STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 660, Charging Party, v. COUNTY OF ORANGE, Respondent.	Case No.LA-CE-101-M PERB Decision No. 1868-M December 15, 2006
ORANGE COUNTY EMPLOYEES ASSOCIATION/ASSOCIATION OF ORANGE COUNTY DEPUTY SHERIFFS, Joined Party.	

Appearances: Altshuler, Berzon, Nussbaum, Rubin & Demain by Jonathan Weissglass, Attorney, for Service Employees International Union Local 660; Olins, Hayes & Miller by Shana C. Lathrop, Attorney, for Association of Orange County Deputy Sheriffs.

Before Shek, McKeag and Neuwald, Members.

DECISION

McKEAG, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Service Employees International Union Local 660 (SEIU) to a proposed decision (attached) of the administrative law judge (ALJ). The charge alleged the local rules for the County of Orange (County) contain an unreasonable signature requirement for decertification petitions in violation of the Meyers-Milias-Brown Act (MMBA)[1]. The ALJ held SEIU's unfair practice charge was not timely filed and thereupon dismissed the complaint and the underlying unfair practice charge.

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

The Board has reviewed the entire record in this matter, including the proposed decision, SEIU's exceptions, the Orange County Employees Association/Association of Orange County Deputy Sheriffs' response and SEIU's reply and conclude the proposed decision is free of prejudicial error. Accordingly, subject to the discussion below regarding timeliness, we adopt the proposed decision as a decision of the Board itself. The Board, therefore, affirms the dismissal of the complaint.

BACKGROUND

SEIU filed an unfair practice charge against the County alleging its local rules contain an unreasonable signature requirement for decertification petitions. The facts in this case were thoroughly addressed in the proposed decision and need not be reiterated herein. However, one set of facts warrants repeating. Namely, SEIU neither filed a decertification petition nor even attempted to obtain any proof of support for such a petition within the six months preceding the filing of the instant unfair practice charge.[2] Accordingly, the County has neither applied nor enforced the signature requirement to SEIU's detriment within the statutory period. In short, SEIU has suffered no harm at the hands of the County in connection with its current decertification attempt. Rather, this action is based solely on Service Employees Internat. Union v. Superior Court (2001) 89 Cal.App.4th 1390 [108 Cal.Rptr.2d 505] (Superior Court) in which the court found unreasonable an identical signature requirement. In essence, SEIU argues the Board should invalidate the signature gathering requirement, regardless of whether or not SEIU has suffered any harm.

[2]The statute of limitations for unfair practices arising under the MMBA is six (6) months. (Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd. (2005) 35 Cal.4th 1072, 1092 [29 Cal.Rptr.3d 234].)

The ALJ ruled that the charge was not timely filed by SEIU and dismissed the complaint and the underlying charge. On appeal, SEIU argues the charge was timely filed by operation of the continuing violation doctrine.[3] For the reasons set forth below, we conclude the continuing violation doctrine is not applicable in this instance and, therefore, hold the charge was not timely filed.

A. Continuing Violations

The Board has recognized the continuing violation doctrine for over twenty years. (See, e.g., San Dieguito Union High School District (1982) PERB Decision No. 194 (San Dieguito); Regents of the University of California (1983) PERB Decision No. 353-H (Regents).) Moreover, like the instant case, the Board has applied the doctrine to charges based upon interference by a public agency. The Board, however, has imposed certain limitations on the use of the doctrine. In State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization) (1998) PERB Decision No. 1279-S (DPA, et al.), the Board explained:

> The challenged conduct, therefore, is continuing in nature. At issue is a continuously discriminatory application of a policy that treats usage of State communications equipment one way for Union purposes and another way for other non-business purposes. This type of unfair practice is a 'continuing violation.' In such cases, even if the first act in a series was outside the period of timeliness, the underlying unfair practice may be revived by a subsequent act within the statutory period. Although the prior incidents may not be the basis for the finding of a violation, the underlying unfair practice can be 'revived' by the new wrongful act that was timely raised. [Emphasis added.]

[3]The County's signature gathering requirement was increased from 30 percent to 50 percent in May 1990. SEIU did not object to the change. Later, in 1997-1998, SEIU filed an unsuccessful decertification petition and has not filed another petition since. Because the instant unfair practice charge was filed in December 2002, 12 years after the rule was modified and four years after SEIU's last decertification attempt, the charge was not timely filed absent a finding of a continuing violation.

Thus, in order to invoke the continuing violation doctrine, the offending party must commit a new wrongful act, and this act must be timely challenged by the charging party. This "new wrongful act" standard has been regularly applied by the Board since 1982. (San Dieguito); (Regents'); Compton Community College District (1991) PERB Decision No. 915; Fresno County Office of Education (1993) PERB Decision No. 978 (Fresno County); State of California (Department of Corrections) (2003) PERB No. 1559-S (Corrections).)

B. The Long Beach Decision Can, and Should, be Distinguished

It should be noted that there is a case in which the Board did not apply the new wrongful act standard when it invoked the continuing violation doctrine. In Long Beach Unified School District (1987) PERB Decision No. 608 (Long Beach), the Board applied the doctrine to an interference charge challenging the employer's access regulations. The Board found the charge timely, even though the regulation was adopted outside the limitations period, and regardless of whether the regulation was revised or enforced within the limitations period.

The ALJ concluded, and we agree, that Long Beach is distinguishable from the present case. In that case, the only way to test the enforcement of the unreasonable access regulation was to violate it and potentially risk disciplinary consequences. In marked contrast, the instant signature requirement may be tested without similar risk by simply filing an arguably reasonable number of signatures in an arguably reasonable period of time. Indeed, the Board seemingly took this into consideration when it explained in Long Beach that:

> [W]e find it unnecessary to adopt the ALJ's statement that each act of enforcement constitutes a new and separate cause of action. While this may be true, the Association need not demonstrate an attempt to violate the regulation in order to show the District would enforce it.

In the present case, the County has not committed a new wrongful act within the statutory period. Thus, there is no intervening act by the County in which to revive a challenge to the County's 1990 adoption of the 50 percent signature requirement. Accordingly, the mere existence of the allegedly unreasonable signature requirement, standing alone, is insufficient to invoke the continuing violation in this case.

C. The Invocation of the Continuing Violation Doctrine Requires an Intervening Act

The dissent, which has abandoned the new wrongful act standard, argues the harm in this case flows, not from the filing of a decertification petition, but from the existence of the County's allegedly unreasonable decertification rules. According to the dissent, the mere existence of an allegedly unreasonable rule interferes on an unending basis with the rights of employees to select the employee organization of their choice. Therefore, the dissent concludes the unfair practice charge is not time barred because it is based on a continuing violation.

This argument, however, is inconsistent with the considerable body of PERB case law in which the Board ruled that the mere fact an arguably unreasonable rule exists does not automatically trigger the application of the continuing violation doctrine. As explained by the Board, "a continuing violation would not be found where the employer's conduct during the limitations period constituted an unfair practice only by its relation to the original offense." (El Dorado Union High School District (1984) PERB Decision No. 382.) In other words, a continuing violation will only be found when the wrongdoer engages in active conduct (i.e., new wrongful act) within the limitations periods that independently constitutes an unfair practice. (See Corrections.)

In the present case, unlike the union in Long Beach, SEIU risks nothing by attempting to meet the signature requirement. If, as proposed in the dissent, the new wrongful act standard was dropped, the statute of limitations for local rule challenges would be eviscerated. Absent a meaningful limitation period, these rules would be subject to challenge at any time with little or no burden to the charging party. As a result, local rules, if subjected to perpetual vulnerability, will likely be thrown into a state of flux and, thereby, create chaos, not stability, in labor-management relations. Moreover, the viability and integrity of local rules, which the Legislature deliberately sought to protect, would be significantly compromised.

