**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| CINDY LACY,<br><br>Charging Party,<br><br>v.<br><br>SERVICE EMPLOYEES INTERNATIONAL UNION UNITED HEALTHCARE WORKERS WEST,<br><br>Respondent. | Case No. SF-CO-355-M<br><br>PERB Decision No. 2486-M<br><br>June 30, 2016 |

Appearances: Cindy Lacy, on her own behalf; Weinberg, Roger & Rosenfeld by Xochitl A. Lopez, Attorney, for Service Employees International Union United Healthcare Workers West.

Before Winslow, Banks and Gregersen, Members.

DECISION

BANKS, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions by Cindy Lacy (Lacy) to the proposed decision (attached) of a PERB administrative law judge (ALJ) dismissing the complaint and Lacy's unfair practice charge against Service Employees International Union United Healthcare Workers West (SEIU-UHW). The complaint alleged that SEIU-UHW breached its duty of fair representation under the Meyers-Milias-Brown Act[1] and PERB regulations[2] by not timely filing and, once filed, not pursuing a grievance challenging Lacy's termination from employment by the Washington Hospital Healthcare System (Hospital) on or about January 30, 2014.

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

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

Following a formal hearing and briefing by the parties, the ALJ found that SEIU-UHW had not breached its duty of fair representation as its conduct toward Lacy was not arbitrary, discriminatory, nor dishonest. The ALJ found that SEIU-UHW reasonably and honestly exercised its discretion when it investigated Lacy's date of hire to determine whether she had completed her probationary period, and when it investigated the circumstances surrounding Lacy's termination from employment. The ALJ also found no evidence that SEIU-UHW discriminated against Lacy for any MMBA-protected conduct or that it dealt in bad faith when it calculated Lacy's probationary period from the date of her orientation, the first day of paid service she performed for the Hospital, as opposed to the earlier date when Lacy had received a conditional offer of employment from the Hospital.

Lacy's exceptions assert various errors in the ALJ's factual findings and reasoning. SEIU-UHW's response argues that Lacy's exceptions are without merit and urges the Board to adopt the proposed decision. The Board has reviewed Lacy's exceptions, SEIU-UHW's response, the proposed decision and the entire record in light of applicable law. Based on this review, we conclude that the ALJ's factual findings are supported by the record and that her conclusions of law are well-reasoned and in accordance with applicable law. Except as otherwise noted below, we adopt the proposed decision as the decision of the Board itself, subject to the following discussion of Lacy's exceptions.

## FACTUAL AND PROCEDURAL BACKGROUND

On October 15, 2013, the Hospital offered Lacy employment, which was conditioned on her passing a background check. Her first day of paid employment was not until November 11, 2013, when she attended an orientation for new hires.

On January 27, 2014, Lacy was removed from her scheduled shift and investigated for allegations that she had fallen asleep on the job. On January 30, 2014, Lacy filed an internal

complaint alleging that the investigation was discriminatory. The same day, the Hospital mailed Lacy written notice that her employment would be terminated, effective immediately.

On various dates in February 2014, Lacy spoke with representatives of SEIU-UHW, including SEIU-UHW Coordinator Jean Cronin (Cronin), each of whom advised Lacy that, because she had not completed her 90-day probationary period, she was subject to at-will termination and nothing could be done to protest her termination. On February 28, 2014, Cronin also advised Lacy that, even if a contract violation had occurred, a grievance would now be untimely, as it must be filed within 14 days of the event being grieved.

On March 13, 2014, Lacy again contacted Cronin with the additional allegation that her termination violated the non-discrimination clause in the contract. On the basis of this new information, Cronin filed a grievance on Lacy's behalf, which the Hospital denied as untimely. Cronin also investigated Lacy's allegations of discrimination and determined that there was no evidence to support the grievance, and that Lacy had admitted to "nodding off" during one of her shifts. On Cronin's recommendation, SEIU-UHW withdrew the grievance, which Lacy appealed through SEIU-UHW's internal review process. On October 6, 2014, SEIU-UHW notified Lacy that it would not pursue the grievance and Lacy commended the present case against SEIU-UHW on March 2, 2015.

