

ruled that PERB lacked jurisdiction to investigate Terris' allegations because she was in a management classification. Consequently, the Board agent dismissed the charge.

We have reviewed the entire record in this matter and find the dismissal well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board adopts the warning and dismissal letters (attached) as the decision of the Board itself, subject to the following discussion.

DISCUSSION

In her appeal, Terris alleges the Board agent's decision wrongfully deprived her of meaningful access to PERB. However, in *City of Beverly Hills* (2004) PERB Decision No. 1681-M (*Beverly Hills*), the Board held that challenges to employee designations are properly conducted pursuant to the unit modification procedures set forth in the employer's local rules. In this case, Terris alleges, among other things, that her position was wrongfully designated by the County as a management classification. Thus, under *Beverly Hills*, Terris' allegation regarding the mis-designation of her position must be asserted under the unit modification procedures contained in the County's Employer-Employee Relations Policy.

The Board has held that parties may not utilize the unfair practice procedure to circumvent the unit modification process. (*Berkeley Unified School District* (2005) PERB Decision No. 1744.) Here, Terris is challenging the County's designation of her position as a management classification without reference to the unit modification process. Therefore, Terris' challenge is invalid and was properly dismissed.

ORDER

The unfair practice charge in Case No. LA-CE-490-M is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Dowdin Calvillo and Huguenin joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2809
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April 28, 2009

Ira L. Gottlieb, Attorney
Bush, Gottlieb, Singer, Lopez, Kohanski, Adelstein & Dickenson
500 North Central Ave., Suite 800
Glendale, CA 91203

Re: *Shawn Terris v. County of Santa Barbara*
Unfair Practice Charge No. LA-CE-490-M
DISMISSAL LETTER

Dear Mr. Gottlieb:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 20, 2008 and was amended on December 2 and 24, 2008 and on March 9, 2009. Shawn Terris (Ms. Terris or Charging Party) alleges that the County of Santa Barbara (County) violated section 3502 of the Meyers-Milias-Brown Act (MMBA or Act)¹ by retaliating against her for exercising her rights under the Act.

Ms. Terris was informed in the attached Warning Letter dated April 10, 2009, that the above-referenced charge did not state a prima facie case. Ms. Terris was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in the Warning Letter, she should amend the charge. Ms. Terris was further advised that, unless she amended the charge to state a prima facie case or withdrew it prior to April 19, 2009, the charge would be dismissed.

On April 16, 2009, Ms. Terris' attorney Pamela Chandran confirmed receipt of the April 10 Warning Letter. On April 20, 2009, Ms. Chandran requested an extension of time until April 27, 2009, to file an amended charge. Ms. Chandran's request was granted. However, on April 28, 2009, Ms. Chandran advised the undersigned that Ms. Terris decided not to file an amended charge. Accordingly, the above-captioned charge is dismissed for the reasons contained in the April 10 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,² Ms. Terris 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

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

dismissal. (Cal. Code Regs, tit. 8, sec. 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. (Cal. Code Regs, tit. 8, secs. 32135(a) and 32130; see also Gov. Code, sec. 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 PERB 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. (Cal. Code Regs, tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If Ms. Terris files 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. (Cal. Code Regs, tit. 8, sec. 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 Cal. Code Regs., tit. 8, sec. 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. (Cal. Code Regs, tit. 8, sec. 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. (Cal. Code Regs, tit. 8, sec. 32132.)

LA-CE-490-M
April 28, 2009
Page 3

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



Sean McKee
Regional Attorney

Attachment

cc: Victoria Parks Tuttle, Deputy County Counsel

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April 10, 2009

Ira L. Gottlieb, Attorney
Bush, Gottlieb, Singer, Lopez, Kohanski, Adelstein & Dickenson
500 North Central Ave., Suite 800
Glendale, CA 91203

Re: *Shawn Terris v. County of Santa Barbara*
Unfair Practice Charge No. LA-CE-490-M
WARNING LETTER

Dear Mr. Gottlieb:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 20, 2008 and was amended on December 2 and 24, 2008 and on March 9, 2009. Shawn Terris (Ms. Terris or Charging Party) alleges that the County of Santa Barbara (County) violated section 3502 of the Meyers-Milias-Brown Act (MMBA or Act)¹ by retaliating against her for exercising her rights under the Act.

Background

The County is a "public agency" within the meaning of MMBA section 3501(c). Ms. Terris is employed by the County as a "Program/Business Leader."

In August 2008, Ms. Terris, on behalf of herself and the Santa Barbara County Management Association (SBCMA), contacted "lower level managers" via telephone and e-mail to discuss forming an organization for the purpose of union representation. Subsequently, the County suspended Ms. Terris for five days.

In 1975, the County adopted an Employer-Employee Relations Policy (EERP).² EERP section III, subsection J, defines management employee as "any employee being a Department Head or Assistant Department Head, or having significant responsibilities for the formulation or administration of County policies and programs, or who regularly renders management advice to a Department Head or an Assistant Department Head, as designated by the Board of Supervisors."

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 Nothing in PERB case law requires a Board agent to ignore facts provided by the respondent and consider only the facts provided by the charging party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

The County has classified the Program/Business Leader position as a "management classification." The job description for the Program/Business Leader classification provides in relevant part: "This management classification is responsible for a significant division within a department or for managing a core business or service of the department." The job description goes on to state: "Program/Business Leaders are senior-level managers in the civil service system and report to executive management."