According to the dissent, PERB has only applied the "new wrongful act" standard to charges alleging unilateral change, discrimination and/or retaliation. Moreover, the dissent contends that:

> The Board has consistently found continuing violations in cases involving charges based on interferences by the public agency, on the ground that once an unreasonable rule is put into effect, it remains operative until revoked or rescinded.

However, the Board has, in fact, applied the new wrongful act standard to charges alleging interference subsequent to the issuance of the Long Beach decision. For example, in Fresno County, the Board upheld a dismissal in which the Board agent applied the new wrongful act standard to an interference charge in which the employer refused to acknowledge an individual as a site representative. Similarly, in The Regents of the University of California (1988) PERB Decision No. 694-H, the new wrongful act standard was applied to an interference charge in which the employer failed to distribute copies of a memorandum of understanding.

Based on the foregoing, it is apparent that the Board has not consistently applied the continuing violation standard set forth in Long Beach to interference cases. We, therefore,

conclude the Long Beach decision does not establish a standard for all interference charges. Rather, it creates an exception to the new wrongful act standard for interference cases involving access restrictions. Accordingly, we hereby affirm the new wrongful act standard as a key component of the continuing violation doctrine and hold that the doctrine is not applicable in this instance.

D. PERB Does Not Issue Declaratory Relief or Advisory Opinions

As discussed above, SEIU has not been harmed by the signature requirement. Indeed, it is possible that SEIU, if it actively sought decertification, might reach the 50 percent threshold when seeking support and, therefore, not be harmed. Because there is no case in controversy before the Board, SEIU essentially seeks a declaratory judgment in this matter. However, the Board has long held that it does not render advisory opinions or provide declaratory relief. (Jefferson School District (1980) PERB Order No. Ad-82.) Thus, if the Board drops the standard, it would overturn long standing PERB precedent.

We conclude that it is inadvisable to open the door to such actions. Since they would not be based on an actual controversy, the evidence in these de facto declaratory relief actions would be based on conjecture and/or theoretical facts. However, the Board's decision making is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the Board to render a decision to finally dispose of the controversy. Said another way, the Board, and for that matter, the public, is better served when the Board focuses on the resolution of specific legal disputes rather than the resolution of abstract differences of legal opinion.

We recognize the desirability to rule on the merits of this case in light of the Superior Court decision. However, based on the discussion above, SEIU needs to take some action to

revive the underlying unfair practice charge. To rule otherwise would disregard years of PERB precedent and potentially open the floodgates to a myriad of local rule challenges.

For these reasons, we believe the ALJ properly rejected SEIU's continuing violation theory in ruling the matter was not timely filed. As the ALJ explained:

> At least when an employee organization wishes to challenge a decertification petition signature requirement, it seems more appropriate to expect the organization either (a) to file a charge with PERB when the requirement has been recently adopted or revised or (2) [sic] to test the enforcement of the requirement by actually filing a decertification petition, and then to file a charge with PERB if necessary.

We agree. Accordingly, we conclude the ALJ's proposed decision is free of prejudicial error and adopt it as a decision of the Board itself.[4]

ORDER

The unfair practice charge in Case No. LA-CE-101-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Neuwald joined in this Decision.

Member Shek's dissent begins on page 9.

[4]The dissent spends a considerable amount of time discussing both the reasonableness of the County's signature requirement and, after concluding the requirement was unreasonable, the appropriate remedy. Since we are dismissing this charge as untimely, both issues are irrelevant and need not be addressed herein.

SHEK, Member, dissenting: I respectfully dissent based on my finding that the majority opinion misinterprets and misapplies the doctrine of "continuing violation" as set forth in San Dieguito Union High School District (1982) PERB Decision No. 194 (San Dieguito). Long Beach Unified School District (1987) PERB Decision No. 608 (Long Beach), and State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization) (1998) PERB[1] Decision No. 1279-S (State of California). In straining to reject a finding of continuing violation, the majority departs from the Long Beach precedent. It incorrectly merges the concepts of "new wrongful act" and "continuing violation," which are set forth in San Dieguito as separate means by which a charge may survive a challenge based upon the statute of limitations. A "new wrongful act" is not required to establish a continuing violation where the charging party alleges that a rule or regulation is invalid on its face.

At issue in the present case is whether or not the existence of an employer decertification rule interferes with the statutory rights of employees or employee organizations. The Board has consistently found continuing violations in cases involving charges based on interferences by the public agency, on the ground that once an unreasonable rule is put into effect, it remains operative until revoked or rescinded. In this case, the decertification rule remained in effect during the six-month period prior to the filing of the charge. Thus, I would reverse the administrative law judge's (ALJ) proposed decision and hold that the charge by Service Employees International Union (SEIU) was timely filed under the continuing violation doctrine.

[1]Public Employment Relations Board (PERB or Board).

Moreover, as discussed below, I would hold the decertification rule invalid in accordance with Service Employees Internat. Union v. Superior Court (2001) 89 Cal.App.4th 1390 [108 Cal.Rptr.2d 505] (Superior Court).

PROCEDURAL HISTORY

This action commenced when SEIU filed an unfair practice charge against the County of Orange (County) on December 20, 2002. The Office of the General Counsel of the Board followed on April 10, 2003, by issuing a complaint against the County. The complaint alleged that since May 1990, the County had maintained an Employee Relations Resolution (ERR). Section 1 LA of the ERR stated in relevant part that a request for decertification was required to be accompanied by a petition signed by at least 50 percent of the regular and probationary employees within the representation unit, and that the signatures on the petition had to be obtained within 30 days prior to the date the request was submitted. The complaint continued to allege that the County policy: (1) was contrary to the Meyers-Milias-Brown Act (MMBA or Act),[2] and as such, violated Sections 3507 and 3507.1, and constituted an unfair practice under Section 3509(b) and PERB Regulation 32603(f);[3] (2) interfered with the rights of bargaining unit employees to be represented by SEIU in violation of Section 3506, and was an unfair practice under Section 3509(b) and PERB Regulation 32603(a); and (3) denied SEIU their right to represent bargaining unit employees in violation of Section 3503, and as such, was an unfair practice under Section 3509(b) and PERB Regulation 32603(b). The County filed an

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

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

answer on April 24, 2003. PERB held informal settlement conferences on May 22 and June 5, 2003, but the case was not settled.

On September 23, 2003, the Association of Orange County Deputy Sheriffs (AOCDS) filed a motion for joinder as a party to the case. On October 2, 2003, the Orange County Employees Association (OCEA) filed a similar application for joinder. Over SEIU's opposition, OCEA and AOCDS were joined as parties by an order dated October 6, 2003.

A formal hearing was conducted before the ALJ on October 14 and 15, 2003, at the PERB office in Los Angeles. At the beginning of the hearing, AOCDS filed a motion to dismiss the case, which was taken under submission. The matter was submitted for decision on February 25, 2004, after the filing of post-hearing briefs. The ALJ issued a proposed decision on May 4, 2004 (proposed decision), finding the unfair practice charge was not timely filed, and thereby dismissed the complaint and the underlying unfair practice charge.

FINDINGS OF FACT

The County is a public agency within the meaning of Section 3501(c) and PERB Regulation 32016(a). SEIU, OCEA and AOCDS are employee organizations within the meaning of Section 350l(b), recognized employee organizations within the meaning of Section 350l(b), and exclusive representatives within the meaning of PERB Regulation 32016(b), representing units of County employees.

The County has about 17,000 employees, almost all of whom are unionized. They work in 213 different County facilities. There are 14 bargaining units. The SEIU Local 660 represents a unit of about 500 employees. OCEA represents 8 units with a total of about 12,000 employees. AOCDS represents a unit of about 1,800 employees.