## DISCUSSION

Whether considered as a failure to file a timely grievance or, once filed, as a decision not to pursue the matter further, the gravamen of Lacy's charge is that SEIU-UHW acted arbitrarily or dishonestly in determining that Lacy was a probationary employee with at-will

status as of the date of her termination.[3] Lacy contends that SEIU-UHW breached its duty of fair representation by not considering the number of hours she had worked for the Hospital, and instead relying solely on the fact that she had been employed for a period of less than 90 days when she was terminated. However, the record demonstrates, and Lacy's exceptions acknowledge, that under the applicable Memorandum of Understanding (MOU), her probationary period would be *the longer of* either 90 calendar days or 320 hours worked since the date of hire. Thus, under SEIU-UHW's interpretation of the MOU, regardless of how many hours Lacy had worked, she was obligated to complete a probationary period of *at least* 90 days before obtaining regular status. Lacy has offered no evidence to suggest that this interpretation was arbitrary or advanced in bad faith. Even if SEIU-UHW's interpretation were incorrect, Lacy has not shown that any reasonable alternative interpretation of the MOU would assist Lacy in this case and we therefore decline to disturb the ALJ's factual findings on this issue. (*Los Angeles Unified School District* (2015) PERB Decision No. 2432, p. 5; *Fremont Unified School District* (2003) PERB Decision No. 1528, p. 3.)

Lacy also contends the ALJ erred in finding that the Hospital terminated her employment on January 30, 2014. Although the Hospital's notice of termination gave January 30, 2014 as its effective date, according to Lacy, it was not mailed until February 1, and not received by Lacy until February 3, 2014. We disagree. The ALJ found that SEIU-UHW's representatives

[3] Aside from one conclusory statement in her post-hearing brief, Lacy does not allege that SEIU-UHW discriminated against her. Rather, the thrust of her allegation appears to be that SEIU-UHW was negligent by not fully investigating whether she had completed her probationary period before her termination and/or that it acted in bad faith by withdrawing the grievance filed on her behalf. Lacy's exceptions characterize her discrimination allegations as separate from the present unfair practice case and acknowledge that the purpose of the PERB hearing was to prove her case against SEIU-UHW not her discrimination allegations against the Hospital. Because the charge does not allege and the record contains no evidence of discriminatory conduct by SEIU-UHW, we find it unnecessary to consider that issue and decline to adopt that portion of the proposed decision.

conducted a genuine investigation and that, after determining that Lacy was still a probationary employee based on a reasonable interpretation of the MOU, concluded that a grievance challenging her termination stood little to no chance of success. Lacy cites no evidence in the record to undermine this finding nor offers any explanation of how her alternative version of events would alter the outcome. Even assuming the proposed decision erred in finding January 30, 2014 as the date of her termination, as of February 3, 2014, Lacy remained a probationary employee and subject to at-will termination. We reject this contention as well.

## ORDER

The complaint and underlying unfair practice charge in Case No. SF-CO-355-M are hereby DISMISSED.

Members Winslow and Gregersen joined in this Decision.

**STATE OF CALIFORNIA**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| CINDY LACY,<br><br>Charging Party,<br><br>v.<br><br>SERVICE EMPLOYEES INTERNATIONAL UNION UNITED HEALTHCARE WORKERS WEST,<br><br>Respondent. | UNFAIR PRACTICE<br>CASE NO. SF-CO-355-M<br><br>PROPOSED DECISION<br>(February 29, 2016) |

Appearances: Cindy Lacy, in propria persona; Weinberg, Roger & Rosenfeld, by Xochitl Lopez, Attorney, for Service Employees International Union United Healthcare Workers West.

Before Alicia Clement, Administrative Law Judge.

PROCEDURAL HISTORY

Charging Party filed the above-referenced unfair practice charge on March 2, 2015, alleging that the Respondent breached its duty of fair representation when it failed to file a timely grievance on her behalf grieving her termination from the Washington Hospital Healthcare System on January 30, 2014.[1] Respondent filed a response to the charge on May 1, 2015, disputing the factual allegations in the charge and denying any violation of the duty of fair representation. On July 24, 2015, PERB issued a complaint alleging a breach of the duty of fair representation arising from the Respondent's October 6, 2014 decision to cease processing a grievance that had been filed on Charging Party's behalf. Respondent filed an Answer to the Complaint on August 18, 2014. An informal settlement conference was held on

[1] Charging Party claims that she was dismissed on February 3, 2014, the date she received notice of the termination. The written notice of termination, attached to the unfair practice charge, states that her termination is effective on January 30, 2014.

August 19, 2015, but the matter was not settled. A Formal Hearing was held on November 12, 2015. An order for the transcript was placed on November 13, 2015.

On November 30, 2015, counsel for Respondent contacted me by e-mail to inquire whether the transcript order had been placed, as she had not yet received a copy. A copy of the transcript was subsequently received by Respondent on December 2, 2015. On December 8, 2015, Charging Party contacted me to notify me that she had not yet received a copy of the transcript, (she had received a notice of attempted delivery from her postal carrier) and requested assistance. Based on the scant information provided, Charging Party was advised to pursue the matter with her local postal carrier, and to inform the ALJ upon her receipt of the transcript. Charging Party subsequently received a copy of the transcript on December 9, 2015. As a result of the delay in receipt of her transcript, Charging Party was provided additional time to file her brief, and although Respondent was required to file its brief according to the original agreed-upon schedule, Respondent was given leave to withhold service of its brief until the later filing date. This matter was fully briefed and submitted for determination on January 4, 2016.

Meanwhile, on December 29, 2015, Charging Party filed a Motion To Correct The Transcript, asserting a number of inaccuracies in the transcript that was produced. Respondent's response to the Motion to Correct the Transcript was timely filed on January 14, 2016.

## FINDINGS OF FACT

On October 14, 2013, Charging Party was presented with a written offer of employment from the Washington Hospital Health Care System (Hospital) for a full-time position as a Certified Nurse Asst. [*sic*]. The letter did not include a start date, as the offer was contingent

upon Charging Party passing the Hospital's background check. Charging Party was notified that she would be given an orientation on November 11, 2013.

Charging Party attended an orientation on November 11, 2013, which was her first day of paid service for the Hospital.[2] At the orientation, Charging Party was provided a copy of the Service Employees International Union-Hospital Memorandum Of Understanding (MOU), and signed a document titled, "SEIU United Healthcare Workers-West Membership Application/Payroll Deduction Authorization/Cope Check-off Authorization." This document lists Charging Party's date of hire as November 11, 2013.

Jean Cronin, Coordinator for Service Employees International Union/United Healthcare Workers West (SEIU/UHWW), also attended the orientation on November 11, 2013. At the time, she was acting as the main representative for the SEIU/UHWW-represented employees at the Hospital, which includes Certified Nurse Assistants. Cronin spoke at the orientation to inform the new employees of their rights under the MOU, and informed employees that they would be considered probationary for the first 90 days of their employment and during that time they could be terminated for any reason.

On January 27, 2014, Charging Party received a call from her supervisor, informing her that she was being taken off the schedule and placed under investigation, stemming from allegations that Charging Party had, among other things, fallen asleep on the job. During the conversation with her supervisor, Charging Party admitted that she had "nodded," but denied that she had slept during a recent work shift. At the hearing, Charging Party explained the incident in question: she had been working a double shift and when a coworker pointed out to

[2] Charging Party asserted at the hearing that she had worked for the Hospital for years through a registry. She clarified, however, that while working through the registry, she was not paid directly by the Hospital. From this scant information, I conclude that Charging Party has not demonstrated employment *by the Hospital* at any time prior to November 11, 2013.

her that she was "nodding," she went to the cafeteria for some coffee and completed her double shift without further incident.

