STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RUBEN GARCIA, et al., Charging Parties, v. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Respondent.	Case No. SF-CO-387-M PERB Decision No. 2575-M June 28, 2018

Appearances: Banys, P.C., by Christopher D. Banys, Attorney, for Ruben Garcia, et al.; Weinberg, Roger & Rosenfeld, by Anthony J. Tucci, Attorney, for Service Employees International Union Local 521.

Before Banks, Winslow and Shiners, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal from the dismissal (attached) by PERB's Office of the General Counsel of an unfair practice charge brought by Ruben Garcia (Garcia) and 70 other Eligibility Workers (collectively, Charging Parties), who are employed by the County of Santa Clara (County) and exclusively represented by Service Employees International Union Local 521 (Local 521). This dispute concerns Local 521's prosecution of a grievance alleging that the County had misclassified certain hours worked by Eligibility Workers as "Special Project Overtime" (SPOT) rather than regular overtime, and thereby failed to compensate employees appropriately under the applicable collective bargaining agreement (CBA).[1] Charging Parties

[1] As alleged in the charge and supporting materials, regular overtime assignments apply to an excess of work or tasks related to the routine processing of cases and are authorized in

allege that Local 521 breached its duty of fair representation, in violation of the Meyers-Milias- Brown Act (MMBA)[2] and PERB Regulations,[3] by: (1) inducing Charging Parties to continue working the misclassified overtime hours with false assurances that they would be fully compensated for all overtime hours worked if Local 521 prevailed in its grievance against the County; (2) urging an arbitrator to award all Eligibility Workers an equal lump sum payment to remedy the grievance and capping the County's total liability at $3.2 million, rather than awarding back pay only to those Eligibility Workers who actually worked the misclassified hours; and, (3) failing to provide notice and opportunity for input and/or misleading Charging Parties regarding the status of settlement negotiations and the terms of an arbitrator's opinion and award, despite repeated requests by Charging Parties for such information.

In a warning letter dated March 24, 2017, the Office of the General Counsel advised Charging Parties of certain deficiencies in the charge, including failure to state a prima facie case and lack of ripeness for review. The charge was amended to include additional information and to identify additional Eligibility Workers as Charging Parties. However, on May 26, 2017, the Office of the General Counsel determined that these amendments did not cure the deficiencies and dismissed the charge.

---

minimum increments of 4.2 hours per case, whereas SPOT was introduced in 2006 as a cost-saving measure to permit the County to assign smaller units of overtime for discrete tasks or '"piece work"' under specific circumstances requiring a regulatory change and specific deadlines for the work to be completed.

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

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

On appeal, Charging Parties argue that contrary to the Office of the General Counsel's determination, PERB has authority to review the substantive terms of the arbitrator's award because it is repugnant to the MMBA. The appeal also reiterates the charge allegations and contends that the Office of the General Counsel erred when it determined that the amended charge failed to state a prima facie case. Local 521 opposes the appeal as meritless and urges the Board to adopt the dismissal.

The Board has reviewed the entire case file and has fully considered the relevant issues and contentions on appeal in light of applicable law. Based on our review, we find the warning and dismissal letters accurately describe the allegations included in the amended charge and, except as otherwise noted below, the Office of the General Counsel's legal conclusions are well reasoned and in accordance with applicable law. We therefore adopt the warning and dismissal letters as the Decision of the Board itself, subject to the discussion below of issues raised in the appeal.

DISCUSSION

1. Standard of Review

On review of a dismissal without hearing, the Board treats the charging party's factual allegations as true and considers them in the light most favorable to the charging party's case. (*San Juan Unified School District* (1977) EERB[4] Decision No. 12, p. 4; *Golden Plains Unified School District* (2002) PERB Decision No. 1489 (*Golden Plains*), p. 6; *California School Employees Association & its Chapter 244 (Gutierrez)* (2004) PERB Decision No. 1606, pp. 3-4; *San Diego Unified School District* (2017) PERB Decision No. 2538, p. 2, fn. 2.) We

[4] Before January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

may also consider information provided by the respondent when such information is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Reg. 32620, subd. (c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M, adopting dismissal letter at p. 1; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994, pp. 12-13; *Riverside Unified School District* (1986) PERB Decision No. 562a, p. 8.) Where the investigation of an unfair practice charge results in receipt of conflicting facts or contrary theories of law, fair proceedings, if not due process, require that a complaint issue and the matter be sent to formal hearing to resolve the material factual disputes and/or to test a novel theory or competing theories of law. (*Eastside Union School District* (1984) PERB Decision No. 466, p. 7; *City of San Jose* (2013) PERB Decision No. 2341-M, pp. 44-45, 49; *Lake Elsinore Unified School District* (2018) PERB Decision No. 2548, p. 15.)

2. PERB Lacks Jurisdiction to Review the Arbitrator's Equal Payment Remedy

The charge alleges that Local 521 filed and pursued to arbitration a grievance against the County for its alleged misclassification of overtime work performed by Eligibility Workers. On July 23, 2014, the arbitrator issued his opinion and award in favor of Local 521 which directed Local 521 and the County to "review SPOT overtime assignments" within the period covered by the grievance to "identify which assignments were improperly assigned as SPOT rather than regular overtime" and to "identify the hourly average pay rate" of employees "affected by the contractual violations." The arbitrator also retained jurisdiction over the dispute, in the event the parties were unable to agree on the appropriate make-whole remedy. From December 2014 through November 2015, Local 521 and the County met and conferred over the appropriate remedy and, on or about November 16, 2015, they reached a tentative agreement whereby all employees who had been eligible to work SPOT overtime assignments

would receive an equal share of the back pay award. In return, the County's back pay liability would be capped at $3.2 million.

However, this tentative agreement was never finalized, and Local 521 then asked the arbitrator to exercise his retained jurisdiction to determine the appropriate remedy. On October 8, 2016, the arbitrator issued a second opinion and award regarding the remedy. The arbitrator's remedial award followed the outlines of the parties' unconsummated tentative agreement as described above, and the $3.2 million back pay award was distributed in equal lump sum payments to all eligible employees on January 27, 2017.

We agree with the Office of the General Counsel's dismissal/refusal to issue a complaint for lack of PERB jurisdiction to review the terms of the arbitrator's opinion and award. Despite Charging Parties' repeated use of the word "settlement," because the tentative agreement between Local 521 and the County was never finalized, the distribution of $3.2 million in equal shares to all Eligibility Workers was the result of the arbitrator's opinion and award, not a negotiated agreement. Whether characterized as a failure to state a prima facie case, lack of ripeness for review, or lack of jurisdiction, the fundamental deficiency in this allegation is that the arbitrator is not the exclusive representative or its agent, and therefore owes no duty to fairly represent Charging Parties. Thus, even accepting Charging Parties' contention that the substantive terms of the arbitrator's opinion and award are irrational, that allegation must be dismissed, because the arbitrator is not a proper respondent for any cognizable unfair practice allegation within PERB's jurisdiction.

