

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



JOHNNY LEE BUCK, JR.,

Charging Party,

v.

AMALGAMATED TRANSIT UNION,
LOCAL 1704,

Respondent.

Case No. LA-CO-29-M

PERB Decision No. 1898-M

April 10, 2007

Appearances: The Williams Group by Fred Williams, President, for Johnny Lee Buck, Jr.; Neyhart, Anderson, Freitas, Flynn & Grosboll by William J. Flynn, Attorney, for Amalgamated Transit Union, Local 1704.

Before Duncan, Chairman; McKeag and Neuwald, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Johnny Lee Buck, Jr. (Buck) of a proposed decision (attached) by an administrative law judge (ALJ). The charge alleged that Amalgamated Transit Union, Local 1704 (ATU) violated the Meyers-Milias-Brown Act (MMBA)¹ by breaching its duty to fairly represent employees when it failed to file a timely grievance challenging Buck's termination. Buck alleged this conduct constituted a violation of MMBA section 3506.

We have reviewed the entire record in this matter, including, but not limited to, the unfair practice charge, ATU's response to the charge, the complaint, ATU's answer to the complaint, the post hearing briefs, the proposed decision, Buck's exceptions and ATU's response/exceptions and conclude the proposed decision is free of prejudicial error. However,

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

while we agree with the conclusions and analysis in the proposed decision, we believe some additional discussion regarding the circumstances under which the duty of fair representation attaches is warranted. Accordingly, we adopt the proposed decision as a decision of the Board itself, subject to the clarification below regarding the duty of fair representation.

DISCUSSION

Duty of Fair Representation

Although the MMBA does not specifically impose a duty of fair representation on an exclusive representative, 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 Local Union No. 3 (1995) 35 Cal.App.4th 1213 [42 Cal.Rptr.2d 389] (Hussey)). The Board has long held that the duty of fair representation is limited to negotiations and contractually based remedies under the union's exclusive controls. (California School Employees Association & its Chapter 130 (Simpson) (2003) PERB Decision No. 1550 (Simpson)).² In general, the duty of fair representation attaches only when the union "possesses the exclusive means by which such employees can obtain a particular remedy." (San Francisco Classroom Teachers Association, CTA/NEA (Chestangue) (1985) PERB Decision No. 544 (association not required to represent teacher in Education Code proceedings).)

²In 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]).

ATU's Exceptions

In its response/exceptions, ATU argues that the ALJ erred when she determined that ATU owed Buck a duty of fair representation. In support of this proposition, ATU cites to Article 22, Section B of the memorandum of understanding (MOU) between Omnitrans and ATU. This section provides as follows:

The grievant shall be present at all steps of the procedure. An aggrieved employee shall have the right to represent themselves or to be represented by a designated ATU representative only at any step in the grievance procedure. The ATU has the right to be present at all steps of the procedure.

According to ATU, the duty only arises in areas of "exclusive representation." Citing Simpson, ATU argues that since Buck had the right to pursue a grievance on his own, the union's representation was not exclusive. Therefore, ATU did not owe Buck a duty of fair representation.³ We disagree.

ATU Possessed the Exclusive Means for Buck to Obtain a Remedy

Although Article 22, Section B, of the MOU allows employees to represent themselves at any step in the grievance process, it also reserves to ATU the right to be present at all steps of the grievance procedure. Moreover, in describing "Step 3" of the grievance process, the MOU provides, in part:

If the grievance is not resolved in Step 2 and if the grievance is a dispute over this MOU's interpretation, or if it is over a disciplinary action that resulted in a written caution, suspension or termination, within seven (7) working days after completion of

³It should be noted that on August 19, 2004, two days after ATU failed to timely file Buck's grievance and one day before the grievance was denied, the Board ruled that even if an employee may pursue a grievance in arbitration without the union's consent, the duty of fair representation still applies. (Service Employees International Union Local 616 (Jeffers) (2004) PERB Decision No. 1675-M (Jeffers)). However, since we conclude that ATU did not relinquish its exclusive control over the grievance process, we need not decide whether, due to the timing of the decision, Jeffers applies in this instance.