On January 30, 2014, Charging Party filed a complaint with the Hospital's Human Resources office, alleging discrimination. Also on January 30, the Hospital sent Charging Party written notice of termination. The Hospital sent Cronin a copy of the notice of termination, but Cronin did not recall seeing it until it was brought to her attention by Charging Party. According to Charging Party, she did not receive a copy of the notice of termination until February 4, 2014.

Charging Party testified that on February 3 and 11, she called the union and spoke with "Lee" on the phone.[3] Both times, Lee informed her that she had not completed her probationary period, and that because she had not completed her 90 day probationary period, the Union could not help her.

Charging Party reached out to Cronin on February 28, 2014, by leaving her a voicemail. Cronin telephoned Charging Party on March 4. During their conversation on March 4, Charging Party provided Cronin the facts of her termination and requested the union's assistance to grieve the termination. When Cronin asked Charging Party her date of hire, Charging Party responded that she was uncertain; Cronin's records, which include Charging Party's union membership card and the Hospital's seniority list, showed Charging Party's hire date as November 11, 2013. Cronin did not consider the number of hours that Charging Party had worked in determining that she was still in her probationary period at the time she was terminated. Cronin's understanding of the MOU is that the probationary period ends at the longer of 90 days or 320 hours. In other words, Cronin understands that the contract requires

[3] Lee was not identified by either party.

an employee to work at least 90 days, but if they have not fulfilled the minimum 320 hours during that 90 day period, their probationary period may be extended until they have completed 320 hours. Cronin counseled Charging Party that because the termination occurred while Charging Party was still within her probationary period, the employer could terminate her for any reason. Cronin also informed Charging Party that, even assuming there were grounds to file a grievance, the contractual period for filing a timely grievance had already expired.

On March 13, Charging Party again contacted Cronin to inform her that she (Charging Party) had additional information about her termination which led her to believe that she had been fired in violation of the non-discrimination clause in the MOU. When Cronin attempted to get more information about the nature of the alleged discrimination against Charging Party, Charging Party stated that the other nurses didn't like her. Cronin told Charging Party that she would investigate the matter and file a grievance on her behalf.

On March 14, 2014,[4] Cronin filed a notice of grievance in the Hospital's Human Resources Department. The Grievance states, in its entirety:

> Dear Bryant Welch
> This will serve as notice of grievance.
>
> Name of grievant: Cindy Lacy
>
> Department: Nursing
>
> Violation: Unjust termination and discrimination

[4] Charging Party recalls a phone conversation with Cronin on March 14 during which Cronin agreed that Charging Party had completed her probationary period by the date of her termination, and also that Cronin stated she had never received a copy of the notice of termination. Cronin had no recollection of this particular conversation, though stated that once the grievance was filed, she and Charging Party had several phone conversations while the Union investigated her allegations.

> Articles: Applicable articles are Article 7 Employee Rules, and Article 5 No Discrimination
>
> Resolution: Requested resolution is to make the employee whole and return her to work.

Charging Party recalled an additional conversation with Cronin on March 17, 2014, in which Cronin agreed that the employer had been "messing with" Charging Party, and stated that she would file a grievance right away. Cronin had no specific recollection of a conversation with Charging Party on March 17. Notably, however, Cronin had already filed a grievance on Charging Party's behalf by the time this conversation allegedly took place.

The employer denied the grievance on March 18, citing the timelines in the MOU as well as the fact that the grievant was still within her probationary period at the time she was terminated. Cronin advanced the grievance through all the contractual steps up to arbitration. While this process was underway, Cronin spoke with several Union stewards assigned to Charging Party's work floor, and concluded that there was no strong evidence demonstrating that Charging Party was subjected to discriminatory treatment and also that Charging Party had admitted to sleeping or nodding off during her work shift. Meanwhile, because the employer had denied the grievance on timeliness grounds, it had refused to participate in the grievance process or to provide any information to the union regarding the reason for Charging Party's termination. Thus, Cronin's investigation included only the information provided by Charging Party herself and by the union stewards on Charging Party's work floor. On the basis of this investigation, Cronin concluded that Charging Party's case was weak, as it lacked proof of any contract violations, and recommended to the union that Charging Party's grievance be withdrawn. Written notice of the union's decision to withdraw the grievance was sent to Charging Party on May 29, 2014. The letter states, in relevant part:

> This letter is to inform you that after careful consideration that included a thorough review of the details of your case, input from member leadership and staff, and knowledge of the interpretation of the applicable collective bargaining agreement, SEIU UHW ("the Union") does not believe that we are likely to prevail in arbitration and subsequently do not intend to further pursue the above referenced grievance to arbitration.

Charging Party appealed the Respondent's decision to withdraw her grievance on June 17, 2014, and participated in a hearing before the Union's appeal panel. On October 6, 2014, Respondent sent Charging Party written notice of the decision of the appeal panel, denying the appeal. The union's appeal panel concluded the following:

> During the hearing, there was no testimony, nor additional information, nor supplemental evidence provided that would support over turning [*sic*] the original recommendation to withdraw this grievance. For these reasons, this panel has determined that the Union is not likely to prevail in arbitration.

The MOU between the Hospital and SEIU/UHWW contains the following relevant provisions:

> 2. HIRING AND PROBATIONARY PERIOD
>
> B. A probationary period of ninety (90) days from date of first hiring shall be established for new employees, except that, for per diem employees, this probationary period will be the longer of 90 calendar days or 320 hours worked. During such probationary period, the employees may be discharged for any reason which, in the opinion of the Hospital, is just and sufficient.
>
> 5. NO DISCRIMINATION
>
> The Hospital and the Union agree that neither the Union nor the Hospital shall discriminate in respect to employment and continuing employment, by reason of Union activity, political affiliation, race, color, creed, national origin, handicap or veteran status, nor, to the extent provided by State, Federal, and County law, by reason of sex, age, or sexual orientation.
>
> 24. EMPLOYEE COMPLAINTS AND GRIEVANCES

> B. Notwithstanding any of the above procedure, no grievance or complaint shall be considered unless it has first been presented in writing within fifteen (15) days of the alleged occurrence thereof.
> . . .
>
> 26. SENIORITY
>
> A. Seniority Defined
>
> 1) A full-time or part-time employee's seniority is determined by his/her most recent date of employment.

## ISSUES

1. Has Charging Party established grounds to correct the transcript? and

2. Did the Union breach its duty of fair representation when it withdrew the grievance filed on Charging Party's behalf?

## CONCLUSIONS OF LAW

### I. Jurisdiction

Charging Party is a public employee as defined by MMBA section 3501, subdivision (d). Respondent is the recognized employee organization of an appropriate unit of employees of the Washington Hospital Health Care System, as defined by MMBA section 3501, subdivision (b). Washington Hospital Health Care System is a public agency as defined by MMBA section 3501, subdivision (c). Accordingly, I find that PERB has jurisdiction over the parties to this case.

### II. The Motion To Correct The Transcript

PERB Regulation 32209, Correction of Transcript, states:

> A motion to correct alleged errors in the transcript of a proceeding before a Board agent must be filed with the Board agent presiding at the proceeding within 20 days of the date of service of the transcript. The motion shall specify the alleged errors and provide a proposed corrected version. Within 10 days following the date of service of such a motion, any party may file

> with the Board agent a response to the motion. Service and proof of service of the motion and of any response to a motion pursuant to Section 32140 are required. Failure to file a timely motion to correct will be deemed a waiver of any objection to the accuracy of the transcript.

On December 29, 2015, Charging Party filed a Motion To Correct the Transcript at pages 5, 8, 10, 13, 18, 31, 55, 88, 120, and 122, as well as the official transcriber's declaration, and the index. Charging Party also notes a number of incomplete statements which reflect actual statements from the hearing. She asks that testimony regarding the basis for her complaint against the other nurses at the Hospital be removed from the transcript and asserts that she only testified with regard to the union complaint. In place of the statements that Charging Party requests to be removed, she provides proposed corrected versions. Charging Party's proposed corrections include additional evidence not presented at the hearing as well as statements that were not uttered at the hearing.