On appeal, Charging Parties aver that, contrary to the Office of the General Counsel's determination, PERB may review the substantive terms of the arbitrator's decision because Charging Parties contend that it is repugnant to the purposes of the MMBA. We disagree.

Where a charge alleges conduct that would constitute an unfair practice by a proper respondent and also a violation of a collective bargaining agreement, and the dispute is subject to binding arbitration, PERB will generally defer the matter to the collectively-bargained grievance and arbitration process. (MMBA, § 3505.8; *Ventura County Community College District* (2009) PERB Decision No. 2082 (*Ventura*), p. 3; cf. *Trustees of the California State University (East Bay)* (2014) PERB Decision No. 2391-H, pp. 37-39 [policy exception for disputes alleging retaliation for participation in PERB unfair practice proceedings]; *Claremont Unified School District* (2014) PERB Decision No. 2357, pp. 14-16 [futility exception].) Upon completion of the grievance-arbitration proceedings in deferred disputes, PERB may review the resulting opinion and award or settlement to determine whether it is repugnant to the purposes of the Act. (MMBA, § 3505.8; PERB Reg. 32661, subd. (a); *Ventura*, *supra*, PERB Decision No. 2082, pp. 3-4.)

PERB's authority to conduct post-arbitration repugnancy review stems from its authority to determine whether the unfair practice allegations are justified, and its review is limited solely to determining whether the resolution or settlement is repugnant to the purposes of the Act. (PERB Reg. 32620, subd. (b)(6); *City of Guadalupe* (2011) PERB Decision No. 2170-M, p. 2.) If the Board determines that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities, or that the resulting award or settlement is "palpably wrong," meaning not susceptible to any interpretation consistent with the Act, it may issue a complaint alleging that *the respondent* in the unfair practice charge engaged in conduct that violates the Act. (PERB Reg. 32661; *Regents of the University of California (San Francisco)* (1984) PERB Order No. Ad-139-H, p. 11, citing *Int'l Harvester Co.* (1962) 138 NLRB 923, enf'd sub nom. *Ramsey v. NLRB* (7th Cir. 1964) 327 F.2d 784;

Trustees of the California State University (Long Beach) (2011) PERB Decision No. 2201-H (*Trustees of CSU* (*Long Beach*)), pp. 7, 9, citing *Olin Corp*. (1984) 268 NLRB 573, 574; see also *Ventura*, *supra*, PERB Decision No. 2082, p. 4.) Here, the allegation that Local 521 breached its duty to represent Charging Parties fairly was not at issue in the arbitration, and there is thus no basis for PERB to review the arbitrator's decision to determine whether that allegation was fully and properly resolved in the arbitration proceedings.

To the extent Charging Parties seek repugnancy review to re-litigate the appropriateness of the arbitrator's remedy, this request is also improper. The repugnancy review process does not authorize PERB to conduct an independent review of an arbitrator's opinion and award, nor provide a mechanism for either party to re-litigate before PERB issues that were resolved by the arbitrator. (*City of Guadalupe*, *supra*, PERB Decision No. 2170-M, p. 2; *Ventura*, *supra*, PERB Decision No. 2082, p. 4.) The party seeking to have the Board set aside an arbitrator's decision has the burden of affirmatively demonstrating the defects in the arbitral process or award. (*Trustees of CSU (Long Beach)*, *supra*, PERB Decision No. 2201-H, p. 8.) Thus, even if, as Charging Parties argue on appeal, the Board had discretion to consider a repugnancy claim in this case, Charging Parties have not alleged facts demonstrating that the arbitrator's opinion and award was "palpably wrong" or that the arbitration proceedings were tainted by fraud, collusion, unfairness, or any serious procedural irregularities.

3. The Charge Does Not Allege Facts Demonstrating that the Tentative Agreement, or Local 521's Decision to Seek a Uniform Remedy for All Eligibility Workers, Was Arbitrary or Irrational

We agree with the Office of the General Counsel that in addition to the jurisdictional problems discussed above, Charging Parties have also failed to allege sufficient facts to

demonstrate that either the terms of the equal distribution remedy or Local 521's negotiation of the tentative agreement including an equal distribution remedy was arbitrary or irrational.

Although the MMBA includes no express duty of fair representation, California courts and PERB have held that such a duty is implied as the quid pro quo for exclusive representation under the MMBA. (*Hussey v. Operating Engineers Local Union No. 3* (1995) 35 Cal.App.4th 1213, 1219; *International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M (*IAM* (*Attard*)), pp. 4-5; see also *Service Employees International Union Local 721* (*Oliver*) (2015) PERB Decision No. 2462-C, pp. 1-2, fn. 1.) Under the three-prong standard borrowed from federal precedent, a recognized employee organization must treat all factions and segments of the unit without hostility or discrimination; it must act in complete good faith and honesty when exercising its broad discretion in negotiations and administration of its agreements; and it must avoid acting on the basis of "irrelevant, invidious, or unfair" criteria when representing bargaining unit employees. (*Vaca v. Sipes* (1967) 386 U.S. 171, 178; *United Teachers Los Angeles (Raines, et al.)* (2016) PERB Decision No. 2475, pp. 70-71 (*UTLA (Raines)*); *Mount Diablo Education Association (DeFrates)* (1984) PERB Decision No. 422, pp. 5-6.) Charging Parties do not allege that Local 521 engaged in discrimination based on irrelevant, invidious or unfair criteria. (Cf. *Steele v. Louisville & N.R. Co*. (1944) 323 U.S. 192.) Thus, to state a prima facie case that Local 521 violated the arbitrary or bad faith prongs of its duty of fair representation, Charging Parties must allege facts showing how, or in what manner, Local 521's action or inaction was without a rational basis or devoid of honest judgment. (*IAM (Attard), supra*, PERB Decision No. 1474-M, p. 4.)

However, in adopting the duty of fair representation from the federal courts, the Legislature did not intend '"that the union will be exposed to harassing litigation by dissident

members over every arguable decision made in the course of day-to-day functioning of the union."' (*Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106, p. 10 (*SEIU* (*Kimmett*)); see also *Gilliam v. Independent Steelworkers Union* (N.D. W. Va. 1983) 572 F.Supp. 168, 171-172.) Because the union's representative function sometimes requires it to take a position contrary to the immediate interests of an employee or group of employees in the bargaining unit, it must have considerable discretion in negotiating and administering its agreements with the employer, including discretion to determine how to represent employees in the adjustment of grievances. (*California School Employees Association & its Chapter 379 (Dunn)* (2009) PERB Decision No. 2028, p. 9; *California School Employees Association and its Chapter 107 (Chacon)* (1995) PERB Decision No. 1108 (*CSEA* (*Chacon*)), adopting warning letter at p. 3; *Air Line Pilots Assn, Intern. v. O'Neill* (1991) 499 U.S. 65, 77 (*ALPA v. O'Neill*); see also *Shaw v. Metro-Goldwyn-Mayer, Inc*. (1974) 37 Cal.App.3d 587, 602.) The representative is not obligated to bargain a particular benefit for any unit members (*Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889, pp. 8-9; *Los Rios College Federation of Teachers, CFT/AFT (Baker, et al.)* (1991) PERB Decision No. 877, p. 11), and the fact that an agreement disadvantages some members of the bargaining unit does not, by itself, violate the representative's duty. (*Baldwin Park Education Association (Hayek, et al.)* (2011) PERB Decision No. 2223, p. 4; *Redlands Teachers Association (Faeth and McCarty)* (1978) PERB Decision No. 72, adopting proposed dec. at pp. 3, 5.)