Step 2, the employee, with the ATU representative, may request, in writing, that the grievance be referred to a Grievance Committee, made up of a representative appointed by the Agency, a representative appointed by ATU and a third party mutually selected by the parties. [Emphasis added.]

In addition, Section 21.15 of ATU's Constitution and General Laws provides as follows:

All questions of whether or not to arbitrate grievances or disputes arising under a L.U. [local union] labor agreement shall be submitted to the decision of the L.U. in accordance with its bylaws.

These provisions stand for the proposition that ATU not only has the right to participate in the grievance proceedings but also controls all requests for grievance arbitration. Under these facts, we conclude ATU possessed the exclusive means by which Buck could obtain his contractually based remedy. We find that ATU owed Buck a duty of fair representation, therefore the proposed decision in Case No. LA-CO-29-M is hereby AFFIRMED.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it has been found that the Amalgamated Transit Union, Local 1704 (ATU) violated the Meyers-Milius-Brown Act (MMBA), Government Code section 3506 when it failed its duty of fair representation to Johnny Lee Buck, Jr., by failing to timely file his grievance.

Pursuant to MMBA section 3509(b), it is hereby ORDERED that ATU and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing the duty of fair representation owed to employees by timely filing grievances it intends or commits to file.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE MMBA:

1. File employee grievances in a timely manner.
2. Within ten (10) workdays following the date this decision is no longer

subject to appeal, post at all locations where notices to employees customarily are posted, including ATU bulletin boards at Omnitrans, copies of this Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of ATU, indicating that ATU will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material;

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. ATU shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Johnny Lee Buck, Jr.

Chairman Duncan and Member Neuwald joined in this Decision.



**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California**

After a hearing in Unfair Practice Case No. LA-CO-29-M, Johnny Lee Buck, Jr. v. Amalgamated Transit Union, Local 1704, in which all parties had the right to participate, it has been found that the Amalgamated Transit Union, Local 1704 violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3506, by failing the duty of fair representation owed to Johnny Lee Buck, Jr., by filing his grievance in an untimely manner.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing the duty of fair representation owed to employees by timely filing grievances it intends or commits to file.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE MMBA:

1. File employee grievances in a timely manner.

Dated: _____ AMALGAMATED TRANSIT UNION,
LOCAL 1704

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



JOHNNY LEE BUCK, JR.,

Charging Party,

v.

AMALGAMATED TRANSIT UNION, LOCAL
1704,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CO-29-M

PROPOSED DECISION
August 31, 2005

Appearances: The Williams Group by Frederick Williams, Labor Relations Consultant, for Johnny Lee Buck, Jr.; Neyhart, Anderson, Freitas, Flynn & Grosboll by William J. Flynn, Attorney, for Amalgamated Transit Union, Local 1704.

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

Johnny Lee Buck, Jr. (Buck) filed an unfair practice charge on December 23, 2004, alleging that the Amalgamated Transit Union, Local 1704 (ATU) failed to represent him by not filing his grievance in a timely manner. The office of General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on February 8, 2005, alleging that by this conduct ATU failed in its duty to fairly represent employees, in violation of section 3506 of the Meyers-Milias-Brown Act (MMBA).¹ ATU filed an answer to the complaint on February 16, 2005, denying any wrongdoing.

An informal conference was held at the Los Angeles offices of PERB on March 2, 2005, but the matter was not resolved. Formal hearing was held before the undersigned on

¹ The MMBA is codified at Government Code section 3500 et seq. Section 3506 states: "Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502." Section 3509(b) provides that a complaint alleging a violation of inter alia, section 3506 "shall be processed as an unfair practice charge by the board."

June 2 and 3, 2005. After the filing of post-hearing briefs, the matter was submitted for decision on August 3, 2005.