After a review of the audio recording of the hearing and comparison against the written transcript provided, I find that the written transcript is an accurate account of the oral testimony provided at the hearing and I hereby DENY the Motion to Correct the Transcript.

III. <u>The Duty of Fair Representation</u>

Charging Party is angry that the Union did not do more to help her. From her perspective, she was unfairly disciplined when she was placed on leave. When she complained to the Hospital's Human Resources Department about discrimination, the Hospital mailed her a notice of termination. She sought the Union's assistance several times before the contractual period for filing a grievance had expired, and was incorrectly informed that she had not completed her probationary period and there was nothing the Union could do to assist her. When she finally got Cronin's attention to the matter, Cronin filed a poorly written and

untimely grievance on her behalf. Cronin then failed to properly investigate Charging Party's claims that she was discriminated against and that she had completed her probationary period, and the Union's decision to withdraw the grievance was based on these misconceptions. As a result of the Union's misfeasance, Charging Party lost her job.

From the Union's perspective, it went above and beyond what was required when it filed a grievance on Charging Party's behalf. Charging Party's termination, during her probationary period, was not grievable in and of itself. When Charging Party came to Cronin with the additional concern that she had been fired for discriminatory reasons, Cronin filed a grievance immediately and undertook an investigation of those claims, despite knowing that the grievance was untimely. Cronin's investigation revealed no evidence that Charging Party had been discriminated against, and instead revealed that Charging Party had engaged in workplace misconduct. After consideration of these facts, Cronin recommended that the Union withdraw the grievance.

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 *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 with federal precedent in *Vaca v. Sipes* (1967) 386 U.S. 171.

Under the MMBA an employee organization must represent fairly the employees whom it exclusively represents. (*International Association of Machinists (Attard)*, *supra*, PERB Decision No. 1474-M.) A breach of the duty of fair representation is established where the employee organization's conduct is arbitrary, discriminatory or in bad faith. (*Redland Teachers Association (Faeth and McCarty)* (1978) PERB Decision No. 72; *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; *Vaca v. Sipes*, *supra*, 386 U.S. 171.) The duty applies to the conduct of a union undertaken in the exercise of its exclusive right to represent employees, that is to say, either negotiating a contract or MOU (*Ford Motor Co. v. Huffman* (1953) 345 U.S. 330), or enforcing employee rights under a procedure vesting in the union the exclusive right to access at least one step in the grievance process, customarily the final step or arbitration. (*Conley v. Gibson* (1957) 355 U.S. 41.)

Though the duty of fair representation standard has occasionally been haphazardly applied, close examination of the NLRB and federal courts' treatment of the standard reveals a rigorous test for each theory of a violation, whether the union's conduct is alleged to be a) arbitrary, b) discriminatory, or c) in bad faith. Each of these theories is treated separately, below.

A. <u>The Union Did Not Act Arbitrarily</u>

Citing the Supreme Court's decision, *Vaca v. Sipes*, *supra*, 386 U.S. 171, the court of appeal has stated,

> …it is also essential that labor organizations have some freedom and discretion in handling employee disputes with employers. The union and employer must be able to develop a consistent interpretation of the terms of the collective bargaining agreement,

> rather than being compelled to follow the desires of every individual union member. In order to prevent the settlement mechanism from being clogged by meritless complaints, the union must be permitted to sort out the substantial grievances from the unjustified ones. If the union did not have the power to settle or discard groundless complaints, the employer would have little motivation to participate in a dispute resolution mechanism. The union's resources could also be depleted as a result of being forced to pursue meritless complaints. Further, important public interests are served by preserving unions as viable entities and preventing their financial depletion as a result of extended legal liability. For these reasons a union is held to have breached the duty of fair representation only if it acts arbitrarily, discriminatorily, or in bad faith.

(*Lane v. International Union of Operating Engineers, Local 39* (1989) 212 Cal.App.3d 164, 169-170, internal citation omitted.)

The Ninth Circuit has stated that it will engage in a two-step analysis to determine whether a union has breached the duty of fair representation.