Pursuant to Section 3507, the County has adopted local rules within the meaning of PERB Regulation 32016(c) for the administration of employer-employee relations. The current ERR was adopted in May 1990, and according to Chief of the County Employee Relations, Susan Paul (Paul), it was continuously in effect until and through the date of the hearing on October 15, 2003. In Section 11 (Decertification Procedure), subsection A of the ERR, it is stated:

> During the 30 days beginning nine months before the expiration of a unit's current Memorandum of Understanding, requests for decertification of an Exclusively Recognized Employee Organization may be submitted by employees, employee organizations or Exclusively Recognized Employee Organizations. The decertification requests should be submitted to the Personnel Director and must be accompanied by a petition signed by at least 50 percent of the regular and probationary employees within the representation unit. The petitions must contain: a) full printed name of employee, b) signature, c) date signed. Signatures on the petition must have been obtained within the 30 days prior to the date the request is submitted. (Emphasis added.)

Before May 1990, and continuously during the period of July 1984 through May 1990, the local rule concerning a decertification petition required signatures of "at least 30 percent of the regular and probationary employees within the unit," to be obtained within the prior 30 days. Before that, the local rule concerning the decertification requirement that was continuously in effect beginning 1969 through 1984, required that signatures of at least 30 percent of the regular and probationary employees be "obtained within the 90 days prior to the date the request is submitted." According to Paul's testimony, the County formally adopted

four separate ERRs with identical decertification requirements during the period of 1969 through 1984.[4]

The decertification petition signature requirement was increased from 30 to 50 percent in May 1990 partly at the request of OCEA Assistant General Manager, Dominic Berardino (Berardino), to create "a more stable labor relations environment." At the hearing in this case, Berardino explained that the higher requirement "discourage[d] the idea" of decertification (or "raiding," as he saw it). On April 3, 1990, the County sent a copy of the proposed revisions to the local rules to SEIU. An attached cover letter stated that some revisions would "modify provisions to avoid undue disruption." If the County had not heard from the recipient by "April 18, 1990," the letter continued, it would assume that the recipient "concur[red] with the proposed revisions" and "proceed to have the Board of Supervisors adopt the revised ERR." On page 10 of the proposed revisions to the local rules, under the heading, "Section 11. DECERTIFICATION PROCEDURE", a numerical "30" was stricken and "50" was inserted to denote the required percentage of signatures of the regular and probationary employees within the representation unit on a petition accompanying a decertification request. (Underline in the original.) SEIU apparently did not respond on or before April 18, 1990, within the 15-day response period prescribed by the County.

SEIU filed an unsuccessful petition to decertify OCEA in at least one unit in 1997-98, and has not filed such a petition for any County unit since then. SEIU Western Regional Organizing Director, since June 1997, Jim Philliou (Philliou), testified that given the "difficulty" of the County's local rule, SEIU was "waiting for this [PERB] process to unfold

[4] An ERR that was adopted in 1969 remained "in effect through 1970." The ERR adopted in 1970 "was in effect during 1974." The ERR adopted in 1974 was "carried through" to 1979, and the one adopted in March 1979 was in effect until 1984.

before doing much more down there." He testified further he had no evidence that SEIU had requested the decertification requirement be changed. He believed SEIU started discussing with the County about changing the rule prior to the filing of the current charge. SEIU had evaluated the different targets for union organization in the County, and concluded that this requirement would make pursuing these targets very difficult.

On March 12, 2003, after SEIU had filed the charge, Paul initiated a meeting with SEIU Representative, Linda Renta, and the then President, Blake Williams, to discuss potential change to the ERR, including the decertification petition signature requirement. SEIU representatives advised Paul that they would meet on March 19, 2003, with other employees, and get back to Paul regarding her proposed meet and confer over the decertification rule.

DISCUSSION

The proposed decision held that SEIU's unfair practice charge was not timely filed since the County did not "[a]dopt or enforce a local rule" within the meaning of PERB Regulation 32603(f) within either the six-month or the three-year limitations period before the charge was filed on December 20, 2002.[5] As stated in the proposed decision, an allegedly unreasonable decertification petition signature requirement was not a continuing violation. Authorizing any employee or employee organization to file a charge challenging any local rule as unreasonable at any time, the proposed decision further held, would be inconsistent with the Legislature's cautious approach to expanding PERB's jurisdiction or authority.

[5]The proposed decision was issued before the California Supreme Court had settled the issue of the applicability of a six-month or a three-year limitations period to MMBA unfair practice charges.

SEIU excepts to the conclusion in the proposed decision that it would be inappropriate to address the merits of the charge and the remedy, given the charge was barred by the statute of limitations.

The AOCDS states in its brief that the ALJ's order was proper because SEIU's unfair practice charge was untimely, thus making any analysis of MMBA violations and/or remedies moot; and that even if the charge were considered timely, the County's decertification requirement was both reasonable and valid.

I give merit to SEIU's allegations that the County's unreasonable decertification petition requirement constitutes a continuing violation. If the County rule violates the intents and purposes of the MMBA by interfering with the public employees' statutory rights to join and participate in the activities of the exclusive representative of their own choosing, and denying SEIU's protected right to represent bargaining unit employees, then the date on which the rule was adopted or revised is immaterial. Once the allegedly unreasonable rule was put into effect, it remained in effect continuously until rescinded or revoked, and the violation is continuing in nature. In accordance with the Court's interpretation of an identical showing of interest requirement in Superior Court, I find the County's decertification petition signature requirement to be onerous, inconsistent with, and does not effectuate the declared intent and purposes of the MMBA. I would therefore order the County decertification rule vacated.

Timeliness

The majority opinion incorrectly states that "in order to invoke the continuing violation doctrine, the offending party must commit a new wrongful act, and this act must be timely challenged by the charging party." (Majority op. at p. 4.)

Contrary to the majority opinion, a careful review of the Board's San Dieguito decision, which discussed the continuing violation doctrine at length, demonstrates that "subsequent unlawful conduct" is not required for a "continuing violation." Instead, San Dieguito separated these two concepts by the disjunctive term "or." Along with tolling of the limitations period, all three distinct concepts act as limitations upon the applicability of the statute of limitations. San Dieguito states:

> [T]he charge may still be considered to be timely filed if the alleged violation is a continuing one, if the violation has been revived by subsequent unlawful conduct within the six-month period, or if the limitation period was tolled while the Association was diligently and reasonably pursuing alternative procedures for obtaining relief and other alternative remedies.
> (Id., at p. 5, emphasis added.)

This statement means that there are different circumstances under which there may be a (i) continuing violation; (ii) a "new wrongful act"; or (iii) tolling of the limitations period. San Dieguito addressed an alleged unilateral change in a policy requiring teachers to sign out if they left the campus, and held that the alleged unilateral change in policy did not constitute a continuing violation. (Id, at p. 9.) It is noteworthy that the charging party in San Dieguito alleged simply that the policy was adopted unilaterally, not that the policy itself was invalid.

Where a rule or regulation itself is being challenged as invalid, the Board has held that its mere existence may be a continuing violation. (Long Beach and State of California.)

At issue in Long Beach was a District rule restricting the organization's right of access to bargaining unit members. The Board held that the association's allegations of unreasonable denial of access asserted a violation of a continuing nature, and that neither the enactment nor revision date of the rule triggered the six-month period, "since it is not the act of revising the regulations of which [the association] complains but, rather, their existence, which continued

up to and through the time of the hearing." (Long Beach, at p. 12; emphasis in original.) "If the regulations violate the Act by unreasonably denying access, then the date on which they were revised is immaterial." (Id, at pp. 11 - 12.) Moreover, the Board in Long Beach stated:

> In reaching this conclusion, we find it unnecessary to adopt the ALJ's statement that each act of enforcement constitutes a new and separate cause of action. While this may be true, the Association need not demonstrate an attempt to violate the regulation in order to show that the District would enforce it.
> (Ibid., at p. 12, emphasis added.)

