STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MR. & MRS. WILLIE COLEMAN, JR., Charging Parties, v. PUBLIC EMPLOYEES UNION LOCAL 1, Respondent.	Case No. SF-CO-92-M PERB Decision No. 1780-M October 11, 2005

Appearances: Mr. and Mrs. Willie Coleman, Jr., on their own behalf; Roland M. Katz, Attorney, for Public Employees Union Local 1.

Before Duncan, Chairman; Whitehead and Neuwald, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Mr. and Mrs. Willie Coleman, Jr. (the Colemans) of a Board agent's dismissal (attached) of their unfair practice charge. The charge alleges that the Public Employees Union Local 1 (Local 1) breached its duty of fair representation to the Colemans in its handling of a grievance in violation of the County of Contra Costa and Local 1's memorandum of understanding and the Meyers-Milias-Brown Act (MMBA).[1]

The Board has reviewed the entire record in this case, including the unfair practice charge, the response, the warning and dismissal letters, the appeal and the request to include the late-filed response to the appeal by Local 1.[2] The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself as set forth below.

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

[2]The Board does not find good cause to include the late-filed response to the appeal.

DISCUSSION

We adopt the warning and dismissal letters of the Board agent as a decision of the Board itself. There are no new issues raised on appeal.

The appeal did not comply with the requirements of PERB Regulation 32635.[3]

LATE FILING

Local 1 indicated the response to the appeal was filed late because of an anticipation that notice with timelines regarding the filing would be sent to Local 1 by the Board. The response indicated that the preparer was unaware that the Board would not send that notice because he did not regularly practice before PERB.

Under PERB Regulation 32136, a late filing may be excused at the discretion of the Board for good cause only. Nothing in the request for acceptance of the late-filed response indicates there is any ground for the Board to find good cause. Ignorance of the law is no excuse and it is certainly not good cause. The response was therefore not considered by the Board in this decision.

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[3]PERB Regulation 32635 states, in pertinent part (PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.):

> The Appeal shall:
>
> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the grounds for each issue stated.

ORDER

The unfair practice charge in Case No. SF-CO-92-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neuwald joined in this Decision.

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

William & Lorraine Coleman
414 Coot Lane
Suisun City, CA 94585

Re: Mr. & Mrs. Willie Coleman, Jr. v. Public Employees Union Local 1
Unfair Practice Charge No. SF-CO-92-M
DISMISSAL LETTER

Dear Mr. and Mrs. Coleman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 29, 2005. Mr. & Mrs. Willie Coleman Jr. alleges that the Public Employees Union Local 1 violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to follow the promotion and bidding provisions in the collective bargaining agreement.

I indicated to you in my attached letter dated May 18, 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 May 25, 2005, the charge would be dismissed.

On May 24, 2005, I received an additional packet of information from you. However, it does not appear that the information was served on the Respondent. As such, the filing does not meet the standard for an amended charge. However, despite this deficiency, I will recite the relevant facts as follows.

Charging Parties are both employed by the Contra Costa County Department of Health Services as Institutional Services Workers (ISW) at the Richmond Clinic. As such, they are exclusively represented by Local 1.

ISWs are assigned to perform either various food service functions or custodial functions. The ISW classification is a "Deep Class" as defined by the County. A Deep Class is one that has several levels. In the case of the ISW classification, there are three levels: Generalist, Specialist and Lead. The Generalist is the entry classification, while Specialists are assigned

[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.

more specialized tasks. An employee in the Lead category assigns and coordinates the activities of the Generalists.

Advancement in Deep Classes are not done through promotional examination. Instead, the County has adopted a special resolution to deal with Deep Classes. Resolution 82-102 provides as follows regarding Deep Classes:

> 9. Reassignment to a Specialist or Lead level position from a Generalist position shall be preceded by written public notice for a minimum of five working days at worksites accessible to the majority of Generalist level Institutional Service Workers.
>
> Selection from amongst interested employees shall then be based on the following:
>
> A. The quantity and quality of relevant experience of interested Generalist level Institutional Service Workers;
>
> B. The relevant qualifications of interested Generalist level ISWs based upon a structured interview;
>
> C. Seniority of interested Generalist ISWs;
>
> D. Prior performance evaluations (particularly those for more recent periods) of interested Generalist ISWs.

In 2001, several ISWs approached then-Business Agent Arlyn Erdman regarding several Specialist and Lead positions that they believed had been filled without being posted. Mr. Erdman contacted the Department about the positions. Health Services responded by providing Local 1 with information about the positions in question. Based upon a review of that information, Local 1 determined that the County had not violated the MOU or Resolution 82-102.

In October 2003, Charging Parties approached Mr. Edrman and complained that certain Specialist and Lead positions were not being posted. Most of the positions in question were those reviewed in 2001. In or about late October 2003, Mr. Edrman and the Charging Parties met with Department representatives to discuss the positions in question. After this meeting, Mr. Erdman received information from the Department regarding when the positions in question were filled. This information directly contradicted the information to Mr. Erdman in 2001.

On November 18, 2003, Local 1 filed a class action grievance on behalf of all ISWs, including the Charging Parties. On December 5, 2003, the County responded by indicating that the grievance was untimely. On January 6, 2004, Local 1 appealed the grievance to Step 3 for a

hearing. On January 13, 2004, the County denied the grievance, again arguing the grievance was untimely filed.

