fact, the arbitrator's decision notes the amount of evidence the union presented on your behalf.[5] Moreover, the union's failure to introduce every document you deem favorable or raise every argument you deem significant is not a breach of the duty of fair representation. (United Teachers – Los Angeles (1990) PERB Decision No. 797.) Additionally, the union is not required to call every witness the grievant asserts is important to their case. (California Assn. of Professional Scientists (1998) PERB Decision No. 1288-S; California Faculty Assn. (Pomerantsev) (1988) PERB Decision No. 698-H.) As the union called most, if not all of your witnesses, and presented a large amount of evidence in support of your claim, you allegations fail to state a prima facie violation of the MMBA.

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 June 9, 2005, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

[5] The arbitrator appears to base his decision in large part on the credibility of you and Mrs. H, finding that Mrs. H's testimony was more credible. It is unclear how the union could be at fault in such a case.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR