

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ELAINE CHOW,

Charging Party,

v.

SEIU LOCAL 521,

Respondent.

Case No. SF-CO-241-M

PERB Decision No. 2186-M

June 15, 2011

Appearances: Elaine Chow, on her own behalf; Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for SEIU Local 521.

Before Martinez, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Elaine Chow (Chow) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that SEIU Local 521 (SEIU) breached its duty of fair representation under the Meyers-Miliias-Brown Act (MMBA)¹ by failing to adequately assist Chow in resolving what Chow perceived as a "hostile work environment" in her employment with the County of San Mateo. The Board agent found that the charge failed to state a prima facie violation of the duty of fair representation.

The Board has reviewed the dismissal and the record in light of Chow's appeal, SEIU's response thereto, and the relevant law. Based on this review, we find the dismissal and warning letters to be well-reasoned, adequately supported by the record, and in accordance with applicable law. Accordingly, the Board adopts the dismissal and warning letters as the

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

decision of the Board itself, supplemented by the discussion below regarding issues raised on appeal.

A. Timeliness of Appeal

SEIU asserts that the appeal is subject to dismissal because it was not timely filed. An appeal from a Board agent's decision to dismiss an unfair practice charge must be filed within 20 calendar days from service of the dismissal. (PERB Reg. 32635(a).)² In computing the time period under PERB regulations, a five-day extension of time applies to any filing made in response to documents served by mail. (PERB Reg. 32130(c).) When the last day to perform an act falls on a Saturday, Sunday or holiday, the time period for filing is extended to the next business day. (PERB Reg. 32130(b).)

The Board agent's decision dismissing the charge was served by mail on January 27, 2011. Accordingly, Chow had until February 22, 2011, within which to file an appeal from dismissal of the charge.³ Therefore, Chow's appeal filed on February 22, 2011 was timely.

B. New Evidence and Allegations on Appeal

In her appeal, Chows presents new evidence and raises new factual allegations that were not presented in the original charge. The evidence and allegations all relate to her claims that SEIU breached its duty of fair representation by failing to adequately assist her in resolving her workplace issues. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b); see also *CSU Employees Union, SEIU Local 2579 (Kyrias)* (2011) PERB Decision No. 2175-H.) The Board has found good cause when "the information provided could not have been obtained through

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

³ Because the last day to file after applying the 5-day extension fell on a state holiday, the deadline was extended by one additional day.

reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.) On January 18, 2011, the Board agent issued a letter advising Chow that the charge failed to state a prima facie case and warning her that the charge would be dismissed unless she amended the charge to state a prima facie case. Chow did not file an amended charge. Therefore, the Board agent dismissed Chow's charge on January 27, 2011. All of the dates of the events alleged for the first time on appeal predate the dismissal, and the appeal provides no reason why they could not have been alleged in the original charge or in an amended charge. Thus, we find no good cause to consider these new allegations and evidence.

ORDER

The unfair practice charge in Case No. SF-CO-241-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member McKeag joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377



January 27, 2011

Elaine Chow
631 Orchid Drive
South San Francisco, CA 94080

Re: *Elaine Chow v. SEIU Local 521*
Unfair Practice Charge No. SF-CO-241-M
DISMISSAL LETTER

Dear Ms. Chow:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 22, 2010. Elaine Chow (Chow or Charging Party) alleges that SEIU Local 521 (SEIU or Respondent) violated the Meyers-Miliias-Brown Act (MMBA or Act)¹ by breaching its duty of fair representation.

Charging Party was informed in the attached Warning Letter dated January 18, 2011, 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 that 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 prior to January 25, 2011, the charge would be dismissed.

PERB has not received either an amended charge or a request for withdrawal. On January 26, 2011, the undersigned Board Agent spoke with Charging Party who stated she would not be filing an amended charge. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the January 18, 2011 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,² Charging Party 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. (Cal. Code Regs, tit. 8, § 32635, subd. (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.

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 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 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. (Cal. Code Regs, tit. 8, § 32635, subd. (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, § 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, § 32135, subd. (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, § 32132.)

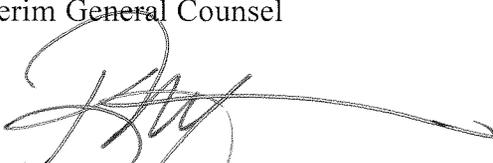
Final Date

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

Sincerely,

WENDI L. ROSS
Interim General Counsel

By

A handwritten signature in black ink, appearing to read 'K. Nyman', written over a horizontal line.

Katharine Nyman
Regional Attorney

Attachment

cc: Kerianne R. Steele, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377



January 18, 2011

Elaine Chow
631 Orchid Drive
South San Francisco, CA 94080

Re: *Elaine Chow v. SEIU Local 521*
Unfair Practice Charge No. SF-CO-241-M
WARNING LETTER

Dear Ms. Chow:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 22, 2010. Elaine Chow (Chow or Charging Party) alleges that SEIU Local 521 (SEIU or Respondent) violated the Meyers-Miliias-Brown Act (MMBA or Act)¹ by breaching its duty of fair representation.

Factual Background As Alleged

In April 2010, Chow starting making telephone contact with SEIU Lead Internal Organizer Brady Calma (Calma) concerning problems she was having with her department manager, Bob Alder (Alder). According to the charge, Calma acknowledged that Chow was being treated unfairly and stated that he “would be [her] voice” in speaking to Alder.

Shortly thereafter, Calma assigned SEIU representative Nick Raisch (Raisch) to assist Chow. According to the charge, Raisch was “not very good at returning calls.” Chow would call Raisch daily or several times a week, “but would not always get a call back.”

On May 5, 2010, Raisch sent Chow an e-mail message arranging a meeting to prepare her to meet with Alder. According to the charge, no meeting between SEIU and Alder ever occurred. There was allegedly a meeting scheduled on June 3, 2010, however Charging Party states that SEIU failed to show up or reschedule the meeting.

The charge also states that Raisch told Chow that he would carbon copy (cc) her on his interactions with her employer, “but [she] has yet to ever receive any e-mails.” In addition, Raisch and Calma allegedly informed Chow that “they would seek a transfer for [her] and on two occasions [she] told them there were other positions open with [her] job title yet [she] was never set up for any interviews.” According to Chow, there was a position open in her department that was given to a temporary employee instead of her.

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

The charge states next that:

On May 5, May 13, May 19, May 24, May 25, June 3, June 6, June 7, June 11, June 13, June 15, June 18, June 20, June 21, June 22, June 28, June 30, July 1, July 7, July 14, July 21, July 23, July 29, July 30, July 31, Aug 2, Aug 3, Aug 4, Aug 5, Aug 6, Aug 10 and Aug 25, I had e-mailed to [Raisch] asking him to help me. Many of my e-mails' subjects was "PLEASE CALL ME" or "PLEASE HELP ME." He replied only a handful of times assuring me that he was working on it. I had called and e-mailed [Calma] on many occasions as well telling him that I was not getting any results from [Raisch] but it also fell on deaf ears. Finally on August 5, I called [SEIU] to ask to speak with a supervisor as I was being ignored and was referred to Carmen Hernandez. She said she would look into this and get back to me. She asked me to fax her details of my work environment which I did twice but she never responded back to me. I called back on August 9 only for her to tell me that [SEIU] did all they could to assist me and that they can not force an interview for me.

Discussion

PERB Regulation 32615(a)(5)² requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

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* (1995) 35 Cal.App.4th 1213.) 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

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

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).

With regard to when “mere negligence” might constitute arbitrary conduct, the Board observed in *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H 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, at p. 1274; see also, *Robesky v. Quantas Empire Airways Limited* (9th Cir. 1978) 573 F.2d 1082.)

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 (Wylter)* (1993) PERB Decision No. 970.)

The Board has long held that the duty of fair representation is limited to negotiations and contractually based remedies under the union’s exclusive control. (*California School Employees Association & its Chapter 130 (Simpson)* (2003) PERB Decision No. 1550.) 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 (Chestangúe)* (1985) PERB Decision No. 544 [association not required to represent teacher in Education Code proceedings].) The exclusive representative only possesses exclusive access to matters within the scope of the collective bargaining agreement, such as the negotiations process, grievances, and arbitration.³ (*Ibid.*)

To the extent that Charging Party is alleging that SEIU breached its duty of fair representation by failing to file a grievance on Chow’s behalf, the Board has held that while the duty of fair representation extends to grievance handling by the exclusive representative (*Fremont Teachers Association (King)* (1980) PERB Decision No. 125), a reasonable decision not to pursue a grievance, regardless of the merits of the grievance, is not a violation of the duty of fair representation. (*California State Employees Association (Calloway)* (1985) PERB Decision No. 497.) In order for PERB to find a breach of the duty of fair representation, the charge must include facts demonstrating that the Union’s decision not to pursue a grievance on Charging Party’s behalf was arbitrary, discriminatory or in bad faith. Here, after multiple communications with SEIU, Chow was informed that SEIU could not assist her further because

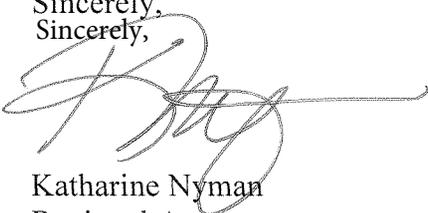
³ It is unclear from the charge whether there was a possible contract violation at issue.

they could not “force an interview” for her. No information presented herein demonstrates that SEIU’s decision not to pursue a grievance was arbitrary or in bad faith.

Charging Party alleges no other facts to demonstrate that SEIU abused its discretion or that its actions were without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)*, *supra*, PERB Decision No. 1474-M; *United Teachers – Los Angeles (Wylar)*, *supra*, PERB Decision No. 970.) Merely alleging that the Union failed to return every phone call is insufficient to establish an overall pattern of conduct. (*Service Employees International Union, Local 221 (Meredith)* (2008) PERB Decision No. 1982.) As such, the charge fails to state a prima facie violation of the duty of fair representation.

For these reasons the charge, as presently written, does not state a prima facie case.⁴ If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may 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 an authorized agent of 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 an amended charge or withdrawal is not filed on or before January 25, 2011,⁵ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,
Sincerely,



Katharine Nyman
Regional Attorney

KN

⁴ In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make “a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing.” (*Ibid.*)

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