Because the representative is not required to satisfy all members of the unit it represents (*CSEA (Chacon*), *supra*, PERB Decision No. 1108, adopting warning letter at p. 3), it may lawfully refuse to process and dispose of a grievance for a variety of reasons (*Castro Valley*

Unified School District (1980) PERB Decision No. 149, p. 6), or agree to settle a dispute on terms that are contrary to the grievant's wishes, without necessarily breaching its duty of fair representation. (*Service Employees International Union, Local 1000 (Gutierrez)* (2011) PERB Decision No. 2191-S, adopting dismissal letter at p. 2; *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 338.) Allegations of mere negligence or poor judgment in the representative's handling or settlement of a grievance do not state a prima facie violation of the duty of fair representation. (*CSEA (Chacon), supra*, PERB Decision No. 1108, warning letter, p. 3, citing *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.)

For example, in *Castro Valley*, *supra*, PERB Decision No. 149, PERB held that even if a grievance has merit, the representative may choose not to pursue it to arbitration if the intended or likely result would not benefit the majority of unit members. (*Id*. at p. 7.) The Board concluded that this explicitly majoritarian calculus was a "rational, non-arbitrary basis" for disposing of a grievance in the absence of evidence that the decision was motivated by hostility or bad faith towards the grievants. (*Id*. at pp. 7-8.) Similarly, in *ALPA v. O'Neill*, the U.S. Supreme Court held that, absent evidence of bad faith or hostility towards employees, a union did not violate its duty of fair representation by negotiating a strike settlement agreement which, in retrospect, might reasonably be regarded as a bad deal for employees. The Court explained that to promote the strong public policy favoring peaceful settlement of labor disputes, a union's negotiated settlement must be viewed in light of the factual and legal landscape at the time of the settlement. (*ALPA v. O'Neill*, *supra*, 499 U.S. at pp. 78-79.) Moreover, "[a]ny substantive examination of a union's performance" in a duty of fair representation case "must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." (*Id*. at p. 66.)

While mere negligence is thus insufficient to establish a violation of the duty of fair representation, PERB has held that unintentional acts or omissions by union officials may be arbitrary if they reflect a reckless disregard for the rights of employees; they severely prejudice the injured employees; and the policies underlying the duty of fair representation would not be served by shielding the union from liability under the circumstances of the case. (*Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H, p. 10.) However, unlike a ministerial act, such as filing a grievance or appealing a grievance to arbitration within the appropriate time limits (see, e.g., *San Francisco Classroom Teachers Association, CTA/NEA (Bramell)* (1984) PERB Decision No. 430 , pp. 7-9), determining the appropriate remedy for a grievance requires the exercise of discretion, particularly where, as here, the alleged contract violation affected not only employee compensation for hours worked, but also lost opportunities to all employees for overtime assignments.

Charging Parties contend that the equal distribution remedy agreed to in principal by Local 521 was irrational because it conflicted with the letter and spirit of the arbitrator's initial opinion and award, which directed Local 521 and the County to review individual payroll records to determine the precise back pay amounts owed to "affected employees." Charging Parties contend that only those employees who actually worked SPOT assignments were "affected" within the meaning of the arbitrator's decision. However, the charge includes a December 21, 2015 communication from Local 521 explaining to employees that the award should be distributed in equal shares among all Eligibility Workers because the County's misclassification of regular overtime as SPOT "reduc[ed] the amount of available overtime for all Eligibility Workers who were eligible to work the regular overtime."

Local 521 also alleges, and Charging Parties do not dispute, that its attempts to review the County's records and calculate back pay awards dragged on for months with no prospect for agreement. This deadlock appeared to be broken only when the County tentatively agreed to distribute equal shares to all Eligibility Workers, thereby avoiding the problem of poring over individual payroll records, and Local 521 agreed to limit the County's total liability to $3.2 million. However, after Charging Parties filed the present unfair practice charge and a related charge against the County, the County advised Local 521 that it would refuse to pay any monetary remedy for the grievance until the PERB charges were resolved and all appeals had been exhausted.

Under the circumstances, it was not arbitrary or irrational for Local 521 to negotiate a settlement distributing the $3.2 million back pay fund in equal shares among all Eligibility Workers. Because the grievance encompassed not only the lost compensation for improperly designated overtime work, but also the lost opportunities to work such assignments, an equal distribution among all employees would vindicate the interests of all bargaining unit employees, and thus, the terms of the tentative agreement were not substantively irrational. Nor do the charge allegations demonstrate that Local 521 recklessly disregarded the rights of employees, even if some were not fully satisfied with the result. Although the overall amount of the settlement was potentially discounted, by agreeing to distribute it equally among all bargaining unit members, Local 521 appeared to resolve the protracted dispute with the County over who was eligible and how to calculate the amounts of individual awards. As the U.S. Supreme Court explained in *ALPA v. O'Neill*, "even a bad settlement may be more advantageous in the long run than a good lawsuit" and, in any event, a settlement "is not irrational simply

because it turns out *in retrospect* to have been a bad settlement." (*ALPA v. O'Neill*, *supra*, 499 U.S. at pp. 79, 81.)

When considered in light of both the facts and the legal climate that confronted Local 521's negotiators at the time the decision was made, including the present value of money to affected employees and the costs and uncertainty of further litigation, it was not irrational for Local 521 to agree to discount the overall monetary remedy owed, rather than continue its dispute with the County and postpone or forego altogether some or all of the relief owed to bargaining unit employees. (*ALPA v. O'Neill*, *supra*, 499 U.S. at pp. 79-81.) The County's subsequent refusal to pay *any* monetary remedy until all PERB charges were disposed of only underscores the rationality of Local 521's attempt to settle the matter sooner rather than later. In short, because the union's duty to represent all unit members fairly and in good faith sometimes requires it to take a position contrary to the immediate interests of an individual employee or group of employees in the bargaining unit, the Board is not in a position to second-guess Local 521's advocacy for an award that would compensate all Eligibility Workers equally from the $3.2 million fund, rather than insisting on disbursing any amount eventually agreed-upon among those employees who actually worked the overtime hours at issue. (*CSEA (Chacon)*, *supra*, PERB Decision No. 1108, adopting warning letter at p. 3; *Shaw v. Metro-Goldwyn-Mayer, Inc*., *supra*, 37 Cal.App.3d at p. 602.) The charge does not, without more, allege facts demonstrating that Local 521 breached its duty to represent all employees fairly by advocating or tentatively agreeing to a remedy that would award all bargaining unit employees equally.[5]

[5] To the extent Charging Parties allege that the arbitrator's remedy conflicts with his prior decision establishing liability, as discussed above, because the arbitrator is not a proper

Charging Parties also contend that Local 521's advocacy before the arbitrator for an equal distribution remedy was arbitrary, because the remedy for previous lost compensation grievances brought by Local 521 had included monetary awards for only those employees who had "actually" worked. In support of this theory, the charge includes a sworn declaration in which Garcia asserts that he can recall "at least two grievances before this one" alleging that "workers were not paid all they were owed for their work." According to Garcia, "In both cases, when [Local 521] won its grievance, only the workers [who] actually worked were paid" and "[n]o equal distribution occurred."