> First, we must decide whether the alleged union misconduct involved the union's judgement, or whether it was procedural or ministerial. Second, if the conduct was procedural or ministerial, then the plaintiff may prevail if the union's conduct was arbitrary, discriminatory, or in bad faith. However, if the conduct involved the union's judgment, then the plaintiff may prevail only if the union's conduct was discriminatory or in bad faith.

(*Marino v. Writer's Guild of America* (9th Cir. 1993) 992 F.2d 1480, 1486, quoting *Burkevich v. Air Line Pilots Ass'n, Int'l*. (9th Cir.1990) 894 F.2d 346, 349, internal quotation marks omitted.) Notably, a union's decision not to arbitrate a grievance that it considers to be meritless is an exercise of its judgement. (*Wellman v. Writer's Guild of America* (9th Cir. 1998) 146 F.3d 666.) This is not to say that there are no checks and balances in the application of this standard, however. The court explained that in order to ensure that

> … the union is employing some principled way of screening the meritorious grievances from the meritless ones, we have held that a union must conduct some minimal investigation of grievances

> brought to its attention. Consequently, when a union member brings a meritorious grievance, the union's decision to ignore that grievance or to process it in a perfunctory manner is a ministerial action that we will overturn if it is arbitrary, discriminatory or performed in bad faith. But we will not find that the union has exercised its duties perfunctorily unless it has treated the union member's claim so lightly as to suggest an egregious disregard of her rights.

(*Wellman v. Writer's Guild of America*, *supra*, 146 F.3d 666, 671, internal citations and quotation marks omitted.) This framework is helpful in understanding the instant case.

The facts of this case involve the Union's exercise of judgement to determine whether it should pursue Charging Party's grievance through arbitration. The Union exercised its judgment first when determining that Charging Party was terminated within her probationary period and next when it conducted an investigation in which it sought information from its records as well as from the employer's records to determine Charging Party's date of hire and whether she had completed her probationary period, as well as information corroborating Charging Party's claim of discrimination. Given my finding that the Union undertook a genuine investigation of Charging Party's claims, it has established that it exercised its discretion and did not act arbitrarily in determining that Charging Party was a probationary employee at the time she was terminated. The Union also investigated Charging Party's claims of discrimination and therefore, did not act arbitrarily in withdrawing Charging Party's grievance. Accordingly, in order for Charging Party to prevail, she must establish that the Union's exercise of judgment was discriminatory or in bad faith.

B. <u>The Union Did Not Discriminate Against Charging Party</u>.

When determining an allegation of discrimination under the statutes it enforces, PERB's jurisdiction is limited to discrimination that occurs not because of an employee's protected classification like age, race, or marital status, but because of an employee's exercise

of rights under the collective bargaining statute(s). (*Baldwin Park Education Association (Hayek, et al.)* (2011) PERB Decision No. 2223.) To determine whether a union has illegally retaliated against an employee for engaging in protected union activity, PERB applies the same test which has long been applied to employees under *Novato Unified School District* (1982) PERB Decision No. 210. (*California State Employees Association (Hard, et al.)* (1999) PERB Decision No. 1368-S.) Accordingly, Charging Party must establish that she engaged in protected activity, that the Union knew of the protected acts, and that the Union took adverse action against her because of her protected activity. It is axiomatic that protected conduct that occurs after an adverse act does not establish that discrimination occurred. (*Berkeley Unified School District* (2004) PERB Decision No. 1702.)

Charging Party does not clearly identify any "protected activity" under the MMBA that precedes her request that the Union file a grievance on her behalf. It is possible that Charging Party intends to argue that she engaged in protected conduct when she filed an internal complaint with the Hospital's Human Resources Department alleging workplace discrimination, and any retaliation by the Union is in response to her actions in filing the discrimination complaint. The only clue that Charging Party provides about the discrimination complaint is in her statement to Cronin that "the other nurses" didn't like her. A reasonable inference from that statement is that Lacy was complaining about her coworkers' interactions with her. PERB has found that complaints to an employer about coworkers is not the same as enforcing rights in the collective bargaining agreement. (See *Coachella Valley Unified School District* (2013) PERB Decision No. 2342.) Thus, it is not clear that Charging Party engaged in any protected conduct that precedes the request to "Lee" that the Union file a grievance on her behalf. Thus, there can be no finding that the initial failure to file a grievance within the