Thus, the Board held that the mere existence of the allegedly invalid regulation was the violation at issue, and applied the continuing violation doctrine without requiring any acts of enforcement.

The decision in State of California is consistent with this rule. Although the portion of the decision cited by the majority refers to subsequent acts within the statutory period (Majority Op. at p. 3), the correct interpretation of State of California can be derived from reading the pertinent portion of that decision in its entirety:

> The evidence in support of the charge of interference establishes that the departments whose conduct is under attack prohibited the four employees from using either e-mail, computers or the fax machine for Union business. The evidence establishes that the restrictions, once put into effect, remained in effect continuously thereafter.
>
> The challenged conduct, therefore, is continuing in nature. At issue is a continuously discriminatory application of a policy that treats usage of State communications equipment one way for Union purposes and another way for other non-business purposes. This type of unfair practice is a 'continuing violation.' In such cases, even if the first act in a series was outside the period of timeliness, the underlying unfair practice may be revived by a subsequent act within the statutory period. Although the prior incidents may not be the basis for the finding of a violation, the underlying unfair practice can be 'revived' by the new wrongful

> act that was timely raised. (Compton Community College District (1991) PERB Decision No. 915.)
>
> I conclude that as to the alleged interference with employee and employee organization rights, the unfair practice charge was timely filed. This is because the challenged discriminatory application of the State policy remained in effect during the period six months prior to the filing of the charge. (State of California, adopting the proposed dec, at p. 32.) (Emphasis added.)

The underlined language emphasizes that the continuing violation doctrine applied in that case because the restrictions "remained in effect continuously." Under the ALJ's analysis, which was adopted by the Board, the statute of limitations did not begin to run upon either the implementation of the policy or the implementation of any specific enforcement action. By the term "new wrongful act," State of California referred to the continuous effect of a discriminatory policy that resulted in interference with employee and employee organization rights. The State of California decision does not undermine the holding of Long Beach that the mere existence of an invalid rule or regulation constitutes a continuing violation.

In another decision, California (Department of Corrections) (1999) PERB Decision No. 1339-S, at p. 8 (Department of Corrections), the Board found a violation under the Ralph C. Dills Act (Dills Act)[6] based upon an "endless" or continuous discriminatory application of the state employer's otherwise reasonable policy.[7] In finding that the charge

[6]The Dills Act is codified at Government Code section 3512, et seq.

[7]In Department of Corrections, the department selectively refused to permit the union to use one of the "In Service Training" classrooms for the union's monthly meetings. The department's defense was that the other entities were "invited" to use the classrooms, whereas the union was not. The Board held that while the State had no obligation to "invite" CSEA to use State property for union meetings, it might not discriminate with impunity by endlessly "refraining from inviting" the union to use the classrooms. (Ibid., at p. 8, emphasis added.) Accordingly, the Board held that the department had engaged in discriminatory actions by "endlessly" or continuously refusing to invite the union to use the classrooms for union

was timely filed, the decision focused upon the continuous discriminatory application of its access policy, rather than upon whether there were single occurrences of new violations.[8]

The "continuing violation" doctrine should be applied in this case under Long Beach and State of California. The maintenance of a rule that allegedly violates employee rights continues to affect those rights; hence, the date of promulgation or actual enforcement is not the only event triggering the statute of limitations. The harm in the present case does not flow from the filing of a decertification petition, but from the existence of the County's allegedly unreasonable decertification rule. The existence of the allegedly unreasonable decertification rule has a "chilling effect" on and therefore interferes endlessly with the right of employees to select the employee organization of their choice, as discussed in the section on "Reasonableness" further below.

The majority opinion holds that to prevail under the "new wrongful act" theory, SEIU would be required to test the decertification rule by filing an arguably reasonable number of signatures obtained in an arguably reasonable period of time. (Majority Op. at p. 4.) SEIU argues, and I agree, that such a requirement would place an incredible burden on the employee organization. The Board has held that "the Association need not demonstrate an attempt to violate the regulation in order to show that the District would enforce it." (Long Beach, at

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meetings. Such continuous discriminatory actions constituted the unlawful conduct that interfered with protected rights of the employees and the union.

[8]The Board stated in a footnote that the charge was timely since it alleged "unlawful conduct occurring within six months prior to the date of the charge." (Department of Corrections, at p. 9, fn. 4, emphasis added.) It is noteworthy the Board viewed the unlawful conduct as "occurring," instead of a single incident "that occurred" within the six-month limitation period. It shows that in finding the charge timely, the Board considered the department's continuous discriminatory application of its access policy, rather than a single occurrence of refusal to grant access that allegedly constituted a "new violation," as the majority suggests.

p. 12.) SEIU challenges the existence of the County decertification rule in this case, not their enforcement in a particular instance. I therefore give merit to SEIU's argument that it is not required to demonstrate an attempt to violate the decertification rule in order to show that the County would enforce them.

The cases cited by the majority indicate that a "new wrongful act" is required to revive the statute of limitations in cases where the alleged violation is an act, rather than the existence of a rule or regulation. None of the decisions cited by the majority support its unwarranted application of the "new wrongful act" to a rule that is alleged to be invalid on its face. As discussed above, San Dieguito involved an allegation of unilateral change. Compton Community College District (1991) PERB Decision No. 915 held that the failure to ratify a retirement bonus was not a continuing violation. Fresno County Office of Education (1993) PERB Decision No. 978 held that the statute of limitations for refusal to acknowledge a site representative begins to run on issuance of a letter providing notice of such refusal. El Dorado Union High School District (1984) PERB Decision No. 382 involved an allegation of unilateral change. Regents of the University of California (1983) PERB Decision No. 353-H discussed equitable tolling, not continuing violations.

Applying the continuing violation doctrine to cases challenging the facial validity of rules or regulations would not require PERB to issue an advisory opinion.[9] The decision in Jefferson School District (1980) PERB Order No. Ad-82-a (Jefferson), cited by the majority

[9]Although it is difficult to find a definition of "advisory opinion," the decision in Santa Clarita Community College District (College of the Canyons) (2003) PERB Dec. No. 1506 (stating that "PERB does not issue 'advisory opinions' or generalized declarations of law") indicated that a Board agent's statement about the merits of a case would be an advisory opinion upon which a party could not rely. Instead, "PERB's binding precedent is articulated only through adjudication of issues presented through appeal of Board agent dismissals of charges or exceptions from decisions of an ALJ." (Ibid., at p. 28.)

opinion, states that PERB will not provide an advisory opinion on the issue of whether parties are required to negotiate certain items. Instead, PERB is limited to adjudicating the negotiability of items for which a party has refused to negotiate. (Ibid., at p. 13.) Jefferson is distinguishable from the instant case because under that scenario, there is no violation until a party refuses to negotiate. In contrast, the mere existence of the unreasonable decertification rule in this case is a violation, and thus adjudication of the validity of the rule would address an alleged violation, and thus would not constitute an advisory opinion.

Even under the continuing violation doctrine, the parties would still be required to show that there is an actual controversy. That requirement is satisfied in this case. In Chas. L. Harney, Inc. v. Contractors' State License Board (1952) 39 Cal.2d 561, 564 [247 P.2d 913] (Harney), which held that a party that wishes to challenge a restrictive rule may test the validity of the rule without having to violate its terms. In that case, a contractor wished to bid on work, but it was precluded from doing so by a rule requiring it to obtain specialty licenses. The court allowed the plaintiff to challenge the rule without actually having bid on the work. (Ibid.) The court held that the "actual controversy" requirement was satisfied in that case where the complaint as a whole indicated that the plaintiff *desired to* bid on work that was subject to the restrictive rule. (Ibid.) Similarly, in the instant case, the allegations that SEIU desired to file a decertification petition, but was deterred from doing so by the rule's "chilling effect", satisfy the actual controversy requirement.