FINDINGS OF FACT

Omnitrans, the employer herein, is a public agency within the meaning of MMBA section 3501 (c), providing charter bus service from its two facilities in Montclair and San Bernardino. Buck was employed for 12 years at Omnitrans' San Bernardino facility as a charter bus driver in a bargaining unit represented by ATU. ATU is a recognized employee organization within the meaning of section 3501(b). Omnitrans and ATU were parties to a memorandum of understanding (MOU) effective from October 2, 2001, through March 31, 2004. Article 22 of the MOU contains a grievance procedure which allows the employee, with or without ATU representation, to file a grievance and pursue it through a Step 1 meeting with the Director of Operations and a Step 2 meeting with the General Manager. Step 3, which must be requested in writing by the grievant and ATU together, provides for non-binding arbitration before a Grievance Committee composed of one representative from Omnitrans, one from ATU, and one mutually selected by the parties from a list provided by the State Mediation and Conciliation Service. The MOU also states:

The union will, in accordance with its bylaws, call for a membership vote to confirm whether or not they wish to proceed with this step of the grievance within 30 days of the request for grievance advancement.

After an arbitration hearing, the Grievance Committee's decision is submitted to the General Manager for "implementation or further appeal." Step 3 is the final step of the grievance procedure; there is no provision for final and binding arbitration before a neutral arbitrator.

This case arose from a specific incident, as follows. From the morning of July 8 to the night of July 9, 2004,² Buck, while off work to commemorate the one-year anniversary of his nephew's murder, consumed approximately 2.5 pints of gin. He reported to work the next day, July 10, at 6:30 a.m. and signed in. When he got into his bus and checked it out, he noticed the fare box was not working properly, so he drove it to the repair shop on the Omnitrans premises. After mechanic Ed Orta (Orta) fixed the fare box, Buck got back into the bus and drove off to begin his route. Immediately after Buck left the shop, Orta phoned Buck's supervisor, Harvey Washington (Washington), and said he smelled alcohol on Buck's breath. Washington then phoned the dispatcher and told him to instruct Buck to immediately meet in Washington's office. When Buck received the call, he had just driven off the Omnitrans yard, so he turned around, returned to the yard and went to Washington's office.

According to Omnitrans' Personnel Policy Manual, all drivers are in "safety-sensitive" positions while operating a bus, even when not "in revenue service." The Manual cites alcohol as a prohibited substance and prohibits employees from performing safety-sensitive functions when their blood alcohol concentration is 0.04 or greater. It states that "(V)iolation of these provisions is prohibited, and will make the employee subject to disciplinary action up to and including termination." The Manual requires drug/alcohol testing under a variety of situations, including "Reasonable Suspicion Testing," and states:

A reasonable suspicion referral for testing must be based upon specific, contemporaneous, articulate observations concerning appearance, behavior, speech, or body odors of the covered safety-sensitive employee consistent with possible drug use or alcohol misuse. These observations will only be made by one supervisor who has received appropriate training in detecting the signs and symptoms of drug and alcohol use and will be

² All dates hereafter refer to the year 2004 unless otherwise specified.

documented by that individual on a "Reasonable Suspicion - Individual Test Summary."

Upon meeting in his office with Buck, Washington, who was duly trained and certified in recognizing substance abuse and administering federal regulations, observed that Buck's walk and speech were normal but that his eyes were red, which Washington did not attribute to drinking. Nor did Washington himself detect alcohol on Buck's breath. Nevertheless, based on Orta's observations,³ he decided that Buck should take an alcohol test and wrote a "Reasonable Suspicion" test summary, citing the following: "Behavior: Normal; Appearance: Red Eyes; Speech: Clear; Odor: Alcohol." He then drove Buck to U.S. Healthworks, a drug/alcohol testing clinic, and dropped him off. At the clinic, Buck was tested on a breath machine. His first breath did not produce a reading, so the technician inserted a new part into the machine. Buck then blew two more breaths, approximately 20 minutes apart. When Washington went back to pick Buck up, the clinic told him Buck had failed the test and gave him the test results in a sealed envelope. The results showed a .108 blood alcohol level at 9:33 a.m. and a .101 level at 9:51 a.m. Washington turned the envelope over to his supervisor, John Steffon (Steffon), transportation manager, and together they decided that Buck should be removed from his driving duties and placed on administrative leave.

