STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SOUTH PLACER FIRE ADMINISTRATIVE OFFICERS ASSOCIATION, Charging Party, v. SOUTH PLACER FIRE PROTECTION DISTRICT, Respondent.	Case No. SA-CE-447-M PERB Decision No. 1944-M February 27, 2008

Appearances: Carroll, Burdick & McDonough by Gary M. Messing and Jason H. Jasmine, Attorneys, for the South Placer Fire Administrative Officers Association; Pinnell & Kingsley by Paul R. Gant, Attorney, for South Placer Fire Protection District.

Before Neuwald, Chair, McKeag and Wesley, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the South Placer Fire Administrative Officers Association (Association) of a Board agent's dismissal (attached) of the unfair practice charge. The charge alleged that the South Placer Fire Protection District (District) violated the Meyers-Milias-Brown Act (MMBA)[1] when it unilaterally removed work from a bargaining unit represented by the Association. The Association alleged this conduct constituted violations of MMBA sections 3502, 3504, 3504.5, 3505 and PERB Regulations[2] 32603(a), (b), (c) and 32620(b)(4). The Board agent found the unfair practice charge was not timely filed and dismissed the case.

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

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

We have reviewed the entire record in this matter, including but not limited to, the initial and amended charges, the District's position statement, the warning and dismissal letters, the Association's appeal and the District's response. Based on this review, we find the unfair practice charge was not timely filed. Accordingly, the Board hereby dismisses the unfair practice charge for the reasons set forth below.

BACKGROUND

The Association represents the Battalion Chief bargaining unit which, prior to September 2005, included the position of Emergency Medical Services (EMS) Administrator. On September 21, 2005, the District's governing board revised the job description for the EMS Administrator. This revised position was designated a Division Chief position and renamed EMS Officer, Division Chief. Division Chief positions, however, were not included in the Battalion Chief unit. Consequently, the EMS Officer, Division Chief position was moved out of the Battalion Chief unit and was no longer represented by the Association. On October 5, 2005, the District provided the Association with the revised job description for its Operations Manual.

On June 16, 2006, the District announced that, effective June 24, 2006, an employee would begin working as the EMS Officer, Division Chief. On July 10, 2006, the President of the Association, Jim Stephens, wrote a letter to the District which provides, in relevant part:

> [The Association] formally grieves the appointment of the position of Division Chief EMS. Since the EMS Administrator position exists within this bargaining unit as a recognized position it must remain as part of this contract until such time as the contract is renegotiated.
>
> The District has failed to bring this unilateral change to the terms and conditions of employment set forth in the existing contract in violation of Government Code Section 3500 (Meyers-Milias

> Brown Act) and Articles 17, 18 and 19 of the Memorandum of Understanding currently in effect with this unit.
>
> We respectfully request that [sic] position recently appointed and previously titled EMS Administrator, be rescinded and reappointed per our current contract.

The Association alleges this conduct by the District constituted an unlawful unilateral change in violation of the MMBA.

DISCUSSION

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd. (2005) 35 Cal.4th 1072 [29 Cal.Rptr.3d 234].) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177 (Gavilan).)[3] The charging party bears the burden of demonstrating that the charge is timely filed. (Cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

In this case, the Association knew the District revised the EMS Administrator position to the EMS Officer, Division Chief position on September 21, 2005. Accordingly, the Association had until March 21, 2006, to file its charge. Since the charge was filed on December 7, 2006, well outside the limitation period, the charge was not timely filed and properly dismissed.

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

On appeal, the Association argues the charge was not based on the District's creation of a new classification outside the bargaining unit. Rather, the Association claims the charge was based on the fact that the Association was first noticed on June 16, 2006, that the District intended to remove work from the bargaining unit on June 24, 2006, in violation of the zipper clause in the memorandum of understanding. We disagree.

In a unilateral change case, the statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's intent to implement a change in policy. (Gavilan.) Here, the Association argues that the statute of limitations began running when it received notice of the District's actual implementation of the change. However, the Board has long rejected arguments that a unilateral change does not occur until it is implemented. (Folsom-Cordova Unified School District (2004) PERB Decision No. 1712; Clovis Unified School District (2002) PERB Decision No. 1504.) Thus, a charging party that rests on its rights until actual implementation of the change bears the risk of running afoul of the statute of limitations.