Discussion

Effective July 1, 2001, PERB acquired jurisdiction over most employers and employees under the MMBA. However, unlike the Educational Employment Relations Act, the Higher Education Employer-Employee Relations Act, and the Ralph C. Dills Act, most MMBA representation issues are resolved pursuant to local rules adopted by the public agency rather than in accordance with PERB regulations. The MMBA specifically grants public agencies the authority to adopt reasonable rules regarding employer-employee relations.

MMBA section 3507 states in pertinent part:

A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer employee relations under this chapter.

MMBA section 3507.1(a) provides in relevant part:

Unit determinations and representation elections shall be determined and processed in accordance with rules adopted by a public agency in accordance with this chapter.

MMBA section 3507.5 provides:

In addition to those rules and regulations a public agency may adopt pursuant to and in the same manner as in Section 3507, any such agency may adopt reasonable rules and regulations providing for designation of the management and confidential employees of the public agency and restricting such employees from representing any employee organization, which represents other employees of the public agency, on matters within the scope of representation. Except as specifically provided otherwise in this chapter, this section does not otherwise limit the right of employees to be members of and to hold office in an employee organization.

MMBA section 3509 describes PERB's powers and duties, including investigating alleged violations of the MMBA. MMBA section 3509 states in relevant part:

(b) A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge 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.

[90]

(f) This section shall not apply to employees designated as management employees under Section 3507.5.³

(Emphasis added.) In *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1078 (*Coachella Valley*), the Court, citing MMBA sections 3511 and 3509, stated: "Exempt from the PERB's jurisdiction under the MMBA are peace officers, *management employees*, the City of Los Angeles, and the County of Los Angeles." (Emphasis added.)

The Board has held that when a statute is clear and unambiguous, the intent of the Legislature is reflected in the plain meaning of the statute (*Barstow Unified School District* (1996) PERB Decision No. 1138 (*Barstow*)) and it is unnecessary to look at legislative history.⁴ (*North Orange County Regional Occupational Program* (1990) PERB Decision No. 857 (*NOCROP*); *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698.) As stated by the Board in *NOCROP*:

In construing a statute, we begin with the fundamental rule that a court "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Mover v. Workmen's Compensation Appeals Board* (1973) 10 Cal.3d 222, 230.) Further, it is a fundamental maxim of statutory construction that,

³ When first enacted, the provision now found in MMBA section 3509(f) was set forth as section 3509(e). This provision was re-designated as section 3509(f) by the enactment of a new Section 3509(e), unrelated to this matter, in the Statutes of 2008, Chapter 712 (Senate Bill 1296).

⁴ Nonetheless, a review of the legislative history regarding MMBA section 3509(f) did not reveal the Legislature's intent when it included subsection (f).

where no ambiguity exists, the intent of the Legislature in enacting a law is to be gleaned from the words of the statute itself, according to the usual and ordinary import of the language employed. Thus, where the language of a statute is clear and unambiguous, case law holds that the construction intended by the Legislature is obvious from the language used.

(Citations omitted.)

Here, the County adopted an EERP pursuant to its authority under MMBA sections 3507 and 3507.5. Pursuant to EERP section III, subsection J, the County classified Ms. Terris' position as a "management classification." PERB lacks jurisdiction and authority to investigate unfair practice charges filed by or concerning "employees *designated as management* employees under Section 3507.5." (Emphasis added.) Consequently, Ms. Terris does not have standing before PERB because she is currently employed in a County position designated as a management classification. (Gov. Code, § 3509, subd. (f).)

Charging Party argues that PERB has jurisdiction to investigate the allegations contained in this unfair practice charge because the County improperly designated Ms. Terris as a management employee. However, MMBA section 3509(f) is clear; PERB lacks jurisdiction and authority to investigate unfair practice charges filed by or concerning "employees *designated as management* employees under Section 3507.5." (Emphasis added.) Consequently, this letter does not analyze whether the County properly designated Ms. Terris as a management employee.

Charging Party also argues that MMBA section 3509(f) "does not eliminate PERB jurisdiction over *all* employees designated as 'managers' by a public employer, but only the relatively limited few among all managers who are further designated under [section] 3507.5 as disqualified because of potential conflicts of interest from representing any employee organization . . . and arguably, any manager seeking to represent an employee organization including non-managers." (Emphasis in original.) No legal authority is cited in support of this interpretation of MMBA section 3509(f) and the proffered interpretation is unpersuasive.

As previously stated, where the language of a statute is clear, "the intent of the Legislature in enacting a law is to be gleaned from the words of the statute itself, according to the usual and ordinary import of the language employed." (*NOCROP, supra*, PERB Decision No. 857.) A reading of MMBA sections 3509(f) and 3507.5 together clearly express the intent of the Legislature to remove employees designated as management employees by public agencies from PERB's jurisdiction. Here, pursuant to MMBA section 3507.5, the County designated Ms. Terris' position as a management classification. Consequently, PERB lacks jurisdiction to investigate Ms. Terris' allegation that the County violated the MMBA. (Gov. Code, § 3509, subd. (f).)

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

April 10, 2009

Page 5

explained above, Ms. Terris may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Fourth Amended Charge, contain all the facts and allegations Ms. Terris wishes to make, and be signed under penalty of perjury by an authorized agent of Ms. Terris. 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 an amended charge or withdrawal is not filed on or before April 19, 2009,⁵ PERB will dismiss the charge. Questions concerning this matter should be directed to me at the telephone number listed above.

Sincerely,



Sean McKee
Regional Attorney

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⁵ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)