Shortly after being placed on leave, Buck contacted Dale Moore (Moore), ATU steward, and asked for his assistance. They discussed filing a grievance, but, as noted below, the grievance could not be filed prior to Buck receiving a final order of dismissal.

On July 15, Steffon sent Buck a "Notice of Proposed Disciplinary Action: Dismissal" based on his positive alcohol test. The Notice also cited two prior disciplines, a written caution

³ Washington testified that in his training, it was not specified whether he had to rely only on his own observations or could also rely on the observations of others in making a test referral.

and a verbal caution, both regarding bus accidents. On July 22, a Skelly hearing⁴ was held; Moore represented Buck and asked that he be returned from leave to resume his driving duties. The Skelly officer sustained the discipline, and on July 29 Steffon sent Buck an order entitled "Order: Dismissal" effective August 1. The order advised Buck that, pursuant to the MOU, he had ten workdays after service of the order to file a grievance. Buck met with Moore on August 4. He told Moore that his son had just been in a serious auto accident and he could not be involved in the grievance. Moore said he would take care of it and had Buck sign a blank grievance form. However, Moore did not file the grievance with Omnitrans until August 17. He filled out the grievance form as follows:

Description of incident that led to the grievance review request:

The reason for this is to determine as to whether or not the agency has in its possession [sic] the factual basis to support the action taken against Mr. Buck. At the Step 1 hearing please have the necessary documentation and verification substantiating the charge.

Specific rule and/or regulation allegedly violated:

The Union and Mr. Buck are in the process of investigating this case as well as the issues surrounding Mr. Buck's dismissal.

Relief Requested:

To be proposed at the Step 1 hearing.

Omnitrans sent Buck a memo dated August 20 in which it denied the grievance, first because it did not identify any alleged violation by the agency, and second because it was untimely.

⁴ In *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14], the court held that due process guarantees to public employees the right to a pre-disciplinary hearing.

At the instant hearing, Moore admitted his error in filing late and testified that he "miscalculated" the filing deadline. He also testified that prior to filing, he had been investigating the dismissal. In doing so, he spoke with Buck, Washington, Orta, Dave Holmgren, employee relations manager, Marjorie Ewing, personnel director, and Barbara Palco, transportation manager. He did not review Buck's personnel file, did not speak with anyone at U.S. Healthworks, and was not aware that the first breath test did not produce a reading. He did ask someone at Omnitrans when the last calibration of the breath machine was conducted, and was told the clinic had assured the company that the machine was recently calibrated and was working properly. He testified that he had a problem with the grievance because he believed Buck drove the bus while intoxicated and he could not find any contractual provision, rule or regulation which Omnitrans violated in dismissing Buck. Nevertheless, he and ATU's then-president Bill Truppe (Truppe) met, at their request, with Holmgren and Ewing some time between the order of dismissal and the filing of the grievance, in an attempt to get Buck reinstated. Moore urged that Buck had been a good long-term employee, that everyone makes mistakes, and that Buck should be given a break; but management would not relent because he violated the prohibition against driving while intoxicated and did not come to them ahead of time to resolve his drinking problem.

Buck contends that ATU deliberately failed to file a timely grievance, as evidenced by a statement made by Truppe. In this regard, April Garcia (Garcia), a fellow bus driver, testified that some time after Buck was placed on leave, she encountered Truppe in the hallway at Omnitrans and asked if ATU was going to help him, to which Truppe responded, "(W)e don't represent alcoholics that come to work drunk." She related this conversation to Buck.⁵

⁵ Garcia also testified that in her conversation with Buck, she pointed out the difference in their situations, i.e., that she acknowledged a drinking problem but never came to

Shortly after his Skelly hearing, Buck asked Moore about Truppe's remark. According to Buck, Moore responded, "(H)e [Truppe] says things like that he's not supposed to," and that he [Moore] would talk to Truppe. Buck also testified that some time later, Moore phoned him and said Truppe admitted making the remark. In his own testimony, Moore denied having said anything to Buck about Truppe or promising Buck he would speak to Truppe, or ever bringing up the issue with Truppe.

Washington also testified regarding Truppe. He said that after Buck was placed on leave he discussed Buck's situation with Truppe, who said that if Buck were found "dirty" he did not need to be represented.

Truppe also testified. He was president of ATU Local 1704 from March through December; prior to that, he had served as vice president since 2002.⁶ When he learned that Buck was under threat of dismissal, he spoke with Washington, who said Buck was "dirty." Truppe denied having told Washington that Buck did not need to be represented. Truppe pointed out that, to the contrary, he assigned Moore to help Buck. According to Truppe, it is ATU's obligation and its position to help its members, even those who violate company rules, and that for him to say he won't help drunks would violate that policy. He described helping Garcia, when she came to him with her own alcohol problem, by arranging a meeting with management and having her enter a treatment program. Truppe claims that he never spoke to Garcia after that, other than to exchange a brief greeting, and did not discuss Buck with her. In May, shortly after helping Garcia, Truppe drafted a letter urging employees to come forward

work drunk. Instead, in late 2003/early 2004, she went to Truppe, who helped her keep her job by arranging with management for her to complete a treatment program.

⁶ Truppe was also a charter bus driver for Omnitrans. His termination in November is the subject of a pending unfair practice charge.

with their substance abuse problems in order to avoid discipline, and posted the letter at Omnitrans' two locations. According to Truppe, Omnitrans will not discipline employees who tell them about their problems and attempt to resolve them, but once an employee gets caught intoxicated he has no excuse. When asked on cross-examination whether he had any conversations with other employees about Buck, the following exchange took place:

Q: Did any employee ask you about Mr. Buck, to your knowledge?

A: I'm sure in passing people said what happened to Mr. Buck.

Q: Did you ever respond to any of them we don't represent alcoholics?

A: No. If I didn't represent alcoholics, I wouldn't have represented April Garcia.

Q: Well, let me finish the question. Did you ever say we don't represent alcoholics who come to work with alcohol in their system?

A: No, no, uh-hum. I wouldn't say anything like that. But if I were, I wouldn't say alcohol in their system, I'd say drunk. But I didn't-

Q: I'm sorry, you'd say what?

A: I would say, you know, somebody was drunk. I wouldn't say alcohol in their system.

Q: You'd say -

A: But I had no reason to say anything like that.

Q: All right. You wouldn't say-So, if you said it, you would say we won't represent drunks?

A: If I said it, yeah, that's what I'd say, yeah.

Q: Now, did you-

A: But I didn't say it.

Neither Buck nor ATU sought to take the grievance to the next step or otherwise to appeal the dismissal. Moore testified that this was the first time ATU filed an untimely grievance and the first time a grievance was not pursued to the Step 1 hearing. However, according to Moore, even if Buck's grievance had been timely and had proceeded through Steps 1 and 2, ATU would not have pursued it to arbitration. ATU's own constitution and bylaws,⁷ as well as the MOU, requires that a decision to arbitrate must be presented to the general membership for approval. Moore explained that the Local 1704 Executive Committee must first make a recommendation to present the issue of arbitration to the membership. In the instant situation, the Executive Committee met some time after August 20 and decided, upon Moore's recommendation, not to pursue Buck's grievance because of the late filing and the lack of merit, as Buck was dismissed for failing an alcohol test. Therefore the issue of arbitration was never taken before the membership. Moore testified without contradiction that ATU has never taken a substance abuse grievance to arbitration and no unit employee charged with substance abuse has retained their job with Omnitrans. ATU also contends that even if the grievance had been arbitrated and upheld, the decision of the Grievance Committee is not binding on the Omnitrans General Manager. Thus, ATU argues, it cannot be concluded that Buck would have prevailed.