Based on the foregoing, the Association had until March 21, 2006, to file its charge. The mere fact that the Association was notified on June 16, 2006, that the District intended to fill the EMS Officer, Division Chief position does not reset or otherwise restart the running of the statute of limitations. Since the charge was filed on December 7, 2006, well outside the limitation period, the charge was not timely filed and properly dismissed.

ORDER

The unfair practice charge in Case No. SA-CE-447-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Neuwald and Member Wesley joined in this Decision.

STATE OF CALIFORNIA
ARNOLD SCHWARZENEGGER, Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8384
Fax: (916) 327-6377

June 11, 2007

Gary M. Messing, Attorney
Carroll & Burdick
1007 7th Street, Suite 200
Sacramento, CA 95814

Re: South Placer Fire Administrative Officers Association v. South Placer Fire Protection District
Unfair Practice Charge No. SA-CE-447-M, Second Amended Charge
DISMISSAL LETTER

Dear Mr. Messing:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 7, 2006. The South Placer Fire Administrative Officers Association (SPFAOA) alleges that the South Placer Fire Protection District (District) violated section 3506 of the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally changing the EMS Administrator position from one included in the Battalion Chief classification to one in the Division Chief classification.

I informed you in my attached letter dated April 11, 2007, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it, the charge would be dismissed. On April 27, 2007, you filed a Second Amended Charge.

In the attached letter, I explained that the charge was untimely filed because the SPFAOA knew on September 21, 2005, that the District was creating an EMS Officer position outside of the bargaining unit and the District did not waver from this position. Although SPFAOA contended that the statute of limitations period should begin to run on June 24, 2006, when the new EMS Officer, Division Chief began working, the Warning Letter cited the following authority to the contrary. A charging party must file a charge when it has actual or constructive notice of a clear intent to implement the action which constitutes the basis for the unfair practice, provided that nothing subsequent to that date evinces a wavering of that intent. The charging party may not wait until actual implementation occurs. (See Peralta Community College District (1998) PERB Decision No. 1281.)

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

In the Second Amended Charge, SPFAOA contends the charge is timely filed because the parties' MOU includes a zipper clause. SPFAOA argues that the District did not take action to violate the parties' MOU until at least June 16, 2006, when the District announced that an employee would be promoted to the EMS Officer, Division Chief position effective June 24, 2006. SPFAOA asserts that it was not obligated to bargain about changes to its MOU during the life of the MOU because it included a zipper clause. SPFAOA then argues:

> Thus, in absence of an agreement between the parties, no change could be made to the MOU. The parties were not required to bargain over the proposed changes. Because the District did not take action to violate the contract until at least June 16, 2006, the statutory time period could not begin to run until at least that date. Thus, the SPFAOA's December 7, 2006 unfair practice charge was timely. [footnote omitted.]

In a footnote to this argument, SPFAOA acknowledges the Board's holding in Peralta Community College District, supra, and argues it is distinguishable because this case involves a zipper clause. SPFAOA also argues the charge is timely filed due to tolling.

The above-stated information does not correct the deficiencies noted in the Warning Letter. SPFAOA knew that the District was creating an EMS Officer position outside of the bargaining unit on September 21, 2005. The charge does not present facts indicative of a wavering of intent. The existence of a zipper clause does not change the statute of limitations period. Nor has SPFAOA provided any facts supporting its assertion that the statute of limitations should be tolled. As such, the charge must be dismissed as untimely filed.