The Harney decision involved a claim for declaratory relief. Although the Jefferson School District decision cited by the majority states that PERB does not provide declaratory relief, this case would not require PERB merely to issue a declaration as to the rights of the parties. Rather, where appropriate, PERB has authority to issue a cease and desist order

requiring the rescission of unlawful policies. (Rio Hondo Community College District (1983) PERB Dec. No. 292.) Thus, PERB has the authority to adjudicate the validity of the decertification rule as an interference charge in the present matter.

Since the issuance of the proposed decision, the California Supreme Court has decided that the limitations period for making a MMBA unfair practice charge to the Board is six months. "[F]or MMBA unfair practices occurring before July 1, 2001, a charge filed with the PERB was timely if brought within three years of the occurrence of the unfair practice, or within six months of July 1, 2001 (in other words, before January 1, 2002), whichever was sooner." (Coachella Valley Mosquito & Vector Control Dist, v. California Public Employment Relations Bd. (2005) 35 Cal.4th 1072, 1092 [29 Cal.Rptr.3d 234].) To effectuate this ruling of the California Supreme Court, the Board recently adopted PERB Regulation 32620(b)(5), effective May 11, 2006, providing that the statute of limitations for the filing of an unfair practice charge is six months. The decertification rule in this case remained in effect during the six-month period prior to the filing of the charge, and I would therefore find SEIU's unfair practice charge constitutes a continuing violation and is not time-barred.

Reasonableness

Because I would find that SEIU's charge is not time-barred, I must address the merits of the charge.

SEIU excepts to the failure of the proposed decision to address the merits of the County rule concerning the decertification petition signature requirement, and requests the Board to

decide the question of law rather than remand this issue.[10] The County decertification petition signature requirement violates several provisions of the MMBA and PERB regulations, namely Sections 3500, 3502 and 3507, and Regulation 32603(f), SEIU contends, because it is not consistent with, and does not effectuate the declared purposes of the MMBA as a whole. The Court of Appeal has already invalidated the exact same decertification rule in Superior Court, and thus, SEIU states, the Board should also invalidate the rule in this case.

AOCDS contends that the present matter is distinguishable from Long Beach, in that the rules and regulations concerning decertification were not unilaterally adopted. AOCDS asserts that the County adopted the rules after it had given SEIU an opportunity to meet and confer pursuant to Section 3507(a), and after SEIU repeatedly declined to meet and confer or failed to attempt to change these rules for more than ten years. The Court of Appeal ordered the Orange County Superior Court to vacate its decertification rule, and to adopt new rules through the meet and confer requirement. AOCDS alleges that SEIU had an opportunity to negotiate with the County regarding its decertification rule, but failed to take any such action. AOCDS also states that the signature requirement was raised from 30 to 50 percent within a 30-day timeframe at the request of the OCEA for the purpose of creating a "more stable labor relations environment." Superior Court is distinguishable from the present case, AOCDS finally contends, since it was neither a PERB nor a MMBA case, it did not involve a statute of limitations issue; and there was an unsuccessful attempt to organize widespread employees prior to the initiation of the legal action.

The issues raised by this charge concern the "reasonableness" of the local rule adopted by the County under the authority granted it by Section 3507, which provides in part:

[10]Since the record is complete, and there are no allegations of unresolved issues of fact,

> (b) A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter.

"The scope of local government rulemaking power under Government Code section 3507 is limited by the policies and purposes of the MMBA." (International Brotherhood of Electrical Workers v. City of Gridley (1983) 34 Cal.3d 191, 202 [193 Cal.Rptr. 518] (City of Gridley); San Bernardino County Sheriff's Etc. Assn. v. Board of Supervisors (1992) 7 Cal.App.4th 602, 613 [8 Cal.Rptr.2d 658] (San Bernardino County).) The "Legislature intended that the MMBA 'set forth reasonable, proper and necessary principles which public agencies must follow in their rules and regulations for administering their employer-employee relations.'" (City of Gridley, at p. 198; Los Angeles County Firefighters Local 1014 v. City of Monrovia (1972) 24 Cal.App.3d 289, 295 [101 Cal.Rptr. 78]: Huntington Beach Police Officers' Assn, v. City of Huntington Beach (1976) 58 Cal.App.3d 492, 502 [129 Cal.Rptr. 893] (Huntington Beach).)

In Huntington Beach, the court quoted with approval the analysis found in Joseph R. Grodin (Grodin), Public Employee Bargaining in California: The Meyers- Milias-Brown Act in the Courts (1972) 23 Hastings Law Journal 719, 724-725. Grodin wrote that the MMBA reserves the power to local agencies to adopt rules and regulations which are "consistent with, and effectuate the declared purposes of the statute as a whole." (Grodin, supra, at p. 725, also quoted with approval in City of Gridley, at p. 202; San Bernardino County, at p. 613; and Los Angeles County Civil Service Com, v. Superior Court (1978) 23 Cal.3d 55, 63 [151 Cal.Rptr. 547].) The court in Huntington Beach thus concluded that it could not attribute to the Legislature "an intention to permit local entities to adopt regulations which would frustrate the declared policies and purposes of the MMBA." (See also City of Gridley, at

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I would deem it appropriate to address the reasonableness of the County rules.

p. 202; San Bernardino County, at p. 613.) In Huntington Beach, the court found a local rule invalid declaring working hours outside the scope of representation because the rule was in conflict with the declared purposes of the MMBA and the mandatory language of Section 3505. In City of Gridley, the State Supreme Court held that the purposes of the MMBA, including protection of public employees' right to participate in organizations of their own choosing, barred the city from revoking recognition of the union for encouraging or condoning a strike.

Subsequent court cases have recognized that "[t]he MMBA deals with a matter of statewide concern, and its standards may not be undercut by contradictory rules or procedures that would frustrate its purposes." (International Federation of Prof. & Technical Engineers v. City and County of San Francisco (2000) 79 Cal.App.4th 1300, 1306 [94 Cal.Rptr.2d 790]; citing Voters for Responsible Retirement v. Board of Supervisors (1994) 8 Cal.4th 765, 781 [35 Cal.Rptr.2d 814]; City of Gridley, at pp. 197-198; and San Bernardino County, at p. 613.) The MMBA only permits public agencies to adopt "reasonable" rules for the administration on employer-employee relations. (City of Gridley, at p. 202, fn. 12.)

"Where a legislative action by a local governmental agency is attacked as unreasonable, the burden of proof is on the attacking party. Such regulations are presumed to be reasonable in the absence of proof to the contrary." (San Bernardino County, at p. 613, citing Organization of Deputy Sheriffs v. County of San Mateo (1975) 48 Cal.App.3d 331, 338 [122 Cal.Rptr. 210].)

The test for reasonableness is based on the language and intent of the MMBA, which provides strong protection for the right of public employees to join organizations of their own choice and be represented by such organizations in their employment relationships with public

agencies. (International Assn, of Fire Fighters Union v. City of Pleasanton (1976) 56 Cal.App.3d 959, 968 [129 Cal.Rptr. 68]; City of Gridley, supra, 34 Cal.3d at 198, 202, fn. 12; MMBA sec. 3502.) It is the purpose of Section 3500 to:

> ... promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies. (Emphasis added.)

Section 3502 provides, in part:

> Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. (Emphasis added.)