ISSUES

1. Did ATU owe a duty of fair representation to Buck regarding his discharge grievance?

⁷ Section 21.15 of the ATU's Constitution and General Laws provides that "(A)ll questions of whether or not to arbitrate grievances or disputes arising under a L.U. [local union] labor agreement shall be submitted to the decision of the L.U. in accordance with its bylaws." It further provides that if a grievance is taken to arbitration, the cost would be assessed among the local membership.

2. If so, did ATU breach its duty of fair representation?

CONCLUSIONS OF LAW

Applicability of the Duty of Fair Representation

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 under the MMBA to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions in such other cases, including Reed District Teachers Association. CTA/NEA (Reyes) (1983) PERB Decision No. 332, under the Educational Employment Relations Act, and American Federation of State, County and Municipal Employees, Local 2620 (Moore) (1988) PERB Decision No. 683-S, under the Ralph C. Dills Act, are consistent with the federal precedent set forth in Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369] (Vaca v. Sipes), i.e., that the duty of fair representation is violated when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.

The California courts as well, in enforcing the MMBA prior to its transfer of jurisdiction to the PERB, have followed Vaca v. Sipes in holding that while the MMBA does not expressly impose a statutory duty upon unions, nevertheless they "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] (Hussey).

It is well-settled that the duty of fair representation extends to grievance handling. (Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H (Buxton); United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) The standard for

finding a violation in these cases is the same as above, i.e., whether the union's conduct was arbitrary, discriminatory, or in bad faith.

ATU argues, however, that the duty of fair representation applies only when a union is the exclusive representative, and that, as MMBA section 3502⁸ allows employees to represent themselves to their employers, ATU is therefore not an exclusive representative and cannot be charged with a duty of fair representation. ATU states that "(A)t least one appellate court" has taken this position, and cites Andrews v. Board of Supervisors (1982) 134 Cal.App.3d 274 [184 Cal.Rptr. 542] (Andrews). In Andrews, the court certainly did reason that, unlike the National Labor Relations Act which has no provision for employee self-representation, the MMBA does contain such a provision, therefore "the rationale for the reciprocal duty of fair representation does not exist." However, the plaintiff in Andrews was complaining that a county ordinance which granted exclusive representation to a union was unfair and unconstitutional because it gave the union exclusive representation over the bargaining unit without also imposing on it a duty of fair representation. I do not find Andrews analogous to the instant situation and therefore do not consider it a compelling precedent.

On the other hand, PERB has made it clear that a duty of fair representation exists under the MMBA with regard to grievances even where the contract allows employees to pursue grievances on their own, as the union, being the exclusive representative, has the duty to enforce the terms of the contract on behalf of the unit employees. (Service Employees International Union Local 616 (Jeffers) (2004) PERB Decision No. 1675-M.) However, a union is not the exclusive representative in non-contractual situations, e.g., a discharge hearing before a civil service commission, and therefore has no corresponding duty to fairly represent

⁸ Section 3502 states in part: "Public employees also . . . shall have the right to represent themselves individually in their employment relations with the public agency."

employees in that context. (California School Employees Association and its Chapter 130 (Simpson) (2003) PERB Decision No. 1550.)

As Buck's grievance was a contractual matter, I find that ATU was the exclusive representative and therefore owed him a duty of fair representation, notwithstanding his right to pursue the grievance on his own. Further, after receiving the dismissal order, Buck told Moore that he (Buck) could not pursue a grievance because of his son's accident, and Moore responded that he would take care of it. Thus, Moore expressly reaffirmed ATU's representational responsibilities. PERB has found that failure by a union representative to carry through on a promise constitutes a breach of the duty of fair representation arising out of the union's arbitrary conduct. (San Francisco Classroom Teachers Association, CTA/NEA (Bramell) (1948) PERB Decision No. 430 (Bramell) (failure to timely appeal a grievance to the next step, as promised).)