contractual time period was retaliatory. For the same reason, I am unable to find that the Union's later decision to withdraw the grievance was in retaliation for some protected activity. Absent evidence that the Charging Party engaged in activity that is protected by the MMBA, and that the Union knew about it, and that the Union withdrew the grievance because of that protected activity, there can be no finding that the Union discriminated against Charging Party.

C. The Union Did Not Act In Bad Faith When It Withdrew The Grievance

Although PERB has occasionally found a union to have acted in bad faith in relation to one of its members, the Board has not explicitly defined what constitutes bad faith conduct in the context of an alleged breach of the duty of fair representation. In *International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers v. NLRB* (D.C. Cir. 1994) 41 F.3d 1532, the court denied enforcement of the NLRB's finding of a bad faith breach of the duty of fair representation because the NLRB failed to provide any evidentiary basis for its finding of bad faith. The court noted that a finding of bad faith carries a high evidentiary burden:

> A bad-faith violation of the duty of fair representation requires a showing of fraud, or deceitful or dishonest action. Courts have applied a demanding standard for finding bad faith under the duty of fair representation, … requiring a union's actions toward unit employees to be sufficiently egregious or so intentionally misleading as to be invidious.

(*Id*. at p. 1537, internal citations and quotation marks omitted.)

Charging Party clearly disputes the manner in which the Union and employer determine seniority. Charging Party asserts that that her first day of employment should be considered the day she accepted a provisional offer of employment from the Hospital, rather than from the first day of her paid service, which is the date both the employer and union consider for establishing employees' seniority. But the fact that the Union disagrees with Charging Party

does not establish that it acted fraudulently, deceitfully or dishonestly. As noted above, "[t]he union and employer must be able to develop a consistent interpretation of the terms of the collective bargaining agreement, rather than being compelled to follow the desires of every individual union member." (*Lane v. IUOE Stationary Engineers, Local 39*, *supra*, 212 Cal.App.3d 164, 169.) In this case, there is no evidence demonstrating that the Union has been inconsistent or dishonest in its application of Article 2, section B of the contract to begin the probationary period after the first day of paid service rather than on the day the employee accepts the offer of employment. Indeed, Charging Party's own presentation of facts establish that, from her first conversation with "Lee" after she received notice of her termination, the Union informed her that she had not completed her probationary period and therefore, it could not grieve her termination. While the Union later filed a grievance, there is no evidence that it did so because it changed its calculation of Charging Party's probationary period or conceded that its earlier calculation was wrong. Thus, I cannot find that the Union engaged in bad faith when it withdrew Charging Party's grievance due, in part, to its determination that she was still a probationary employee when the employer terminated her employment.

Based on all the facts presented, Charging Party has failed to meet her burden of demonstrating that the Union breached its duty of fair representation by failing to file a grievance within the contractual time period or by later withdrawing her grievance. Neither the failure to file a grievance when Charging Party first made the request nor the Union's later decision to withdraw Charging Party's grievance was arbitrary, discriminatory or made in bad faith. The Union exercised its discretion first in determining that Charging Party had not completed her probationary period and later in determining that the grievance it had filed would not prevail at arbitration. These exercises of discretion establish that the Union did not

act arbitrarily. There is no evidence that Charging Party engaged in protected conduct prior to the alleged adverse acts and so she cannot establish that the Union retaliated against her. And finally, Charging Party has not established that the Union engaged in fraud, deceit or dishonesty such that its calculation of her probationary period or its decision to withdraw her grievance was made in bad faith. Accordingly, the charge is hereby DISMISSED.

## PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. SF-CO-355-M, Cindy Lacy v. Service Employees International Union United Healthcare Workers West, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. 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

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

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 California Code of Regulations, title 8, section 32135, subdivision (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.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)