STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JON RICHARD MAY, Charging Party, v. STATIONARY ENGINEERS LOCAL 39, Respondent.	Case No. SA-CO-76-M PERB Decision No. 2098-M February 24, 2010

Appearance: Jon Richard May, on his own behalf.

Before McKeag, Neuwald and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Jon Richard May (May) of a Board agent's dismissal of his unfair practice charge. The charge alleged that the Stationary Engineers Local 39 (Local 39) violated the Meyers-Milias-Brown Act (MMBA)[1] when it breached its duty of fair representation. The Board agent dismissed the charge for failure to state a prima facie case.

The Board reviewed the dismissal and the record in light of May's appeal and the relevant law. Based on this review, the Board affirms the dismissal of the unfair practice charge for the reasons stated below.

BACKGROUND

May is employed as a Building Inspector by the City of Auburn (City). Local 39 is the exclusive representative of a bargaining unit of 31 city employees, including May.

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

In or before April 2009,[2] the City and Local 39 engaged in negotiations over proposed layoffs. The City proposed an addendum to the parties' memorandum of understanding that would add a "Cost Savings Plan" to the contract. The proposal included mandatory time off (MTO or furloughs) to address the City's fiscal crisis. The MTO option called for a 10 percent pay reduction and the layoff of two employees. In the alternative, the City proposed the layoff of eight bargaining unit employees.

On May 11, Local 39 Business Representative Kevin O'Hair (O'Hair) met with bargaining unit employees and presented the addendum. The addendum was discussed and the employees took an advisory vote regarding the proposal. The vote was 15 to 8 in favor of the reduction in pay in lieu of the layoff of eight employees.

O'Hair informed the unit employees that the advisory vote results would be discussed with Local 39 in Sacramento, and would be "approved, or disapproved" by May 13. O'Hair also indicated that it would be unlikely that the results of a vote to approve the addendum by the members would be ratified by Local 39 in Sacramento.

On May 13, May sent an e-mail to O'Hair requesting to know Local 39's decision regarding the addendum discussed at the May 11 meeting. O'Hair responded stating, in relevant part:

> At our membership meeting on 5-11-09 there was an opinion poll taken, Not [sic] a vote. I indicated that I would take your response and forward it up to the leadership of this Local Union. I also indicated that it was highly unlikely that I would get permission to agree to the present City language.

Following two more e-mails from May to O'Hair on May 14, O'Hair responded on May 14, stating:

[2] Hereafter all dates refer to 2009.

> We have decided to fight the layoffs. That is all that I can say for now.

On May 15, May sent an e-mail to O'Hair and numerous other union officials on behalf of himself and 16 other unit employees, expressing disagreement with the bargaining position taken by O'Hair and Local 39. The e-mail also complains about unanswered e-mails and unreturned phone calls. The e-mail requests information regarding procedures to file an internal union grievance, and procedures to elect new shop stewards and a new local representative. The e-mail also states that a majority of the bargaining unit employees request a special meeting pursuant to Local 39 bylaws for the purpose of voting to accept or reject the City's proposal.[3] O'Hair did not respond to this e-mail.

The charge does not provide facts indicating the results of negotiations between Local 39 and the City. However, at least four bargaining unit employees were laid off. The charge states that as a result of the layoffs, additional assignments and work duties were imposed on May and the remaining unit employees.

The charge alleges Local 39 breached its duty of fair representation when it failed to: (1) respond to May's inquiry about Local 39's decision regarding the bargaining proposal discussed at the May 11 meeting; (2) respond to the request for Local 39's procedures concerning internal union grievances, and the election of job stewards and local representatives; (3) call a special meeting of the general membership to allow the bargaining

[3] Article XIII, Section 3(a) of the Local 39 bylaws states:

> A Special Meeting of the general Membership shall be called when ordered by the president or by a majority of the following officers: Vice-President, Financial Secretary, Treasurer and Business Manager-Recording-Corresponding Secretary, or upon written request of one-third of the Members of the Local Union in good standing.

unit members to vote on the proposed addendum; and (4) fairly represent its members in negotiations with the City regarding the MTO proposals.

DISCUSSION

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers Local Union No. 3* (1995) 35 Cal.App.4th 1213 (*Hussey*).) In *Hussey*, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members, . . . absent a showing of arbitrary exercise of the union's power."