The provisions of Sections 3500 and 3502 suggest that the power to enact restrictions on the right of employees to be represented by labor organizations of their own choosing is reserved to the state Legislature. (City of Gridley, at p. 198.) The "structure and history of the [MMBA] suggest that the only limitations on the right of employees to participate in the organization of their choice contemplated by the Legislature as 'reasonable' were procedural rules relating to the mechanics of selection and recognition of representatives." In examining Section 3507, the Court held that "the Legislature did not intend to grant local agencies the power to adopt substantive rules that would interfere with employee choice." (City of Gridley, at p. 200.) The Legislature's explicit mandate recognized the employees' right to choose their own exclusive representative. (City of Gridley, at p. 200.)

Equally significant is the statutory mandate that the Board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of the MMBA. (Sec.

3509(b).) The Court of Appeal considered a challenge to the decertification rule of the Orange County Superior Court, that required a showing of interest requirement of at least 50 percent of employee signatures and a time allotment of 30 days to collect them before calling for a decertification election. (Superior Court.) Although Superior Court involved application of the California Rules of Court, rather than MMBA, the court expressly held that the rules at issue were to be "applied and interpreted in accordance with judicial interpretations of [MMBA] section 3507," and stated:

> Accordingly, pursuant to the California Supreme Court's interpretation of section 3507, we must decide if [the disputed rule] is reasonable in light of the intent of the MMBA to provide strong protection for the right of employees to be represented by the union of their own choosing. • (City of Gridley, at pp. 199-202, fn. 12.)

In the Superior Court decision, the Court first recognized that the purpose of the showing of interest requirement is:

> to save the time and expense of having an election if there is insufficient employee interest; it is not intended to determine what the employees ultimately desire. (See The Pike Co. and Bricklayers and Allied Craftsman, Local No. 11 (1994) 314 NLRB 691, 691-692.)
> (Superior Court, at p. 1395.)

The Court then found that the disputed showing of interest requirement was more onerous and required greater support from the employees than what was needed to actually win the election. It stated, in part:

> Pursuant to [the disputed rule], signatures from 50 percent of all the employees in a bargaining unit must be collected in 30 days to simply call for a decertification election; in contrast, the incumbent union will be decertified if a majority of those casting ballots in a secret ballot election vote in favor of it. Such a rule is neither consistent with protecting the right of employees to be represented by unions of their choosing, nor with the purpose of the showing of interest requirement in general. (See

> International Brotherhood of Electrical Workers v. City of Gridley, supra. 34 Cal.3d at pp. 199-202.)
> (Superior Court, at p. 1395; emphasis in original.)

When compared with the showing of interest requirement in 16 other local agencies cited by SEIU, OCEA and Orange County Superior Court, the Court of Appeal determined that the Orange County Superior Court requirement was the most onerous. It found that:

> Monterey, Sacramento, San Mateo, Santa Barbara, Santa Clara, Yolo and Yuba Counties and the Orange County Sanitation District require that petitions for decertification elections be accompanied by signatures from 30 percent of the employees in a bargaining unit collected over a six-month period. Riverside and San Berardino [sic] counties require signatures from 40 percent of the employees collected in a 30-day period. San Luis Obispo County requires a 40 percent showing of interest collected over a year, and the City of Seal Beach requires a 40 percent showing of interested collected over any time period. The cities of San Diego and Richmond have the second most onerous showing of interest rules, and require signatures from 50 percent of the employees collected within a 90-day period.
> (Superior Court, at p. 1396.)

The Court found that while such an increase protected OCEA's status as the incumbent union, "rules or policies that might promote a stable labor environment cannot be used to abrogate or circumvent the strong protection afforded the right of employees to be represented by the union of their choosing." (Superior Court, at p. 1396, citing City of Gridley, at pp. 199-202.) In weighing stability in labor relations against the rights of employees, the Court has long established that:

> Only the Legislature can determine whether the stability of established contractual relations outweighs the rights of workers to decertify their bargaining representative. (See Bodinson Mfg. Co. v. California E. Com. (1941) 17 Cal.2d 321, 325 [109 P.2d 935]; Estate of Horman (1971) 5 Cal.3d 62, 77 [95 Cal.Rptr. 433, 485 P.2d 785], cert. den. 404 U.S. 1015 [30 L.Ed.2d 662, 92 S.Ct. 672].) (Service Employees Internat. Union v. City of Santa Barbara (1981) 125 Cal.App.3d 459, 467 [178 Cal.Rptr. 89].)

The evidence in the present case undisputedly shows that the County's decertification petition signature requirement is identical to the invalidated showing of interest requirement of the Orange County Superior Court. The evidence also demonstrates that the County's decertification requirement differs markedly from those established under PERB. For instance, both EERA section 3544.5(d)[11] and HEERA section 3574(b)[12] provide that a decertification petition shall require only 30 percent support in order to create a question concerning representation. By PERB Regulation sections 40200(b) and 32770(c), PERB has applied this same standard under the Dills Act. For all three acts, PERB has established twelve months as the time period during which proof of employee support remains valid (PERB Reg. 32700(b)).

In accordance with the statutory mandate under Section 3509(b) that the Board shall apply and interpret the MMBA consistent with the existing judicial interpretations of the Act, I would defer to the court's interpretation of the Orange County Superior Court's showing of interest requirement in Superior Court. Since the showing of interest requirement is completely identical to the decertification petition signature requirement in the present case, I would adopt the Court's interpretation that such a requirement is onerous.

As demonstrated by the record, SEIU is deterred by the "difficulty" of the County's existing decertification rule to embark on a petition to decertify an incumbent union, subsequent to a failed decertification petition in recent history. The County's decertification petition signature requirement has made it almost impossible to decertify an incumbent union and elect a second labor organization. An incumbent union, such as AOCDS or OCEA in this case, might readily agree to such a requirement because it renders the union safe from

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

[12]HEERA is codified at Government Code section 3560, et seq

challenge. It is not unexpected that the signature requirement was increased from 30 to 50 percent in May 1990 partly at the request of Berardino of OCEA to create "a more stable labor relations environment." The effect of such an augmented requirement would be to diminish employee rights to select their own labor organization, as Philliou of SEIU testified at the hearing. Given the limitations of the County decertification rule, Philliou concluded that it would make pursuing different targets in the County very difficult. SEIU decided to wait for PERB's determination on the reasonableness of the rule before engaging in any union organization activities. This is unmistakable evidence that this rule interfere with employees' right to join and participate in the activities of an exclusive representative of their choice, and deters SEIU from representing bargaining unit employees.

Thus, the rule has a chilling effect on the exercise of the employees' right to join and participate in the activities of the labor organization of their choice, and the labor organization's right to represent bargaining unit members. I would find that the County rule is not consistent with, and do not effectuate the declared intents and purposes of the MMBA as a whole, and are therefore unreasonable within the meaning of the Act. I would therefore conclude that SEIU has sustained its burden of proof in showing that the County decertification rule is unreasonable, and accordingly, constitute a violation of the MMBA.

The County further argues that it did not unilaterally adopt the decertification rule, but adopted them after giving SEIU an opportunity to meet and confer pursuant to Section 3507(a). SEIU allegedly declined to meet and confer or attempt to change this rule for more than ten years. However, the County's contention that SEIU has waived its right to oppose the decertification rule by declining to meet and confer, must fail. The MMBA contains declarations of organizational rights, and prohibitions against interference and discrimination,

such as those stated in Sections 3500, 3502 and .3506. The rights of employees to join and participate in the activities of the labor organizations of their choice, and of labor organizations to represent bargaining unit members are statutory rights which are not subject to mandatory bargaining. "Insistence to impasse on a nonmandatory subject is a per se violation of the EERA." (South Bay Union School Dist, v. Public Employment Relations Bd. (1991) 228 Cal.App.3d 502, 507 [279 Cal.Rptr. 135].) Accordingly, the County cannot insist to impasse that SEIU give up their statutory right to represent bargaining unit employees, or that the employees forsake their rights to join and participate in the activities of the labor organization of their choosing.