For the purpose of deciding this appeal, we treat these allegations as true and consider them in the light most favorable to Charging Parties' case. (*Golden Plains, supra*, PERB Decision No. 1489, p. 6; *San Diego Unified School District, supra*, PERB Decision No. 2538, p. 2, fn. 2.) However, even accepting Garcia's allegations as true, the charge still does not, without more, state a prima facie case.

Federal authorities have held that an employee organization's unexplained deviation from its own policies or procedures on matters substantially affecting the employment relationship may demonstrate that it has acted irrationally or arbitrarily in derogation of its duty of fair representation. (*Demetris v. Transport Workers Union of America, AFL-CIO* (9th Cir. 2017) 862 F.3d 799, 809; *Teamsters Local 282* (1983) 267 NLRB 1130, 1130-1131.) However, the charge and supporting materials demonstrate that Local 521 communicated with bargaining unit employees about the terms of the tentative agreement before it was final. Thus,

---

respondent to an unfair practice allegation, we are without jurisdiction to undertake an independent review of his decision.

to the extent Charging Parties allege that Local 521 departed from an established policy regarding grievance remedies, its decision was hardly unannounced or unexplained.

The fact that Local 521 may have changed its position on how to remedy this particular grievance also fails to demonstrate a breach of the duty of fair representation. For the reasons explained in the warning and dismissal letters, such a conclusion would be inconsistent with the wide latitude afforded unions in deciding how best to represent bargaining unit employees in negotiations and the adjustment of grievances. We affirm the dismissal of Charging Parties' allegation that the equal distribution remedy advocated by Local 521 and ordered by the arbitrator is substantively irrational or otherwise violates Local 521's duty of fair representation.

4. The Charge Fails to Allege Facts Demonstrating that Local 521 Failed to Provide Notice and Opportunity for Input before Settling its Grievance Against the County

Our cases hold that as a corollary to its statutory right to represent employees, the exclusive representative must provide notice and "some consideration of the views of various groups of employees and some access for communication of those views" when modifying collectively-bargained rights that substantially affect the employment relationship. (*SEIU (Kimmett), supra*, PERB Decision No. 106, p. 11; *El Centro Elementary Teachers Association* (*Willis and Willis*) (1982) PERB Decision No. 232, adopting proposed decision, p. 14; *Santa Ana Educators Association (O'Neil, et al.)* (2009) PERB Decision No. 2087, pp. 17-18.) PERB does not prescribe the precise manner or procedures to satisfy this requirement. Rather, it recognizes that employee organizations have substantial leeway in their internal procedures for developing bargaining strategy, selecting a negotiating team, and ratifying or otherwise approving the results of negotiations. (*SEIU (Kimmett), supra*, PERB Decision No. 106, pp. 10-12.) In *UTLA (Raines), supra*, PERB Decision No. 2475, PERB held that, while the

exclusive representative need not provide notice of every proposal and counterproposal during negotiations, it must give at least some notice and opportunity to be heard to bargaining unit members before entering into a side letter, which effectively altered employees' contractual seniority rights. (*Id*. at p. 75.)

In this case, the charge alleges, variously, that Local 521 acted arbitrarily or in bad faith by concealing from employees any information about the grievance "settlement" until after Local 521 had already decided on the equal distribution formula opposed by Charging Parties, and that Local 521 gave no notice to employees that it had agreed to discount the overall amount of the County's liability in return for an equal distribution.

As noted previously, the Office of the General Counsel determined that PERB lacks jurisdiction to consider whether the arbitrator's opinion and award was substantively irrational and/or discriminatory, as the arbitrator is not the exclusive representative and therefore owes no duty of fair representation to Charging Parties. The Office of the General Counsel relied on similar reasoning to dismiss Charging Parties' allegations that they had received insufficient notice or opportunity to give input before the arbitrator issued his remedy. That is, because the arbitrator is a third-party neutral and not the exclusive representative, the Office of the General Counsel reasoned that the arbitrator had no duty to give affected employees notice or opportunity to comment before issuing his award. Additionally, the Office of the General Counsel noted that, although Charging Parties were not parties to the arbitration proceedings, on September 16, 2016, counsel for Charging Parties presented argument to the arbitrator regarding the appropriate remedy. Thus, even assuming the arbitrator's award in this case were subject to the notice and opportunity for input requirements recognized in *UTLA* (*Raines*), *supra*, PERB Decision No. 2475 and other authorities, the Office of the General

Counsel determined that Charging Parties' views were adequately considered before the arbitrator issued his remedial decision.

On appeal, Charging Parties essentially repeat the factual allegations and legal authorities in the amended charge and argue that the Office of the General Counsel erred by dismissing their lack of notice allegation. They also argue that the dismissal letter incorrectly suggests that Local 521 is insulated from liability for any breach of the duty of fair representation simply because an arbitrator was involved in the grievance procedure. These arguments also lack merit.

We agree with the Office of the General Counsel that, for several reasons, the present charge fails to state a prima facie case for lack of notice to affected employees. First, this allegation presents some of the same jurisdictional problems as other theories included in the charge. Despite repeated references in the charge and the appeal to a "settlement," as noted above and in the warning and dismissal letters, the equal distribution remedy which Charging Parties complain of was the result of an arbitrator's decision, not a settlement agreement negotiated by Local 521. Thus, whether characterized as failure to state a prima facie case, lack of jurisdiction to review the arbitrator's decision, or a lack of ripeness for review, this allegation must be dismissed, because the arbitrator is not a proper respondent in an unfair practice charge before PERB. Additionally, while the *tentative* agreement's equal distribution provision was negotiated by Local 521, because it never took effect, it had no substantial impact on the employment relationship and is likewise not conduct that can establish an unfair practice within PERB's jurisdiction. (*UTLA (Raines), supra*, PERB Decision No. 2475, pp. 39-40, 42-43; *SEIU, (Kimmett), supra*, PERB Decision No. 106, pp. 8, 17.)