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

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

to show how it properly exercised its discretion. (*United Teachers – Los Angeles (Wyler)* (1993) PERB Decision No. 970.)

It is well-established, however, that PERB does not have jurisdiction over matters concerning internal union affairs unless they have a substantial impact on the relationship of bargaining unit employees to their employer so as to give rise to a duty of fair representation. (*Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106; *California State Employees Association (Hutchinson, et al.)* (1998) PERB Decision No. 1304-S.) In *California State Employees Association (Hutchinson)* (1999) PERB Decision No. 1369-S, the Board dismissed allegations that the union conducted elections outside the timeframe required by union bylaws; and mailed election ballots, improperly validated ballots, failed to properly distribute election results, and improperly installed union officers in violation of union bylaws. In *California State Employees Association (Hackett)* (1993) PERB Decision No. 1012-S, the Board found no substantial impact on the employee-employer relationship where the union suspended the bargaining team; submitted a proposal to the membership for ratification that was not approved by the bargaining team; failed to provide a secret ballot; and failed to give the membership any choice on the ballot except to vote for ratification or strike.

In comparison, the Board has intervened in the internal affairs of a union when alleged union reprisals against members substantially impacted the employment relationship. For example, in *California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S, the union filed a citizen's complaint against an employee with his employer, causing the employer to initiate an investigation of the employee's conduct. In finding a violation, the Board held that the union's conduct directly and substantially impacted the employee's employment relationship with his employer.

The present charge does not provide facts that establish that Local 39's failure to inform May of its bargaining decision, provide union election and grievance procedures to its members, or call a meeting of the union's general membership, has a substantial impact on the employee-employer relationship. In this case, the manner of communication, or lack of communication, between Local 39 and its members has no direct and substantial impact on the employment relationship between May and the City. Furthermore, union grievances, elections and membership meetings concern the internal operation of the union. The charge does not demonstrate how Local 39's failure to communicate this information to May has a substantial impact on the employee-employer relationship.[4]

Finally, the charge alleges that Local 39 breached its duty to fairly represent its members because it did not comply with the advisory vote in support of furloughs rather than layoffs.

As a general rule, an exclusive representative enjoys a wide range of bargaining latitude. As the United States Supreme Court explained in *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330:

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. . . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it

[4] May contends that his employment is impacted because the layoff of at least four employees has resulted in additional work assignments. However, the dispute concerns internal union operations and communication with union members, not the ultimate outcome of negotiations between Local 39 and the City.

represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Acknowledging the need for such discretion, PERB determined that an exclusive representative is not expected or required to satisfy all members of the unit it represents. (*California School Employees Association (Chacon)* (1995) PERB Decision No. 1108.) Moreover, the duty of fair representation does not mean an employee organization is barred from making an agreement which may have an unfavorable effect on some members, nor is an employee organization obligated to bargain a particular item benefiting certain unit members. (*Ibid.*; *Los Rios College Federation of Teachers (Violett, et al.)* (1991) PERB Decision No. 889.) The mere fact that some employees are not satisfied with the agreement is insufficient to demonstrate a prima facie violation. (*Los Rios College Federation of Teachers (Violett, et al.)*, *supra.*)

In contrast, a union violates its duty to fairly represent its members if its conduct in representing bargaining unit employees in contract negotiations is arbitrary, without a rational basis or devoid of honest judgment. (*Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124.) The duty of fair representation concerning contract negotiations requires an exclusive representative to provide "some consideration of the views of various groups of employees and some access for communication of those views." (*El Centro Elementary Teachers Association* (1982) PERB Decision No. 232.)

Here, O'Hair met with unit employees to discuss the proposed contract addendum. Although it is unclear whether Local 39 and the City reached an agreement, May and other employees had the opportunity to share their views with Local 39. While it appears Local 39 did not agree with some of the unit employees' views, there are no facts that establish that Local 39's bargaining position was arbitrary, without a rational basis or devoid of honest

judgment. Accordingly, the charge does not demonstrate a prima facie case of a breach of the duty of fair representation.

ORDER

The unfair practice charge in Case No. SA-CO-76-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Neuwald joined in this Decision.