In defense, ATU contends that Buck should have been suspicious when he heard that Truppe said ATU wouldn't represent drunks, whereupon Buck should have either ensured that Moore was properly processing his grievance or processed it himself. However, according to Buck, shortly after the Skelly hearing he asked Moore about Truppe's comment; Moore acknowledged that Truppe should not have said that and he would speak to Truppe about it. Moore denied having had this conversation with Buck; however, as discussed below, I credit Buck's testimony and conclude that Moore did in fact give Buck reassurances regarding Truppe. Under these circumstances, I do not see that Buck had any reason for further concern about the matter, or any reason to believe that Moore was no longer willing or able to continue processing his grievance. I therefore do not find that Buck was put on any notice that ATU would not pursue his grievance or that he should follow through on his own.

Breach of the Duty of Fair Representation

In Hussey, the court 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 Buxton 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, 1274 [113 LRRM 3532]; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082 [98 LRRM 2090].)

Here, Buck's dismissal order was dated July 29 and sent to him by certified mail; he therefore received it on or about July 30 and had until on or about August 12, ten workdays later, to file a timely grievance. He met with Moore on August 4, and Moore told Buck he would take care of it. The grievance was not filed until August 17 and was denied in part because it was untimely. ATU contends that at most, it was merely negligent because Moore had miscalculated the filing deadline. However, Buck's interest in the grievance was strong and Moore's failure to perform the ministerial act of filing the grievance on time completely extinguished Buck's right to pursue the grievance.

Further, I find that Moore's conduct was not merely due to a calendar miscalculation but also to his view that the grievance had no merit and that Omnitrans did not violate any provision of the MOU. Had ATU decided not to file the grievance at all for these reasons and notified Buck in time for him to file it on his own, it would have acted lawfully, as a union has wide discretion to decline to pursue a grievance because it lacks merit or because the chances

of success are minimal. (Service Employees International Union Local 790 (Lowery) (2004) PERB Decision No. 1666-M (Lowery); I.U.O.E. Local 39 (Siroky) (2004) PERB Decision No. 1618-M (Siroky)). However, Moore promised Buck he would file the grievance, ATU was therefore obligated to do it fairly. (Brammel.)

I also find that Moore's conduct was influenced by Truppe's statement that ATU need not represent Buck. In this regard, Washington and Garcia both testified that Truppe told them words to that effect, and Buck testified that Moore told him Truppe admitted making such a remark to Garcia. Moore denied having said anything in that regard to Buck or ever discussing the matter with Truppe. Truppe denied making such a remark to Washington or discussing Buck's situation with Garcia; however, he did not deny discussing the matter with Moore or admitting to Moore his remark to Garcia. I therefore must make credibility findings as to whether Truppe made the remarks claimed by Garcia and Washington, whether he admitted this to Moore, and whether Moore reported this to Buck.

In Daikichi Sushi (2001) 335 NLRB No. 53 [169 LRRM 1197, 1199], the NLRB discussed factors upon which credibility resolutions may be made:

Where demeanor is not determinative, an administrative law judge properly may base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, and "reasonable inferences which may be drawn from the record as a whole." [Citation omitted.]

Here, I saw nothing in the demeanor of any of the witnesses upon which to base a credibility finding. As to the weight of the respective evidence, both Garcia and Washington, neither of whom has an interest in these proceedings, testified to similar comments made to them by Truppe. The record also reveals that Truppe was caught in a trap of his own making when he testified that he would never have said ATU doesn't represent employees who come to work when they have "alcohol in their system" but rather would have said they're not entitled to

representation if they were "drunk," the very word that Garcia claims Truppe used in their conversation. I therefore find that the evidence, as well as inherent probabilities, weighs in favor of Garcia and Washington, and I therefore conclude that Truppe did in fact make the comments to which they testified. I also find it inherently probable that Buck, after speaking with Garcia, was concerned about Truppe's remark and questioned Moore on it, that Moore in turn spoke to Truppe about it, that Truppe admitted making it, and that Moore reported this back to Buck. I also note that, although Moore denied having spoken to Truppe about the matter, Truppe did not deny speaking to Moore. I therefore conclude that Truppe admitted to Moore having told Garcia that ATU would not represent an employee who came to work drunk, and that Moore reported this to Buck.