The County must also show that SEIU waived its statutory right to represent bargaining unit members in clear and unmistakable terms. (Oakland Unified School District (2005) PERB Decision No. 1770, adopting ALJ proposed dec. at p. 48; Amador Valley Joint Union High School District (1978) PERB Decision No. 74.) Even assuming that the County has given sufficient notice to SEIU, the latter cannot be held to have waived its objection to the County's unreasonable decertification rule by simply failing to respond to the County's proposal to increase the decertification petition signature requirement, because the rule is not a mandatory subject of negotiation. Thus, the County's defense that SEIU has waived its right to oppose the decertification rule by declining to meet and confer is without merit.

I would submit that the County has violated Sections 3500, 3502, 3506 and 3507, and PERB Regulations 32603(a) and (f) by maintaining an unreasonable rule pertaining to the decertification petition signature requirement. The violation would thus be actionable and remediable before this Board. The appropriate remedy in such cases would be to require the

County to rescind the unreasonable decertification petition signature requirement, and cease and desist from enforcing it.

Pursuant to Section 3509(a), the Board under Section 3541.3(i) is empowered to:

> ... take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

The County should be ordered to meet and confer in good faith with SEIU and all other appropriate employees organizations on the issue of adopting new and reasonable rules and regulations providing for a reasonable decertification petition signature requirement.

Accordingly, as a result of the above-described violation, I would find the County to have interfered with the right of employees to join and participate in an employee organization of their own choosing in violation of Section 3506 and PERB Regulation 32603(a), and denied SEIU its right to represent employees in their employment relations with a public agency in violation of Section 3503 and PERB Regulation 32603(b). The appropriate remedy would be to cease and desist from such unlawful conduct.

Finally, it is the ordinary remedy in PERB cases that the party found to have committed an unfair practice be ordered to post a notice incorporating the terms of the order. Such an order ordinarily is granted to provide employees with a notice, signed by an authorized agent that the offending party has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. Thus, it would be appropriate to order the County to post a notice incorporating the terms of the order herein at its buildings, offices, and other facilities where notices to bargaining unit employees are customarily posted. Posting of such notice effectuates the purposes of the MMBA that employees be informed of the resolution of this matter and the County's readiness to comply with the ordered remedy.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 660, Charging Party, v. COUNTY OF ORANGE, Respondent, ORANGE COUNTY EMPLOYEES ASSOCIATION and ASSOCIATION OF ORANGE COUNTY DEPUTY SHERIFFS, Joined Parties.	UNFAIR PRACTICE CASE NO. LA-CE-101-M PROPOSED DECISION (5/4/04)

Appearances: Altshuler, Berzon, Nussbaum, Rubin & Demain by Jonathan Weissglass and Stacey M. Leyton, Attorneys, for Service Employees International Union Local 660; Wanda S. Florence, Deputy County Counsel, for County of Orange; Donald L. Drozd, General Counsel, for Orange County Employees Association; Olins, Hayes & Miller by Douglas F. Olins, Attorney, for Association of Orange County Deputy Sheriffs.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union alleges that a county has unlawfully maintained excessively stringent requirements for decertification petitions. The county denies any violation of law.

Service Employees International Union Local 660 (SEIU) filed an unfair practice charge against the County of Orange (County) on December 20, 2002. The general counsel of the Public Employment Relations Board (PERB) issued a complaint on April 10, 2003, to which the County filed an answer on April 24, 2003. PERB held informal settlement conferences on May 22, 2003, and (by telephone) on June 5, 2003, but the case was not settled.

On September 23, 2003, the Association of Orange County Deputy Sheriffs (AOCDS) filed a motion for joinder as a party to the case. On October 2, 2003, the Orange County Employees Association (OCEA) filed a similar application for joinder. Over SEIU's opposition, OCEA and AOCDS were joined as parties by an order dated October 6, 2003.

PERB held a formal hearing on October 14-15, 2003. At the beginning of the hearing, AOCDS filed a motion to dismiss the case, which was taken under submission. With the receipt of the final post-hearing briefs on February 25, 2004, the case was submitted for decision.

FINDINGS OF FACT

The County is a public agency within the meaning of Government Code section 3501(c) of the Meyers-Milias Brown Act (MMBA) and PERB Regulation 32016(a).[1] SEIU, OCEA and AOCDS are employee organizations within the meaning of MMBA section 3501(b), recognized employee organizations within the meaning of MMBA section 350l(b), and exclusive representatives within the meaning of PERB Regulation 32016(b), representing units of County employees.

The County has about 17,000 employees, almost all of them unionized. They work in 213 different County facilities, although most of them work within 10 miles of the civic center. There are 14 bargaining units. SEIU represents a unit of about 500 employees. OCEA represents 8 units with a total of about 12,000 employees. AOCDS represent a unit of about 1,800 employees.

Pursuant to MMBA section 3507, the County has adopted local rules within the meaning of PERB Regulation 32016(c) for the administration of employer-employee relations. The current local rules provide in Section 11 (Decertification Procedure), subsection A:

[1] MMBA is codified at Government Code section 3500 and following. PERB regulations are codified at California Code of Regulations, title 8, section 31001 and following.

> During the 30 days beginning nine months before the expiration of a unit's current Memorandum of Understanding, requests for decertification of an Exclusively Recognized Employee Organization may be submitted by employees, employee organizations or Exclusively Recognized Employee Organizations. The decertification requests should be submitted to the Personnel Director and must be accompanied by a petition signed by at least 50 percent of the regular and probationary employees within the representation unit. The petitions must contain: a) full printed name of employee, b) signature, c) date signed. Signatures on the petition must have been obtained within the 30 days prior to the date the request is submitted. [Emphasis added.]

These local rules were adopted in May 1990.

The County's previous local rules, adopted in July 1984, required that a decertification petition have signatures of "at least 30 percent of the regular and probationary employees within the unit," obtained within the prior 30 days. Prior to that, the County's local rules, adopted in March 1979, had required signatures of at least 30 percent of the regular and probationary employees "obtained within the 90 days prior to the date the request is submitted." Earlier local rules adopted by the County in 1969, 1970 and 1974 had similar signature requirements of 30 percent in 90 days.

The signature requirement was raised from 30 percent to 50 percent in May 1990 at least partly at the request of OCEA Assistant General Manager Dominick Berardino (Berardino) to create "a more stable labor relations environment." At the hearing in this case, Berardino explained that the higher requirement "discourages the idea" of decertification (or "raiding," as he saw it). On April 3, 1990, the County had sent to SEIU for comment a copy of the proposed revisions to the local rules, with a cover letter indicating that some revisions would "modify provisions to avoid undue disruption." SEIU apparently did not respond.

SEIU filed a petition to decertify OCEA in at least one unit in 1997-98, but without success. SEIU has not filed such a petition for any County unit since then. SEIU's Western

Regional Organizing Director testified that, given the "difficulty" of the County's local rules, SEIU is "waiting for this [PERB] process to unfold before we do much more down there."

ISSUE

1. Is the charge timely?
2. If so, do the County's local rules violate MMBA?
3. If so, what remedy is appropriate?

CONCLUSIONS OF LAW

Court of Appeal Decision

Looming large in the background of this PERB case is a court of appeal decision, Service Employees International Union v. Superior Court (2001) 89 Cal.App.4th 1390 [108 Cal.Rptr.2d 505] (Superior Court). In that case, SEIU successfully challenged the same decertification signature requirement (50 percent in 30 days) that is at issue here.

In Superior Court, the Orange County Superior Court (Superior Court) had adopted in May 1998 employee relations regulations that were substantially the same as the County's local rules, including the same decertification signature requirement. In August 2003, SEIU had submitted to the Superior Court a timely request for decertification elections in two units. The request was accompanied by signatures obtained within the previous 30 days from 37 percent of the employees in one unit and 33 percent of the employees in the other. The Superior Court rejected the request for failure to meet the 50 percent signature requirement.