To the extent Charging Parties argue that the arbitrator would not have chosen the equal distribution remedy, but for Local 521's change of position on this issue, this allegation also fails to state a prima facie case under *UTLA* (*Raines)*, *supra*, PERB Decision No. 2475. *UTLA* (*Raines*) involved an agreement to abrogate collectively-bargained seniority rights effective immediately upon execution by the parties' representatives. There was no tentative agreement or ratification process and no notice to affected employees of the change in their seniority status. As indicated above, however, the facts alleged in the present charge differ from those in *UTLA Raines*, because Charging Parties apparently had actual notice and meaningful opportunity to comment on the tentative agreement before it was finalized.

An exhibit to the amended charge includes a December 21, 2015 communication from Local 521 summarizing its months-long discussions with the County over how to calculate the appropriate remedy and announcing its "agreement in principle" to cap the County's liability at $3.2 million, to be distributed equally among all Eligibility Workers. Exhibit 5 to the amended charge includes communications, dated January 26 and 27, 2016, from Local 521 Eligibility Worker Chief Steward Raquel Vallejo (Vallejo), announcing a February 4, 2016 meeting for all Eligibility Workers "who are interested in getting more information or have questions regarding the process" for distributing the arbitrator's award. Vallejo's communications acknowledge that "[s]ome Eligibility Workers have contacted the Union to challenge the settlement of this arbitration award." They also explain Local 521's position that the award should be distributed in equal amounts among all eligible employees to reinforce solidarity among Eligibility Workers. Vallejo's January 27, 2016 communication also includes the following statement in bold print: "Please attend the informational meeting on Feb. 4 in order to share questions and concerns about the settlement before the agreement is finalized."

In light of these allegations, the Office of the General Counsel correctly determined that Local 521's preference for the equal distribution formula was not procedurally arbitrary, because it was fully explained to members, and that, even if the arbitrator's remedy were attributable to Local 521, Charging Parties had adequate notice and meaningful opportunity for input before it became final.

Ignoring the fact that the tentative agreement never took effect, Charging Parties appear to contend on appeal that they were entitled to notice and opportunity to comment not only before the tentative agreement was finalized, but before any tentative agreement was even discussed. Charging Parties allege that until its January 26, 2016 announcement, Local 521 did not distribute information or provide notice of the intended distribution of the back pay award, and that it did not request permission, solicit opinions, take surveys or seek a vote of its members regarding the intended distribution of the award, including the equal distribution formula tentatively agreed to with the County. Thus, Charging Parties insist on notice and opportunity for employee comment *even before* the union's representative has negotiated a tentative agreement. In effect, they ask PERB to order employee organizations to seek prior authorization or parameters for settling grievances. We decline to extend the holding of *UTLA* (*Raines*), *supra*, PERB Decision No. 2475 to the facts alleged here.

The representative's authority to settle alleged violations of its collective bargaining agreement with the employer is implicit in its authority to negotiate such agreements in the first instance. Requiring notice and opportunity for comment *before* a tentative grievance settlement agreement is negotiated, as opposed to allowing employees to comment *on the tentative agreement* before it becomes final, comes close to requiring the kind of "detailed notice to unit members of every proposal and counterproposal during negotiations," which we

expressly rejected in *UTLA* (*Raines*), *supra*, PERB Decision No. 2475, p. 75. It also ignores the fact that unions routinely seek ratification after a tentative agreement has been reached, and that *UTLA Raines* expressly approved "post-negotiation ratification of tentative agreements" as one of several lawful procedures available to unions, so long as the ratification process provides some notice and opportunity for input by affected employees. (*Id*. at p. 75; see also *Fontana Teachers Association, CTA/NEA (Alexander, et al.)* (1984) PERB Decision No. 416, adopting warning letter, pp. 3-4, fn. 2)

If adopted, Charging Parties' interpretation of the law would inevitably and unnecessarily embroil PERB in internal union matters to an extent never envisioned by the Legislature, a result we also expressly disapproved of in *UTLA (Raines)*, *supra*, PERB Decision No. 2475, p. 80, fn. 48. For these reasons, we decline Charging Parties' invitation to extend the holding of *UTLA Raines* to the present case and we affirm the dismissal of Charging Parties' failure to communicate/lack of notice allegation.

Otherwise, Charging Parties' appeal raises no issues with respect to this allegation which were not already adequately addressed in the Office of the General Counsel's warning and dismissal letters. Accordingly, we adopt the dismissal of this allegation.

5. Charging Parties' Misrepresentation/Reliance Allegation also Fails to State a Prima Facie Case Because it Includes No Facts Demonstrating any Material Misrepresentation or Omission by Local 521

Charging Parties also appeal the dismissal of their allegation that Local 521 made misrepresentations to Charging Parties, which they relied on by continuing to work misclassified overtime assignments in the expectation that they would be fully compensated in accordance with the CBA. Charging Parties argue that the dismissal letter improperly ignored this factual allegation and relied on inapplicable authorities regarding the scope of an exclusive

representative's discretion to settle grievances. In particular, they argue it is undisputed that Local 521 made misrepresentations to Charging Parties and that the cases cited in the dismissal letter are inapplicable because, unlike here, they did not involve "explicit misrepresentations by the union to its membership, let alone a misrepresentation going to the heart of an employee's relationship with the[] employer."

Notwithstanding its wide latitude in adjusting grievances, our cases hold that the representative "must act in complete good faith and honesty when exercising its broad discretion." (*UTLA (Raines), supra*, PERB Decision No. 2475, p. 70, and cases cited therein.) The representative cannot deliberately misrepresent or conceal from employees material information affecting the employment relationship, when the representative is the sole source of such information. (*UTLA* (*Raines), supra*, PERB Decision No. 2475, p. 76, and authorities cited therein.) Although Charging Parties' statement of the law is correct, they have not alleged facts demonstrating that Local 521 has deliberately misrepresented or concealed material information from employees that substantially affects the employment relationship.

Charging Parties rely primarily on the sworn declaration of Charging Party Garcia. Garcia's declaration asserts that in 2010 and 2011, while serving as Local 521's Vice Chair of Eligibility Workers, he communicated to Local 521 members that they should work the misclassified overtime hours, that Local 521 would file a grievance on their behalf, and that they would be fully compensated for their work, if and when Local 521 prevailed in the grievance. According to Garcia's declaration, the grievance that is the subject of the present PERB charge was not filed until 2011. By his own account, Garcia's assurances to employees in 2010 thus pertained to a prior grievance, which was settled, and is therefore not relevant to

any claims of misrepresentation or reliance as they pertain to the resolution of the 2011 grievance at issue in this case.

As to Garcia's statements in 2011, Charging Parties presumably do not contend that contrary to fundamental principles of equity, Garcia may now benefit as the charging party in an unfair practice case based on misrepresentations he allegedly made to other employees while serving as an agent of the respondent. (*Oshiver v. Levin, Fishbein, Sedran & Berman* (3d Cir. 1994) 38 F.3d 1380, 1388.) In fact, Garcia's declaration asserts that his "job," presumably as a union official, "was always to protect [Local 521's] members." Thus, Charging Parties apparently allege that when Garcia instructed other members to continue working SPOT assignments and gave assurances that Local 521 would protect their interests, he did so in good faith. As such, Garcia's declaration does not allege facts demonstrating that Local 521's agents, including Garcia, deliberately misrepresented or concealed material facts from employees.