Therefore, without deciding that Moore's conduct was deliberate or in bad faith, I find that at the very least it went beyond mere negligence and was arbitrary. (Vaca v. Sipes; Hussey.) Accordingly, I conclude that ATU violated its duty of fair representation owed to Buck by failing to timely file his grievance, in violation of MMBA section 3506.

REMEDY

MMBA section 3509(b) gives PERB the exclusive jurisdiction to

[m]ake a "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."

It has been found that ATU failed its duty of fair representation to Buck by failing to timely file his grievance. It is appropriate therefore that ATU be ordered to cease and desist from such conduct. ATU should also be ordered to timely file employee grievances in the future. It is also appropriate that ATU be required to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of ATU, will provide employees with notice that ATU has acted in an unlawful manner, is being required to cease

and desist from this activity, and will comply with the order. It effectuates the purposes of the MMBA that employees be informed of the resolution of this controversy and ATU's readiness to comply with the ordered remedy. (Placerville Union High School District (1978) PERB Decision No. 69.)

Buck also seeks a remedy including back pay. However, PERB has held that a charging party may not receive a make-whole remedy in cases regarding the union's failure to process a grievance without a showing that the employee would have prevailed on the merits if the grievance had been properly processed. (United Teachers of Los Angeles (Valadez, et al.) (2001) PERB Decision No. 1453.) In his post-hearing brief, Buck contends that his positive drug test was not conclusive proof that he exceeded the legal alcohol limit, that the Omnitrans rule providing for discipline "up to and including discharge" did not automatically require his discharge, and that his ten-year record as a good employee plus his reason for drinking, i.e., the anniversary of his nephew's murder, could have mitigated the level of discipline. However, that he might have been able to prove during the grievance procedure that he did not exceed the legal alcohol limit, that he should have been disciplined at a level lower than discharge, or that his discipline should have been mitigated because of his good record, is not only speculative but unlikely, as no employee charged with substance abuse has been able to retain his job with Omnitrans.

Further, it is unlikely that the ATU membership would have voted to take Buck's grievance to arbitration, as ATU has never before taken a substance abuse grievance to arbitration. As noted above a union may lawfully decide not to pursue a grievance because it doubts the merits or believes its chances of success are minimal. (Lowery; Siroky.) Finally, even if Buck's grievance were taken to arbitration and he prevailed, an arbitration decision

under the MOU is advisory only and not binding on the Omnitrans General Manager, thus it is speculative whether General Manager would have upheld it.

I therefore cannot find that Buck has fulfilled his burden of showing that his grievance would have prevailed on the merits if it had been properly filed and processed. Accordingly, I shall not order ATU to pay Buck any back pay or reimburse him for other monetary losses which he suffered as a result of his discharge.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CO-29-M, Johnny Lee Buck, Jr. v. Amalgamated Transit Union, Local 1704 are hereby upheld, it having been found that Amalgamated Transit Union, Local 1704 (ATU) failed its duty of fair representation to Johnny Lee Buck, Jr., by failing to timely file his grievance, in violation of the Meyers-Milias-Brown Act (MMBA) section 3506.

Pursuant to MMBA section 3509(b), it is hereby ORDERED that ATU and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing its duty of fair representation owed to employees by failing to file in a timely manner those grievances which it intends or commits to file.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE MMBA:

1. File employee grievances in a timely manner;

2. Within ten (10) workdays of service of a final decision in this matter, post at all locations where notices to employees customarily are posted, including ATU bulletin boards at Omnitrans, copies of this Notice attached hereto as an Appendix. The Notice

must be signed by an authorized agent of ATU, indicating that ATU will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material;

3. Upon issuance of a final decision in this matter, make written notification of the taken to comply with this Order to the General Counsel of the Public Employment Relations Board in accord with his instructions.

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.)

Ann L. Weinman
Administrative Law Judge