On January 21, 2004, the union appealed the grievance to Step 4 for a Board of Adjustment hearing. On February 19, 2004, after not receiving a response from the County, Mr. Erdman sent another letter to the County requesting a Board of Adjustment hearing. On February 23, 2004, the County responded to Mr. Erdman's request by again arguing the grievance was untimely as the changes took place in 2001. Over the next several months, the parties traded letters and information regarding the ISW issue.

During the summer of 2004, the parties met to discuss the underlying issues. During that meeting, the County asserted the Specialist positions were not subject to posting requirements. Additionally, the County asserted that several of the positions were management positions that had been transferred to the Richmond Clinic after the County became aware of the need for more ISWs at the Clinic. After failing to reach agreement, the parties scheduled a Board of Adjustment hearing for October 27, 2004.

On or about November 3, 2004, the County and Local 1 met to attempt to resolve the grievance. During this meeting, the parties agreed to meet and confer over new post and bid requirements for ISWs. On November 8, 2004, Local 1 sent the Charging Parties a letter informing them that the grievance had been settled. The letter further indicated that the union chose to settle the grievance rather than take the chance that the Board of Adjustment or arbitrator would rule against the ISWs and not afford any relief to those workers. The letter also provided Charging Parties with extensive information regarding the County's position, as well as information on why certain contract provisions did not apply. Lastly, the union provided a detailed explanation as to why they chose the remedy they did, indicating that it benefited the classification as a whole.

In or about December 2004, Local 1 provided all ISWs with a survey asking how employees would like Local 1 to proceed during negotiations. More specifically, Local 1's survey provided as follows:

> ___ I believe the Union should take the position that all ISW positions in the department should be re-bid.
>
> ___ I believe the Union should take the position that all ISW's should be returned to their bidded position.
>
> ___ I believe that the Union should take the position that all ISWs should stay in their current assignment and that bid notices should be created to reflect that current assignment.

After receiving survey results, Local 1 allowed members to chose their rank and file negotiators from each worksite. Charging Party William Coleman is the representative from the Richmond Clinic.

Based upon these facts, as well as information provided by the union, the charge still fails to state a prima facie violation of the MMBA, for the reasons provided below.

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]).

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, facts provided demonstrate Local 1 pursued the ISW issue for more than two years and resolved the matter in a manner the benefited the classification as a whole. The union filed a grievance as soon as it discovered the discrepancy and consistently communicated with ISWs about the status of the grievance. In fact, Charging Parties received a copy of all correspondence sent by Local 1 to the County. Lastly, the union provided a detailed explanation as to why it settled the grievance, addressing the County's arguments as well as those in favor of the union. As such, the conduct described does not indicate the union acted arbitrarily, capriciously or in bad faith.

Right to Appeal

Pursuant to PERB Regulations,[2] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

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

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

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

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

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Rollie Katz

PUBLIC EMPLOYMENT RELATIONS BOARD

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

May 18, 2005

Mr. & Mrs. Willie Coleman
414 Coot Lane
Suisun City, CA 94585

Re: Mr. & Mrs. Willie Coleman, Jr. v. Public Employees Union Local 1
Unfair Practice Charge No. SF-CO-92-M
WARNING LETTER

Dear Mr. & Mrs. Coleman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 29, 2005. Mr. & Mrs. Willie Coleman Jr. alleges that the Public Employees Union Local 1 violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to follow the promotion and bidding provisions in the collective bargaining agreement.

Investigation of this charge revealed the following. Both of you are employed by the County of Contra Costa in the General Service and Maintenance Department. As such, both of you are exclusively represented by Local 1. Local 1 and the County are parties to a collective bargaining agreement that expires on September 30, 2005. With regard to promotions, Article 21 provides as follows:

> **21.1 Competitive Exam.** Promotion shall be by competitive examination unless otherwise provided in this MOU.
>
> **21.2 Promotion Policy.** The Director of Human Resources, upon request of an appointing authority, shall determine whether an examination is to be called on a promotional basis.

With regard to bidding for vacant positions, Article 22 provides in relevant part as follows:

> **22.4 Voluntary Reassignment (Bidding) Procedure.** The below listed procedure shall apply to the following groups of employees: the entire General Services and Maintenance Unit, the entire LVN-Attendant/Aide Unit, the entire Health Services Unit, Probation Counselors in the Probation Department and that portion of the Engineering Unit in the Public Works Department.

[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.

> Permanent employees may request reassignment to vacant permanent positions in the same classification or in the same level of their deep classification. All permanent vacancies will be offered for bid to presently assigned full-time, part-time and permanent-intermittent employees for reassignment.

The charge alleges as follows:

> PEU, Local 1 failed to follow the proper procedures for promotion of employees as stipulated in the Memorandum of Understanding (MOU) between Contra Costa County and & PEU Local 1. Section 22.4 (Bidding procedures). Furthermore, they show disregard in their efforts to carry out the steps necessary to complete the grievance procedure MOU Sect. 25.

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.

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging 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, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.) Herein, the charge is devoid of any facts regarding the specific nature of the allegations made. As such, it is impossible for PERB to investigate this charge.

Assuming Charging Parties wish to allege the union violated its duty of fair representation, the following standard must be met.[2] 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

[2] Charging Parties allege the union violated the MOU. However, allegations of MOU violations may only be made by the employer itself, not by individual employees. (Oxnard School District (1988) PERB Decision No. 667.)

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]).

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.)

Should Charging Parties wish to amend the charge to allege such a violation, the above standard should be addressed.

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 May 25, 2005, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR