

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



LAURA FOWLES,

Charging Party,

v.

OFFICE & PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 29,
AFL-CIO & CLC,

Respondent.

Case No. SF-CO-229-M

PERB Decision No. 2236-M

February 7, 2012

Appearance: National Right to Work Legal Defense Foundation, Inc. by Erin E. Smith, Representative, for Laura Fowles.

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

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Laura Fowles (Fowles) from a PERB Board agent's dismissal of her unfair practice charge. The charge alleged that the Office & Professional Employees International Union, Local 29, AFL-CIO & CLC (OPEIU) violated the Meyers-Milias-Brown Act (MMBA)¹ and PERB Regulation 32992² by failing to inform Fowles of her right not to become a member of OPEIU, failing to provide notice of her rights as an agency fee payer, and by affirmatively misrepresenting to Fowles that full union membership was required as a condition of employment. The Board agent dismissed the charge based upon the determination that: (1) the charge, as amended, was not timely filed because the factual

¹ The MMBA is codified at Government Code section 3500 et seq. Unless otherwise noted, all statutory references are to the Government Code.

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

allegations of the amended charge all occurred more than six months prior to the filing of the amended charge and did not “relate back” to the allegations of the original charge; (2) the charge failed to state a prima facie case of a violation of PERB Regulation 32992; and (3) the charge failed to establish a prima facie case that the alleged misrepresentations violated either the MMBA or PERB regulations.

The Board has reviewed the dismissal and the record in light of Fowles’s appeal and the relevant law. Based on this review, the Board reverses the dismissal of the charge and directs that a complaint be issued for the reasons discussed below.

FACTUAL ALLEGATIONS³

Fowles is employed by Alameda Hospital (Hospital) and is a member of a bargaining unit represented by OPEIU. The Hospital and OPEIU were parties to a collective bargaining agreement (Agreement) for the period February 1, 2007 through January 31, 2010. Section 4 of the Agreement, entitled “Union-Agency Shop” states, in relevant part:

Employees who are members of the Union on May 13, 1970, shall maintain such membership during the term of this Agreement. All employees hired after May 13, 1970, shall, not later than the thirty-first (31st) day following the commencement of their employment, become and remain members of the Union in good standing. “Membership in good standing” shall be defined to mean employed members in the Union who tender periodic dues and initiation fees uniformly required by the Union as a condition of acquiring or retaining membership.

.....

All employees who have been employed prior to May 13, 1970, and who are not members of the Union shall, as a condition of continued employment, one month after May 13, 1970, pay to the

³ At this stage of the proceedings, we must assume that the essential facts alleged in the charge are true. (*Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M; *Golden Plains Unified School District* (2002) PERB Decision No. 1489; *San Juan Unified School District* (1977) EERB* Decision No. 12.) (*Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.)

Union each month a service charge as a contribution toward the administration of this Agreement. The service charge shall be in an amount equal to the Union's regular monthly dues.

A newly employed employee shall be notified of the Union membership requirements of this Agreement immediately upon employment.

The Union will provide copies of membership applications and the collective bargaining Agreement to the Hospital and the Hospital will furnish each newly employed employee with a copy of this Agreement.

.....

Upon written notice to the Hospital and upon examination of documentary proof that an employee is or was a member of the Union within the meaning of this Section, or that an employee has failed to acquire and maintain membership as above provided, the Hospital shall terminate the employment of such employee unless the Hospital has reasonable grounds for believing that Union membership was denied or terminated for reasons other than failure to maintain good standing as defined above. Failure to pay service charge where required is cause for termination upon request of the Union.

On January 8, 2010, OPEIU sent Fowles a letter entitled "Welcome to OPEIU

Local 29" that stated, in part:

Welcome!! You are now represented by OPEIU Local 29. The Collective Bargaining Agreement between your Employer and OPEIU Local 29 (copy enclosed) requires that you become a member in good standing and that you maintain such status as a condition of employment.

Enclosed you will find the following documents, an "**Application For Membership**" that must be completed and returned upon your receipt of this letter, "**This is Your Union**" for important information regarding your monthly Membership Dues/Fees, "**Our Commitment To You**", services available to you since you are now a Union member, "**Local 29 Members Who Work Less Than Full Time**", a policy for all part time dues/fees reimbursements and "**Welcome To OPEIU Local 29**" important information regarding OPEIU Local 29.

(Emphasis in original.)

Believing she was required to join the union based on the letter and union application provided to her by OPEIU on January 8, 2010, Fowles completed the union membership application.

On or about February 10, 2010, while working at a second job, Fowles received a handout from OPEIU, who was involved in a representation election with that employer.⁴ The handout stated that, although management had told employees that they would have to become union members if OPEIU won the election, “[i]t is against the law to compel you to be a ‘member’ of the union.” The handout also informed employees of their option to be an agency fee payer.⁵ Fowles alleges that, until she received this handout, she was not aware that she had the option to be a non-member agency fee payer.

On February 18, 2010, OPEIU sent Fowles a letter demanding the payment of dues for the months of December 2009, and January and February 2010. Like the January 8, 2010 welcome letter, the February 18, 2010 letter contains the following statement:

The Collective Bargaining Agreement between your Employer and Local 29 requires that you become a member in good standing, and that you maintain such status as a condition of employment.

On February 19, 2010, Fowles sent OPEIU a letter in which she resigned her membership with OPEIU and objected to paying anything more than an agency fee. The letter contained a check for \$315.50 along with a membership application form in which Fowles had struck out the word “Membership” and wrote in “Fee Payment Only,” and wrote on the form, “I choose not to join and will pay the fees associated.” She also added the notation, “This is

⁴ Although not entirely clear, it appears that the other employer was a private employer.

⁵ As discussed in further detail below, an “agency fee” payer is an employee who chooses not to become a member of the union but is nonetheless required to pay a fee to the union for the cost of representational activities on the employee’s behalf.

not an application for membership but, an authorization for non-member dues only.”

(Underlining in original.) OPEIU contends that it received the letter on or about March 1, 2010 and that it thereafter changed Fowles’ status to that of a “Financial Core Member.”

On May 20, 2010, OPEIU sent Fowles two letters demanding payment of delinquent dues or fees for March and April 2010. Unlike the prior letters, one of the May 20, 2010 letters states that the Agreement between Fowles’ employer and OPEIU requires that she be a “member/fee payer” in good standing. The other letter also states that “dues/fees” have not been submitted.

On June 24, 2010, OPEIU sent Fowles a letter that again asserted that the Agreement between her employer and OPEIU required that she become a member in good standing and that she maintain such status as a condition of employment. The letter asserted that Fowles owed dues for March, April and May 2010. The letter further stated that failure to comply with this request “may result in a request to your Employer for your termination for not maintaining dues in good standings [sic] with the Union as required by your Collective Bargaining Agreement.”

On June 21, 2010, Fowles filed an unfair practice charge that alleged, in relevant part:

2) The employer and Local 29 have been parties to a contract containing a “union security” clause. In enforcing this “union security” clause, Local 29 has never informed the Charging Party or any similarly situated discriminates [sic] of their right to be a nonmember or of their rights under PERB Regulation 32992, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

3) To the contrary, since beginning employment and continuing to date, Local 29 has misrepresented to the Charging Party and to all employees that joining the union, signing dues deduction cards, and paying full union dues and initiation fees is required as a condition of employment.

On July 8, 2010, OPEIU responded to the charge and provided additional facts.⁶

On March 1, 2011, the Board agent issued a letter warning Fowles that the charge failed to state a prima facie case and providing her with the opportunity to amend the charge to correct the deficiencies identified in the warning letter. On March 15, 2011, Fowles filed an amended charge. The amended charge included the following allegations:

- The January 8, 2010 letter from OPEIU informed Fowles that the Agreement between the Hospital and OPEIU required Fowles to become a member in good standing and that she maintain such status as a condition of employment. Unaware that she had any other option, Fowles completed a union membership card at that time.
- In both its welcome letter and the fine print of the membership card, OPEIU did not inform Fowles that she had the right to be a non-member, pay an agency fee, or of the safeguards provided to non-members under *Hudson*⁷ and PERB Regulation 32992.
- Prior to receipt of the February 10, 2010 handout Fowles received from OPEIU at her second job, she was not aware she had the option to be a non-member agency fee payer.
- The February 18, 2010 letter from OPEIU demanded payment of dues and an initiation fee and asserted that Fowles was required to become a member of OPEIU in good standing and to maintain such status as a condition of employment.
- Fowles revoked her union membership on February 19, 2010 and objected to paying anything more than an agency fee.
- The May 20, 2010 letter demanded payment of March and April 2010 dues.

⁶ Nothing in the MMBA or PERB law requires a Board agent to ignore the facts provided by the respondent to an unfair practice charge and to consider only the facts provided by the charging party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

⁷ *Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292 (*Hudson*).

- The June 24, 2010 letter stated that Fowles was required to become a member of OPEIU and maintain that status as a condition of employment, and threatened her with termination if she failed to pay dues for March, April and May 2010.

On April 5, 2011, the Board agent dismissed the charge for failure to state a prima facie case. Fowles timely appealed the dismissal to the Board.

BOARD AGENT'S DISMISSAL

The Board agent determined that the charge was untimely because the factual allegations of the amended charge all occurred more than six months prior to the filing of the amended charge and did not "relate back" to the allegations of the original charge. The Board agent further determined that, even if the amended charge were timely filed, it failed to state a prima facie case of either a violation of PERB Regulation 32992 or that the alleged misrepresentations by OPEIU that Fowles was required to become a union member rather than advise her of her right to be an agency fee payer violated either the MMBA or PERB regulations.

APPEAL

On appeal, Fowles argues that the charge is timely in that the amended charge does not make any new factual allegations but only clarifies the broader statement of facts contained in the original charge. Fowles further argues that, taken together, the original charge and the amended charge state a prima facie violation of PERB Regulation 32992 and the rules set forth by the United States Supreme Court in *Abood v. Detroit Bd. of Education* (1977) 431 U.S. 209 (*Abood*) and *Hudson* concerning the right not to become a union member.⁸

⁸ OPEIU did not file a response to the appeal.

DISCUSSION

Timeliness

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. Public Employment Relations Bd. (2005) 35 Cal.4th 1072.) 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.)*⁹ A charging party bears the burden of demonstrating that the charge is timely filed. *(Long Beach Community College District (2009) PERB Decision No. 2002.)*

Fowles filed her charge on June 21, 2010. The Board has held that the statute of limitations for allegations that a union improperly collected fair share fees begins to run during the first pay period in which the improper fee is collected. *(Service Employees International Union Local 1000 (Slotterbeck) (2010) PERB Decision No. 2135-S [allegations that union collected full fair share fee amount despite timely requests by employee to pay a reduced fee].)* Here, Fowles alleges that OPEIU improperly demanded full member fees beginning on February 18, 2010. Thus, the charge is timely on that basis.

The Board has found amended unfair practice charges to “relate back” to the original charge when they clarified existing allegations or added a new legal theory based on the same set of facts in the original charge. *(Temple City Unified School District (1989) PERB Order No. Ad-190; Gonzales Union High School District (1984) PERB Decision No. 410.)* The relation back doctrine does not apply, however, when the amended charge raises new factual

⁹ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act (NLRA), codified at 29 U.S.C. section 151 et seq., and California labor relations statutes with parallel provisions. *(Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)*

allegations, separate conduct or acts not sufficiently related to or raised by the initial charge. (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959; *The Regents of the University of California (Lawrence Livermore National Laboratory)* (1997) PERB Decision No. 1221-H; *Los Angeles Unified School District* (1992) PERB Decision No. 918; *The Regents of University of California* (1990) PERB Decision No. 826-H; *Burbank Unified School District* (1986) PERB Decision No. 589; *Monrovia Unified School District* (1984) PERB Decision No. 460.)

In her original charge, Fowles alleged that, in enforcing the union security clause contained in the Agreement, OPEIU had never informed her of her right to be a nonmember of the union or of her rights under PERB Regulation 32992, *Abood*, and *Hudson*. Fowles further alleged that, since the beginning of her employment, OPEIU had misrepresented to her that joining the union, signing dues deduction cards, and paying full union dues and initiation fees were required as a condition of employment. The amended charge clarifies these existing factual allegations by providing specific dates and describing the factual circumstances under which OPEIU allegedly made misrepresentations to Fowles concerning her obligation to join OPEIU and pay union dues. We find these allegations to be sufficiently related to the original allegations of the charge and therefore timely.

Duty to Provide Notice of Agency Fee Payer Rights

The central issue in this case is whether OPEIU breached an obligation to inform Fowles of her rights with regard to union membership under the MMBA. Historically, statutory or contractual “organizational security” provisions have been recognized as a “means by which an exclusive representative may lawfully require financial support from the employees it represents, whether or not the employees are members of the organization.” (*California Public Sector Labor Relations* (2011) § 31.01[1][a].) In the private sector, a

“union shop” requirement, under which all employees must become members of the exclusive representative as a condition of employment, is expressly permitted under NLRA. (NLRA, §§ 157, 158(a)(1) and (3); *Communications Workers v. Beck* (1988) 487 U.S. 735, 745 (*Beck*).) Under federal law, however, the scope of a permissible union shop requirement is limited to “financial core” membership, by which an employee may be compelled to pay union dues and initiation fees but may not be denied or discharged from membership for any reason other than the failure to pay such dues or fees. (NLRA, § 158(a)(3); *Beck*; *NLRB v. General Motors* (1963) 373 U.S. 734, 743-744 (*General Motors*).) Closely related, but not identical, to the union shop is the “agency shop,” under which union membership is not a condition of employment, but nonmembers represented by the union must pay a fee for the representation services provided by the union. (See *Abood* at pp. 221-222.)

Under the MMBA, however, the union shop is not permitted. (*City of Hayward v. United Public Employees, Local 390* (1976) 54 Cal.App.3d 761, 764 (*Hayward*).) MMBA section 3502 grants covered employees both the right to participate in the activities of employee organizations as well as the express right to refrain from doing so, and provides:

Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency.

(Emphasis added.)

At the time *Hayward* was decided, nothing in the MMBA expressly permitted agency shop agreements. Therefore, the court construed section 3502 to mean that, in the absence of language expressly authorizing agency shop agreements, such agreements were unlawful under the MMBA. Thus, the court stated:

Section 3502 implicitly recognizes that employees may choose to join or participate in different organizations. (See, e.g., *Sacramento County Employees Organization, Local 22 etc. Union v. County of Sacramento* [1972] 28 Cal.App.3d 424.) It also confers upon each employee the right not to join or participate in the activities of any employee organization. Section 3506 not only prohibits management from interfering with an employee's section 3502 rights, but also imposes the same ban on employee organizations.

(*Hayward* at p. 766.)

In 1981, the MMBA was amended to expressly authorize a covered employer and an exclusive representative to enter into an agency shop agreement, under which employees may be required, as a condition of continued employment, either to join the recognized employee organization or to pay to the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization. (MMBA, § 3502.5(a).) While it has been said that the agency shop is the practical equivalent of the union shop (*Hayward*, citing *Retail Clerks v. Schermerhorn* (1963) 373 U.S. 746, 751 and *General Motors* at p. 743), a distinction nonetheless exists in terms of the employee's membership obligations. Under the union shop, the employee is required, as a condition of employment, to join the union as a member, but "the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues." (*General Motors* at p. 742.) Under an agency shop agreement, the employee need not join the union or pay union dues, but is required to pay a fee for representational activities. (*Hudson* at p. 303, fn. 10, citing R. Gorman, *Basic Text on Labor Law* 642 (1976).)

As indicated above, the courts have also limited the matters for which an employee may be compelled to contribute financially to a labor organization. While there is no constitutional barrier to an agency shop agreement requiring every employee in a bargaining unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance

adjustment, a union may not, consistent with the First Amendment to the United States Constitution, require dissenting employees to pay money for the support of ideological causes not germane to its duties as collective bargaining agent. (*Abood* at pp. 235-236.) To be constitutionally valid, an agency fee collection system must meet three requirements: (1) it must provide for the objection or challenge of agency fees before their collection; (2) it must provide nonmembers with adequate information about the basis for the agency fee; and (3) it must provide for a reasonably prompt decision regarding any challenge by an impartial decision maker. (*Hudson* at p. 310.) Furthermore, a collective bargaining representative may not, over the objection of a dues-paying nonmember, expend funds collected under a union security agreement on activities unrelated to collective bargaining, contract administration, or grievance adjustment. (*Beck* at p. 745.)

PERB Regulation 32992 represents the Board's codification of the rules governing the collection of agency shop fees set forth by the United States Supreme Court in *Hudson*. (*Paso Robles Public Educators (Andrus, et al.)* (2004) PERB Decision No. 1589

(*Paso Robles*.) Regulation 32992 provides:

- (a) The exclusive representative shall provide annual written notice to each nonmember who will be required to pay an agency fee. The notice shall include:
 - (1) The amount of the exclusive representative's dues and the agency fee;
 - (2) The percentage of the agency fee amount that is attributable to chargeable expenditures and the basis for this calculation;
 - (3) The amount of the agency fee to be paid by a nonmember who objects to the payment of an agency fee amount that includes nonchargeable expenditures (hereinafter referred to as an "agency fee objector"); and
 - (4) Procedures for (A) objecting to the payment of an agency fee amount that includes nonchargeable expenditures and (B) challenging the calculation of the nonchargeable expenditures.

(b) (1) The calculation of the chargeable and nonchargeable expenditures will be based on an audited financial report, and the notice will include either a copy of the audited financial report used to calculate the chargeable and nonchargeable expenditures or a certification from the independent auditor that the summarized chargeable and nonchargeable expenditures contained in the notice have been audited and correctly reproduced from the audited report, or

(2) the calculation of the chargeable and nonchargeable expenditures may be based on an unaudited financial report if the exclusive representative's annual revenues are less than \$50,000 and a nonmember is afforded a procedure sufficiently reliable to ensure that a nonmember can independently verify that the employee organization spent its money as stated in the notice.

(c) Such written notice shall be sent/distributed to the nonmember either:

(1) At least 30 days prior to collection of the agency fee; or

(2) Concurrent with the initial agency fee collection provided escrow requirements in Section 32995 are met; or

(3) In the case of public school employees, where the agency fee year covers the traditional school year, on or before October 15 of the school year, provided escrow requirements in Section 32995 are met.

In interpreting Regulation 32992, PERB has held that enough information must be provided to potential agency fee objectors to make an "intelligent objection," and that the information must be provided with the initial notice of collection of the agency fee.

(Paso Robles citing San Ramon Valley Education Association, CTA/NEA (Abbot and Cameron) (1990) PERB Decision No. 802.)

In this case, Fowles alleges either that OPEIU did not provide her with notice of her rights under PERB Regulation 32992 or that, if she received notice, it was inadequate because it did not clearly inform her of her right not to be a member of OPEIU. Thus, she contends that, if a notice was provided, it was insufficient because OPEIU misrepresented to her that she

was required to join the union and pay full union dues as a condition of employment. In addition, she contends that the notice was insufficient because OPEIU failed to inform her of her rights to become an agency fee payer and to pay a reduced fee based only upon the cost of collective bargaining, grievance adjustment, and contract administration.

While the MMBA and cases interpreting it do not specifically address the nature of the notice to be given to employees of their right to become an agency fee payer, rather than a member of the employee organization, we find guidance in decisions under the NLRA addressing the rights of agency fee payers.¹⁰ Thus, the NLRB has held that, before a union may seek to obligate newly hired nonmember employees to pay dues and fees under a union-security clause, it must inform them of their right to be or remain nonmembers, that nonmembers have the right to object to paying for union activities unrelated to the union's duties as the bargaining representative and to obtain a reduction in dues and fees for such activities, and that the notice must be reasonably calculated to apprise nonmembers of their rights. (See, e.g., *Lamons Gasket Co.* (2011) 357 NLRB No. 72; *The Leland Stanford Junior University* (1977) 232 NLRB 326; *California Saw and Knife Works* (1995) 320 NLRB 224.)

In this case, Fowles alleges both that she did not receive notice of her right not to become a union member and that the notice she did receive was inadequate to apprise her of her rights. Accordingly, we find that the charge states a prima facie violation of the MMBA and PERB Regulation 32992. For this reason, we direct that a complaint be issued in this case in order to develop a full record upon which it may be determined whether OPEIU complied

¹⁰ Although it is not bound by decisions of the National Labor Relations Board (NLRB), the Board will take cognizance of NLRB precedent, where appropriate, as an aid in interpreting identical or analogous provisions of the statutes administered by PERB. (*Carlsbad Unified School District* (1979) PERB Decision No. 89; *County of Imperial* (2007) PERB Decision No. 1916-M.)

with its obligations under the MMBA, PERB Regulation 32992, and the standards set forth in *Hudson and Abood*.

ORDER

The Public Employment Relations Board hereby REVERSES the dismissal of the unfair practice charge in Case No. SF-CO-229-M and REMANDS this case to the Office of the General Counsel for issuance of a complaint consistent with this Decision.

Chair Martinez and Members McKeag and Huguenin joined in this Decision.