SEIU filed a successful petition for a writ of mandate in the court of appeal, which concluded that the Superior Court's signature requirement was unreasonable. The court of appeal ordered the Superior Court to vacate its signature requirement and to adopt a reasonable one. The court of appeal declined, however, to direct the Superior Court to conduct

decertification elections upon signatures from 30 percent of the employees in a unit, or to formulate any specific signature requirement for the Superior Court.

Presumably, the Superior Court has changed its signature requirement by now. The County, however, has not changed its identical signature requirement.

MMBA and PERB Regulations

MMBA section 3507 has long stated in part:

> A public agency may adopt reasonable rules and regulations . . . for the administration of employer-employee relations under [MMBA].

The local rules adopted pursuant to this section may cover a variety of employment relations matters, specifically including recognition of employee organizations and access of employee organization officers and representatives to work locations.

Prior to July 1, 2001, PERB had no authority to administer or enforce MMBA. On that date, however, a new MMBA section 3509 became effective, stating in part:

> (a) The powers and duties of the board [PERB] described in [Government Code] Section 3541.3 shall also apply, as appropriate, to this chapter [MMBA] and shall include the authority as set forth in subdivisions (b) and (c).
>
> (b) A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 shall be processed as an unfair practice by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.
>
> (c) The board shall enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections.

A new MMBA section 3510(a) added:

> The provisions of this chapter shall be interpreted and applied by the board in a manner consistent with and in accordance with judicial interpretations of this chapter.

PERB thus assumed quasi-judicial authority to enforce both MMBA and local rules adopted under MMBA.

As effective on July 1, 2001, the amended MMBA did not explicitly give PERB authority to address alleged conflicts between MMBA and local rules, but PERB found that such authority was necessarily implied. PERB issued a new Regulation 32603(f), making it an unfair practice for a public agency to

> Adopt or enforce a local rule that is not in conformance with the requirements of Government Code section 3507, 3507.1 and/or 3507.5 [of MMBA].

At the same time, PERB Regulations 32603(g) and 32604(e) made it an unfair practice for public agencies and employee organizations to violate MMBA or any local rule adopted thereunder.

In 2001, the Legislature confirmed in part the implied authority of PERB to address alleged conflicts between MMBA and local rules. The Legislature added a new MMBA section 3509(f), stating:

> The board shall not find it an unfair practice for an employee organization to violate a rule or regulation adopted by a public agency if that rule or regulation is itself in violation of this chapter. This subdivision shall not be construed to restrict or expand the board's jurisdiction or authority as set forth in subdivisions (a) to (c), inclusive.

Without expanding PERB's jurisdiction or authority, the Legislature thus made it clear that PERB could find a local rule to be contrary to MMBA, as a defense to an alleged violation of the local rule by an employee organization.

More recently, in 2003, the Legislature went further and added a new MMBA section 3507(d), stating:

> Employees and employee organizations shall be able to challenge a rule or regulation of a public agency as a violation of this chapter. This subdivision shall not be construed to restrict or expand the board's jurisdiction or authority as set forth in subdivisions (a) to (c), inclusive, of Section 3509.

The Legislature also added the following language to MMBA section 3509(a):

> Included among the appropriate powers of the board are the power to order elections, to conduct any election the board orders, and to adopt rules to apply in areas where a public agency has no rule.

The Legislature also amended MMBA section 3509(b) to refer to local rules adopted under MMBA section 3507.5 (concerning management and confidential employees) as well as those adopted under MMBA section 3507. The Legislature did not otherwise expand PERB's jurisdiction or authority.

In general, it appears from these developments that the Legislature has acquiesced in PERB's regulations but has been cautious about further expanding PERB's jurisdiction or authority.

Most recently, effective February 2, 2004, PERB has revised its Regulation 32603(f) to make it an unfair practice for a public agency to:

> Adopt or enforce a local rule that is not in conformance with MMBA.

The only change is that the regulation now refers to "MMBA" rather than to certain sections of MMBA. The "adopt or enforce" language is unchanged.

Is the charge timely?

It is currently in dispute whether a six-month or a three-year limitations period applies to MMBA unfair practice charges. PERB has used a three-year period (Sacramento Municipal Utility District (2003) PERB Decision No. 1535-M), while a court of appeal has favored a six-month period (Coachella Valley Mosquito & Vector Control Dist, v. California Public

Employment Relations Bd. (2003) 114 Cal.App.4th 46). The California Supreme Court has recently agreed to review the issue, leaving it unsettled in the meantime.

Fortunately, in the present case it does not appear to matter which limitations period applies, because no significant event occurred within either the six-months or the three years before the charge was filed on December 20, 2002. Specifically, it appears that the County did not "[a]dopt or enforce a local rule" within the meaning of PERB Regulation 32603(f) in either period. The local rule in question was adopted in May 1990, and it apparently has not been enforced since 1997-98, when SEIU last filed a decertification petition.

SEIU relies on a single case and a single theory to support the timeliness of its charge. The case is Long Beach Unified School District (1987) PERB Decision No. 608 (Long Beach), and the theory is one of a continuing violation. In Long Beach, PERB held that an employer's regulation limiting a union's right of access to employees was a continuing violation, and that the date on which the regulation was adopted or revised was immaterial. PERB added:

> In reaching this conclusion, we find it unnecessary to [state] that each act of enforcement constitutes a new and separate cause of action. While this may be true, the [union] need not demonstrate an attempt to violate the regulation in order to show that the [employer] would enforce it.

PERB found that the union's unfair practice charge challenging the access regulation was timely, even though the regulation had been adopted outside the limitations period, and regardless of whether the regulation had been revised or enforced within the limitations period.

I conclude, however, that Long Beach can and should be distinguished from the present case. It makes sense to treat an unreasonable access regulation as a continuing violation, given that access is a continuing issue with a day-to-day and month-to-month effect on a union's ongoing ability to represent employees and to conduct union business. It makes less sense to treat an allegedly unreasonable decertification petition signature requirement as a continuing

violation, given that the requirement only comes into play on the relatively rare occasion when a decertification petition is filed. Furthermore, as suggested in Long Beach, the only way to test the enforcement of an unreasonable access regulation may be to violate it, and thus to risk the disciplinary consequences. An unreasonable signature requirement, however, may be tested without similar risk, simply by filing an arguably reasonable number of signatures obtained in an arguably reasonable period of time.

MMBA section 3507(d) now specifically authorizes employees and employee organizations to challenge local rules as MMBA violations. SEIU would apparently interpret this section as authorizing any employee or employee organization to file a charge challenging any local rule as unreasonable at any time, regardless of whether or not the rule had been adopted, revised or enforced within the limitations period. Such an interpretation seems inconsistent with the Legislature's cautious approach to expanding PERB's jurisdiction or authority. At least when an employee organization wishes to challenge a decertification petition signature requirement, it seems more appropriate to expect the organization either (a) to file a charge with PERB when the requirement has been recently adopted or revised or (2) to test the enforcement of the requirement by actually filing a decertification petition, and then to file a charge with PERB if necessary.

I conclude that SEIU's unfair practice charge in this case was not timely filed. Given that conclusion, it would be inappropriate for me to offer an opinion on the other issues in the case. (Long Beach Community College District (2002) PERB Decision No. 1475.)

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is ordered that the complaint and the underlying unfair practice charge in Case

No. LA-CE-101-M, Service Employees International Union Local 660 v. County of Orange, are hereby dismissed.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 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 California Code of Regulations, title 8, section 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. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served

on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Thomas J. Allen
Administrative Law Judge