Aside from Garcia's declaration, Charging Parties also rely on a September 15, 2015 e-mail message from Local 521 representative[6] Theresa Perez (Perez), which allegedly misled employees to believe that only those who actually worked the overtime assignments would be eligible for any monetary remedy or settlement. The materials included with the charge do not support this allegation. In fact, they undermine it.

According to the documents submitted with the charge, on September 15, 2015, while Local 521 and the County were still reviewing records and attempting to determine the hourly

[6] Perez's precise title and responsibilities with Local 521 are unclear. The amended charge and supporting materials variously describe her as "Assistant Chief" and as an "official" of the union. We assume for the purposes of this appeal that she is a representative or agent of Local 521 and authorized to speak on its behalf.

average pay rate for Eligibility Workers "affected by" the contractual violations, Charging Party Michelle Benavides wrote to Perez with the following inquiry: "Has it been determined if the back pay will be divided among everyone who works or all EWs? I have heard different stories about who will be paid." Perez responded the same day: "That has not been determined. The arbitrator said to pay those affected. To me that means those that worked." The response from Perez clearly indicates that it "has not been determined" which employees were "affected" and/or would receive back pay under any settlement or remedy. Perez's opinion is clearly qualified as her own, and not presented as an official position on behalf of Local 521, which was still meeting with the County over this issue. As such, the e-mail communication from Perez does not support Charging Parties' allegation that Local 521 misrepresented its position to employees.

Thus, while the amended charge describes Local 521's communications with employees as "misrepresentations," a contention reiterated in the appeal, at most, the evidence presented indicates that, at some point after prevailing in the liability phase of the grievance, Local 521's leadership *changed its position* as to the appropriate remedy. In a September 16, 2016 letter brief to the arbitrator, Counsel for Charging Parties asserted that Local 521's "current position," i.e., "that any award should be distributed amongst all Eligibility Workers, was invented only recently." Thus, Charging Parties' allegations, even when read in the light most favorable to their case, fail to support their misrepresentation theory, as there are no facts alleged to indicate deliberate misrepresentation or concealment.

As discussed in the warning and dismissal letters, absent evidence of bad faith, discrimination, or arbitrary conduct, allegations of mere negligence, poor judgment or even incompetence in the representative's handling of a grievance do not state a prima facie

violation of the duty of fair representation. (*Coalition of University Employees (Buxton)*, *supra*, PERB Decision No. 1517-H, pp. 7-10; *CSEA (Chacon)*, *supra*, PERB Decision No. 1108, warning letter, p. 3.) Here, the gist of Charging Parties' allegation is that the exclusive representative's considerable latitude in grievance adjustment does not include the right to change its mind about the appropriate remedy for a grievance. We disagree. In accordance with the discussion and authorities cited in the dismissal letter, the remedy advocated by Local 521 and ultimately ordered by the arbitrator was not irrational or discriminatory and, in the absence of evidence of bad faith or hostility, Charging Parties have failed to demonstrate that Local 521 misrepresented or deliberately concealed material facts from employees regarding settlement negotiations or the remedy ultimately ordered by the arbitrator, and thus it is unnecessary to consider whether Charging Parties reasonably relied on such material misrepresentation or omissions.

ORDER

The amended unfair practice charge in Case No. SF-CO-387-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Winslow and Shiners joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

May 26, 2017

Christopher D. Banys, Attorney
Banys, P.C.
1032 Elwell Court, Suite 100
Palo Alto, CA 94303

Re: *Rueben Garcia, et al. v. Service Employees International Union Local 521*
Unfair Practice Charge No. SF-CO-387-M
DISMISSAL LETTER

Dear Mr. Banys:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 13, 2016. Rueben Garcia, et al. (Charging Parties) allege that the Service Employees International Union Local 521 (SEIU or Respondent) violated section 3509 of the Meyers-Milias-Brown Act (MMBA or Act)[1] by breaching its duty of fair representation.

SEIU filed a verified position statement dated May 20, 2016. Charging Parties submitted correspondence to PERB dated June 23, 2016, and October 11, 2016. SEIU submitted correspondence to PERB dated June 17, 2016 and September 20, 2016.

Charging Party was informed in the attached Warning Letter dated March 24, 2017, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to April 14, 2017, the charge would be dismissed.

On April 14, 2017, Charging Parties filed a first amended charge. On May 9, 2017, SEIU filed a further verified position statement. The amended charge does not cure the defects discussed in the Warning Letter, and it does not state a prima facie case. Therefore, the charge is hereby dismissed based on the facts and reasons set forth herein and in the March 24, 2017 Warning Letter

[1] The MMBA is codified at Government Code section 3500 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

Summary of Facts[2]

The initial charge identified 45 individuals to be included as the Charging Party. The amended charge increases the number of individuals identified as the Charging Party to 71.

As discussed in the Warning Letter, the underlying dispute involves a grievance filed by SEIU against the County pursuant to a grievance procedure under the applicable Memorandum of Understanding (MOU). The grievance concerned mispayment of Special Project Overtime (SPOT) to Eligibility Workers. The grievance proceeded to binding arbitration before Arbitrator Morris Davis. On July 23, 2014, Arbitrator Davis issued an Opinion and Award in favor of SEIU, told the County and SEIU to meet and confer over the amount of the remedy, and retained jurisdiction over the remedy. Subsequently, the County and SEIU met to discuss the amount and apportionment of the remedy.

SEIU wanted money apportioned equally amongst all employees who had been eligible for SPOT during a relevant time period. Charging Parties believe that the money should be apportioned only to those who actually worked SPOT. On August 27, 2015, the County and SEIU had a further hearing before Arbitrator Davis regarding the remedy.

On December 21, 2105, SEIU notified some members, via e-mail message, that a settlement in principle had been reached for $3.2 million. However, the e-mail stated that SEIU and the County were still working on the details of the agreement. Under the proposed settlement, the money would be distributed evenly amongst all employees who were eligible for SPOT.

On January 26, 2016, SEIU representative Raquel Vallejo (Vallejo) sent an e-mail message to multiple recipients announcing a meeting for February 4, 2016, to discuss the SPOT arbitration and the method for distributing the settlement. According to an attached flyer, the purpose of the meeting was "to share questions and concerns about the settlement before the agreement is finalized."

Charging Parties further allege that, prior to its January 26, 2016 announcement, SEIU did not distribute information or provide notice about the intended distribution of the settlement, and did not request permission, solicit opinions, take surveys or seek the vote of its members, including Charging Parties, regarding the intended distribution of the settlement, prior to its January 26, 2016 announcement.

---

[2] Where allegations contained in the County's verified position statement do not conflict with the allegations in the charge, they have been included herein. Nothing in PERB case law requires a Board agent to ignore undisputed 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.) PERB also may take official notice of its own records. (*West Contra Costa County Healthcare District* (2011) PERB Decision No. 2164-M, at fn. 4.) Charging Parties filed a separate charge against the County of Santa Clara (County), case number SF-CE-1388-M. Official notice is taken of the documents in that file.

In May 2016, SEIU and the County asked Arbitrator Davis to convene a second day of remedial hearing as settlement discussions had broken down.[3] SEIU alleges that no settlement agreement exists, which is why the arbitrator had to exercise his retained jurisdiction over the remedy.

Arbitrator Davis conducted a further remedial hearing on September 22, 2016. During the hearing he received a written position statement from Charging Parties' attorney, Christopher Banys, although Charging Parties were not parties to the arbitration.[4] The County had rerun its calculations and argued that it owed only $2.6 million. However, the County agreed to pay $3.2 million, which is the amount it had previously agreed to. The County and SEIU asked Arbitrator Davis to decide which Eligibility Workers should be awarded a portion of the remedy.[5]

Arbitrator Davis issued an Opinion and Award Regarding the Remedy (Remedial Order) on October 8, 2016. He concluded:

> The Arbitrator is persuaded that the appropriate remedy for this award be distributed to all the Eligibility Workers who could have volunteered for this overtime … The Arbitrator has considered the arguments raised by Mr. Banys as well as the County … The Arbitrator is persuaded that the County's alternative method of distribution, that the whole award will be divided among all eligible Eligibility Workers II and III who worked at any time during the statutory period, is the most appropriate remedy.

Charging Parties allege that on January 27, 2017, "the settlement" was distributed equally to approximately 1,100 workers, most of whom never worked any SPOT. Charging Parties allege they were undercompensated by the distribution and have not been paid for the hours they actually worked.

Discussion

1. Duty of Fair Representation With Regard to Arbitration

Charging Parties allege that SEIU breached its duty of fair representation. 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

[3] Remedial Order, page 4.

[4] Remedial Order, page 5.

[5] Remedial Order, page 5.

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

The exclusive representative has significant discretion in pursuing and adjusting grievances. (*California School Employees Association & its Chapter 379 (Dunn)* (2009) PERB Decision No. 2028.) For example, a disagreement between the exclusive representative and a grievant regarding whether a grievance should proceed to arbitration does not establish a breach of the duty of fair representation. (*Service Employees International Union, Local 250 (Hessong)* (2004) PERB Decision No. 1693-M.) Settlement of a grievance contrary to the grievant's wishes also does not breach the duty of fair representation. (*Service Employees International Union, Local 1000 (Gutierrez)* (2011) PERB Decision No. 2191-S; *United Teachers of Los Angeles (Seliga)* (1998) PERB Decision No. 1289.) Once an arbitration award has been issued, the exclusive representative has no duty to appeal the award, absent evidence of bad faith or malfeasance. (*American Federation of State, County and Municipal Employees (Martin)* (1999) PERB Decision No. 1321.)

Here, SEIU pursued a grievance through binding arbitration. The Arbitrator issued an initial Opinion and Award in July 2014. The Arbitrator retained jurisdiction over the matter and issued the Remedial Order in October 2016. It appears that the County made a payment on

January 27, 2017, to comply with the terms , of the Remedial Order.. Under the award, approximately 1,100 Eligibility Workers, including Charging Parties, received approximately $3,000. The money was distributed equally and all received the same amount, in accordance with the Remedial Order. Because the Arbitrator is not the exclusive representative, he does not owe a duty of fair representation to the employees. His Remedial Order, therefore, cannot be a breach of the duty of fair representation.

Charging Parties appear to contend that they expected to receive more money, reflecting the individual amounts of overtime they performed. They disagree with SEIU's decision to pursue an evenly-distributed remedy. They allege that they worked SPOT in reliance that SEIU would protect them and compensate them if and when SEIU won a grievance against the County. And, they allege that SEIU sent e-mail messages on a few occasions suggesting that each individual would receive full compensation.

As stated above, SEIU has discretion in processing and pursuing grievances. It may settle a grievance contrary to a grievant's wishes and it may decide to stop pursuing a grievance. (*Service Employees International Union, Local 1000 (Gutierrez), supra*, PERB Decision No. 2191-S; *United Teachers of Los Angeles (Seliga), supra*, PERB Decision No. 1289; *Service Employees International Union, Local 250 (Hessong), supra*, PERB Decision No. 1693-M.) Charging Parties do not demonstrate that SEIU's decision to seek a uniform remedy for all Eligibility Workers was arbitrary, discriminatory, or in bad faith.

2. Communications With Charging Parties

In *United Teachers Los Angeles (Raines, et al)* (2016) PERB Decision No. 2475, p. 75 (writ denied, February 2, 2017), the Board held that the exclusive representative was required to give some notice to bargaining unit members impacted by an agreement, before the agreement became final. Here, there was no agreement reached. The decision regarding the remedy was an award made by a third-party arbitrator. An arbitrator does not have a duty to give notice to bargaining unit members prior to issuing an award.

SEIU and the County did have settlement discussions between July 2014 and January 2016 regarding the potential resolution of the grievance. Charging Parties allege that information about the potential settlement was not provided to the bargaining unit until the January 26, 2016 announcement of a meeting where the potential settlement would be discussed.[6] Accordingly, the bargaining unit members were given "some notice" of the potential agreement. Some months later, the potential settlement was abandoned and the matter returned to the Arbitrator. Charging Parties do not demonstrate how this notice of a potential settlement—a settlement that was never finalized—breaches the duty of fair representation.

[6] This contradicts Charging Parties' allegation that some bargaining unit members were notified on December 21, 2015.

Right to Appeal

Pursuant to PERB Regulations, Charging Parties 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.

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,

J. FELIX DE LA TORRE
General Counsel

By _____
Laura Z. Davis
Supervising Regional Attorney

Attachment

cc: Kerianne R. Steele, Attorney
Cheryl A. Stevens, Deputy County Counsel (non-party)

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

March 24, 2017

Christopher D. Banys, Attorney
Banys, P.C.
1032 Elwell Court, Suite 100
Palo Alto, CA 94303

Re: *Rueben Garcia, et al. v. Service Employees International Union Local 521*
Unfair Practice Charge No. SF-CO-387-M
WARNING LETTER

Dear Mr. Banys:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 13, 2016. Rueben Garcia, et al. (Charging Parties allege that the Service Employees International Union Local 521 (SEIU or Respondent) violated section 3509 of the Meyers-Milias-Brown Act (MMBA or Act)[1] by breaching its duty of fair representation.

Summary of Facts[2]

Charging Parties are 45 employees of the County of Santa Clara County; it is presumed herein that all 45 are members of the bargaining unit exclusively represented by SEIU.

In 2006, the County and SEIU negotiated an agreement regarding a certain type of overtime, known as Special Project Overtime (SPOT). The provision regarding SPOT was subsequently incorporated in the Memorandum of Understanding (MOU) between SEIU and the County then in effect.[3] It was also included in the MOU covering the term July 25, 2011 through June 23, 2013.

[1] The MMBA is codified at Government Code section 3500 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

[2] Where allegations contained in SEIU's verified positions statement do not conflict with the allegations in the charge, they have been included herein. Nothing in PERB case law requires a Board agent to ignore undisputed 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.)

[3] The term of this agreement is not provided.

On November 15, 2011, SEIU filed a grievance with the County, evidently pursuant to a grievance procedure provided in the MOU, alleging that the County had misused or miscalculated SPOT payments due to members. The County denied the grievance and the matter proceeded to arbitration. On February 18, 2014, an arbitration was held before Arbitrator Morris Davis. On July 23, 2014, Arbitrator Davis issued his Opinion and Award (Award) in favor of SEIU. The Award provided that, in order to determine the appropriate remedy, the parties (SEIU and the County) were to review records in order to calculate the correct overtime rates and amounts that should have been paid.

From December 2014 through November 2015, the County and SEIU met and conferred regarding the Award. On or about November 16, 2015, SEIU and the County agreed to settle the Award for $3.2 million dollars. The County initially agreed to compensate only those employees who had worked, but SEIU wanted the money to be equally distributed among a group of employees (Eligibility Workers), whether or not they had actually worked the overtime.

According to the charge, between July 2014 and January 2016, SEIU was "virtually silent" regarding the status of the Award and any settlement, despite Charging Parties' "repeated requests" for information. A few Charging Parties did have communications with SEIU during this time, and those employees believed from those communications that they would be compensated for SPOT actually worked.

On January 26, 2016, SEIU provided a written announcement to bargaining unit members concerning the distribution of the Award. The announcement stated that the settlement money would be distributed equally to Eligibility Workers.

The charge states that, as of May 2016, "distribution is imminent" and that SEIU intends to distribute the money "as soon as possible."

Position of SEIU

SEIU filed a verified position statement on May 20, 2016. SEIU stated that it and the County had entered a tentative agreement. The agreement had not yet been drafted, and was not scheduled to be drafted for another three weeks (i.e., in June 2016). The agreement was not final or executed.

On September 20, 2016, SEIU filed a letter with PERB, stating that "Arbitrator Morris Davis has agreed to exercise his retained jurisdiction in the arbitration case that is factually related [to the charge]. … The matter is back before the Arbitrator and the settlement is off the table … ."

Discussion

Charging Parties allege that SEIU breached its duty of fair representation by agreeing to a proposed distribution that was arbitrary and lacked a rational basis, and by failing to communicate with members regarding the proposed distribution.

1. This Matter is Not Ripe for Review

A court—and by extension, a quasi-judicial agency such as PERB—may not issue rulings on matters that are not ripe for review. (*Pacific Legal Foundation v. California Coastal Comm.* (1982) 33 Cal.3d 158, 171.) PERB does not issue advisory opinions or generalized declarations of law. (*Santa Clarita Community College District (College of the Canyons)* (2003) PERB Decision No. 1506.)

For instance, in *Tustin Unified School District* (1987) PERB Decision No. 626, a school district sought an advisory opinion from PERB regarding whether it could restrict an employee organization from using the district's internal mail system. The school district in that case had not yet taken any action to restrict the usage of its mail system, therefore there was no existing controversy ripe for adjudication, and PERB declined to consider the matter. (*Id.* at fn. 1.)

As another example, in *Regents of the University of California* (1985) PERB Decision No. 531-H, the University of California proposed to make certain changes to the working conditions of student library employees. The Board held these allegations were not ripe, stating: "No change is alleged to have been implemented. At this stage it has been merely proposed." (*Ibid.*)

Here, the Award directed the County and SEIU to meet and obtain information in order to that an appropriate remedy could be determined. After more than a year of discussion, the County and SEIU reached a tentative agreement regarding a lump sum settlement, and a plan for how the money would be distributed.

There are no facts to show that this agreement was finalized or actually implemented. According to the charge itself, no payments had been made as of May 2016. Indeed, according to SEIU's September 20, 2016 letter, the proposed settlement is now "off the table," and the matter has been returned to the Arbitrator for further proceedings. No final agreement was drafted or executed, no money has been paid, and it appears that this matter is still being adjudicated by an arbitrator with retained jurisdiction. The charge does not allege that any actual harm occurred and therefore the matter is not ripe.

2. The Facts Do Not Establish that SEIU Breached its Duty of Fair Representation

Even assuming, arguendo, that the matter was ripe for review, Charging Parties do not allege facts sufficient to state a prima facie case.

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

In addition, an exclusive representative enjoys a wide range of bargaining latitude. As the United States Supreme Court stated in *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 338:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to good faith and honesty of purpose in the exercise of its discretion.

Acknowledging the need for such discretion, PERB determined that an exclusive representative is not expected or required to satisfy all members of the unit it represents. (*California School Employees Association (Chacon)* (1995) PERB Decision No. 1108.) Moreover, the duty of fair representation does not mean an employee organization is barred from making an agreement which may have an unfavorable effect on some members, nor is an

employee organization obligated to bargain a particular item benefiting certain unit members. (*Ibid.*; *Los Rios College Federation of Teachers (Violett)* (1991) PERB Decision No. 889.) The mere fact that Charging Parties were not satisfied with the agreement is insufficient to demonstrate a prima facie violation. (*Los Rios College Federation of Teachers (Violett), supra*.)

The discretion accorded to an exclusive representative includes its decisions of how to handle or settle grievances. The exclusive representative may decide whether or not to pursue a grievance, and whether to pursue or decline arbitration of a grievance. (See, e.g., *California School Employees Association & its Chapter 724 (Davis)* (2011) PERB Decision No. 2208 [union may resolve dispute through mediation rather than grievance procedure]; *United Educators of San Francisco (Gillead)* (2007) PERB Decision No. 1897 [union may consolidate grievances]; *Public Employees Union Local 1 (Coleman)* (2005) PERB Decision No. 1780-M [union may resolve grievance in manner that benefits all employees in a classification].) Here, the facts indicate that SEIU was seeking to resolve a grievance following the arbitration process by engaging in settlement discussions regarding the remedy, at the direction of the Arbitrator. These facts do not show that SEIU's conduct was arbitrary, discriminatory or in bad faith.

In *United Teachers Los Angeles (Raines, et al)* (2016) PERB Decision No. 2475, p. 75 (writ denied, February 2, 2017), the Board held that the exclusive representative in that case was required to give some notice to bargaining unit members impacted by an agreement, before the agreement became final. This case does not apply: in the instant case, the agreement has not become final. Accordingly Charging Party has not established that SEIU breached its 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

[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.*)

PERB. If an amended charge or withdrawal is not filed on or before **April 14, 2017**,[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Laura Z. Davis
Supervising Regional Attorney

LD

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