Right to Appeal

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

A document is considered "filed" when actually received during a regular PERB business day. (Regulations 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

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

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-8231
FAX: (916) 327-7960

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

Service

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

Extension of Time

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

Final Date

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

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Tammy Samsel
Senior Regional Attorney

Attachment

cc: Paul R. Gant

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
Sacramento Regional Office
1031 18th Street
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April 11, 2007

Gary Messing, Attorney
Carroll & Burdick
1007 7th Street, Suite 200
Sacramento, CA 95814

Re: South Placer Fire Administrative Officers Association v. South Placer Fire Protection District
Unfair Practice Charge No. SA-CE-447-M, First Amended Charge
WARNING LETTER

Dear Mr. Messing:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 7, 2006. The South Placer Fire Administrative Officers Association (SPFAOA) alleges that the South Placer Fire Protection District (District) violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally changing the EMS Administrator position from one included in the Battalion Chief classification to one in the Division Chief classification. My investigation revealed the following information.[2]

SPFAOA represents the Battalion Chief bargaining unit, which includes an EMS Officer, EMS Coordinator or EMS Administrator position. On September 21, 2005, the District revised the job description for the EMS Officer, to make it a Division Chief position. Division Chief positions are not within the unit represented by SPFAOA.

SPFAOA was aware of the District's action on September 21, 2005, when SPFAOA attended the board meeting during which the change was adopted. On October 5, 2005, the District provided the revised job description to SPFAOA in its Operations Manual.

On June 16, 2006, the District announced that effective June 24, 2006, an employee would begin working as the EMS Officer, Division Chief. On July 10, 2006, SPFAOA President Jim Stephens, wrote the following letter to the District:

> SPFAOA formally grieves the appointment of the position of Division Chief EMS. Since the EMS Administrator position exists within the bargaining unit as a recognized position it must

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[2] The charge referenced unfair practice charge SA-CE-380-M. In or about February 2006, PERB issued a complaint in that charge alleging the District unlawfully reclassified the incumbent Fire Marshal as an Assistant Chief on September 21, 2005.

> remain as part of this contract until such time as the contract is renegotiated.
> The District has failed to bring this unilateral change to the terms and conditions of employment set forth in the existing contract violation of Government Code Section 3500 (Meyers-Milias Brown Act) and Articles 17, 18, and 19 of the Memorandum of Understanding currently in effect with this unit.
>
> We respectfully request that position recently appointed and previously titled EMS Administrator, be rescinded and reappointed per our current contract.

In addition to the above-described grievance, this charge was filed. In its position statement, the Respondent alleges that the charge was untimely filed. The Charging Party clarified its position regarding the charge as follows:

> While it may be true that the District created the EMS Officer position on or about September 21, 2005, that is not the subject of the original grievance, nor is it the subject of the ULP. Rather, the ULP is based on the District's June 24, 2006 [Exhibit 2] decision to take the work that had previously been performed by the EMS Administrator (in the SPFAOA bargaining unit) and assign it to the EMS Officer.
>
> * * * * * * * * *
>
> Contrary to the District's assertions, the SPFAOA could not have had actual notice of the District's act of removing work from the bargaining unit on September 21, 2005, or October 5, 2005. The District's improper action was its removal of work from the bargaining unit without bargaining, and in violation of the zipper clause in the MOU between the parties. This action happened no earlier than June 16, 2006. Thus, the SPFAOA ULP is timely.

The above-stated information fails to state a prima facie violation for the reasons that follow.

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board (2005) 35 Cal.4th 1072 [29 Cal.Rptr.3d 234].) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint

Community College District (1996) PERB Decision No. 1177.)[3] The statute of limitations is an affirmative defense which has been raised by the respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party now bears the burden of demonstrating that the charge is timely filed. (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

The facts indicate that the SPFAOA knew on September 21, 2005, that the District was creating an EMS Officer position outside of the bargaining unit. The job description clearly indicates that the position is a Division Chief position. Although the Charging Party contends the statute of limitations period should begin to run on June 24, 2006, when the new EMS Officer, Division Chief began working, the facts do not support such a conclusion. The charging party must file a charge when it has actual or constructive notice of a clear intent to implement the action which constitutes the basis for the unfair practice, provided that nothing subsequent to that date evinces a wavering of that intent. The charging party may not wait until actual implementation occurs. (See Peralta Community College District (1998) PERB Decision No. 1281.) It appears the District implemented the change or transfer of work on September 21, 2005. The charge does not provide facts indicating that the District wavered from this position. As such, SPFAOA had until March 21, 2006 to file this unfair practice charge. Thus, the charge is untimely filed and must be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before April 23, 2007, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Tammy Samsel
Senior Regional Attorney

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